The SHAPE v Supreme Litigation: The Interaction of Public and Private International Law Jurisdictional Rules

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The interaction between public and private international law is becoming more and more manifest. There is no better example of this interaction than the Shape v Supreme litigation ongoing before Dutch courts, with the most recent decision in this dispute rendered in December 2019 in *Supreme Headquarters Allied Powers Europe ("SHAPE") et al v Supreme Site Service GmbH et al (Supreme)*, COURT OF APPEAL OF 's-HERTOGENBOSCH, Case No. 200/216/570/01, Ruling of 10 December 2019 (the 'CoA Decision'). I first provide a summary of the relevant facts. Second, a brief outline of the current status of the litigation is provided. Third, I make some observations on how public and private international law interact in this dispute.

1 Background to the litigation

In 2015, the Supreme group of entities (a private actor) brought proceedings (the 'Main Proceedings') against two entities belonging to the North Atlantic Treaty Organisation ('NATO') (a public international organisation) before a Dutch district court for alleged non-payments under certain contracts entered into between the parties for the supply of fuel (CoA Decision, para 6.1.12). The NATO entities against whom the claims were brought in question were Shape (headquartered in Belgium) and Allied Joint Force Command Headquarters Brunssum (JFCB) (having its registered office in the Netherlands). JFCB was acting on behalf of Shape and concluded certain contracts (called BOAs) with Supreme regarding the supply of fuel to SHAPE for NATO's mission in Afghanistan carried out for the International Security Assistance Force (ISAF) created pursuant to a Chapter VII Security Council Resolution following the September 11 terrorist attacks in the United States (CoA Decision, para 6.1.8). While the payment for the fuels supplied

by Supreme on the basis of the BOAs was made subsequently by the individual states involved in the operations in Afghanistan, 'JFCB itself also purchased from Supreme. JFCB paid Supreme from a joint NATO budget. The prices of fuel were variable. Monitoring by JFCB took place…' (CoA Decision, para 6.1.9. The applicable law of the BOAs was Dutch law but no choice of forum clause was included (CoA Decision, para 6.1.9). There was no provision for arbitration made in the BoAs (CoA Decision, para 6.1.14.1). However, pursuant to a later Escrow Agreement concluded between the parties, upon the expiry of the BoAs, Supreme could submit any residual claim it had on the basis of the BOAs to a mechanism known as the Release of Funds Working Group ('RFWG'). Pursuant to that agreement, an escro account was also created in Belgium. The RFWG comprises of persons affiliated with JFCB and SHAPE, in other words, NATO's representatives (CoA Decision, para 6.1.10). Supreme invoked the jurisdiction of Dutch courts for alleged non-payment under the BOAs. The NATO entities asserted immunities based on their status as international organisations ('IOs') and succeeded before the CoA meaning that the merits of Supreme's claims has not been tested before an independent arbiter yet (more on this at 2).

In a second procedure, presumably to protect its interests, Supreme also levied an interim garnishee order targeting Shape's escrow account in Belgium (the 'Attachment Proceedings') against which Shape appealed (see here for a comment on this issue). The Attachment Proceedings are presently before the Dutch Supreme Court where Shape argued amongst other things, that Dutch courts did not possess the jurisdiction to determine the Attachment Proceedings asserting immunities from execution as an IO (see an automated translation of the Supreme Court's decision here (of course, no guarantees of accuracy of translation can be made)). The Dutch Supreme Court made a reference for a preliminary ruling to the European Court of Justice ('CJEU') (case C-186/19). It is this case where questions of European private international law have become immediately relevant. Amongst other issues referred, the threshold question before the CJEU is:

> *Must Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ 2012 L 351, p. 1 [Brussels Recast] be interpreted as meaning that a matter such as that at issue in the present case, in which an international organisation brings an*

> *action to (i) lift an interim garnishee order levied in another Member State by the opposing party, and (ii) prohibit the opposing party from levying, on the same grounds, an interim garnishee order in the future and from basing those actions on immunity of execution, must be wholly or partially considered to be a civil or commercial matter as referred to in Article 1(1) of the Brussels I Regulation (recast)?*

Whether the claims pertinent to the Attachment Proceedings constitute civil and commercial matters within the meaning of Article 1 of the Brussels Recast is a question of much importance. If it cannot be characterised as civil and commercial, then the Brussels regime cannot be applied and civil jurisdiction will not exist. If jurisdiction under the Brussels Recast does not exist, then questions of IO immunities from enforcement become irrelevant at least in an EU member state. The CJEU has not yet ruled on this reference.

2 The outcome so far

Thus far, the dispute has focused on questions of jurisdiction and IO immunities. These issues arise in somewhat different senses in both sets of proceedings.

The Main Proceedings

Shape and JFCB argue that Dutch courts lack the jurisdiction in public international law to determine the claims brought by Supreme as NATO possesses immunities given its status as an IO (CoA Decision, para 6.1.13). The rules and problems with the law on IO immunities have been much discussed, including by this author in this very forum. Two things need noting. First, in theory at least, the immunities of IOs such as NATO are delimited by the concept of 'functionalism' – IOs can only possess those immunities that are necessary to protect its functional independence. And second, if an IO does not provide for a 'reasonable alternative means' of dispute resolution, then national courts can breach IO immunities to ensure access to justice. According to the district court, as the NATO entities had not provided a reasonable alternative means of dispute resolution to Supreme, the former's immunities could be breached. The CoA summarised the district court's decision on this point as follows (CoA Decision, para 6.1.14):

> *[T]he lack of a dispute settlement mechanism in the BOAs, while a petition to*

> *the International Chamber of Commerce was agreed in a similar BOA agreed with another supplier, makes the claim of an impermissible violation of the right to a fair trial justified. The above applies unless it must be ruled that the alternatives available to Supreme comply with the standard in the Waite and Kennedy judgments: there must be "reasonable means to protest effectively rights". The District Court concludes that on the basis of the arguments put forward by the parties and on the basis of the documents submitted, it cannot be ruled that a reasonable alternative judicial process is available.*

The CoA disagreed with the district court. It said that this was not the type of case where Shape and JFCB's immunities could be breached even if there was a complete lack of a 'reasonable alternative means' available to Supreme (CoA Decision, para 6.7.8 and 6.7.9.1). This aspect of the CoA's Decision was made possible because of the convoluted jurisprudence of the European Court of Human rights where that court has failed to provide precise guidance as to when exactly IO immunities can be breached for the lack of a 'reasonable alternative means', thereby giving national courts considerable leeway. The CoA went on to further find that in any event, Supreme had alternative remedies: it could bring suit against the individual states part of the ISAF action to recover its alleged outstanding payments (CoA Decision, para 6.8.1); and could have recourse to the RFWG (CoA Decision, para 6.8.4). This can hardly be said to constitute a 'reasonable alternative means' for Supreme would have to raise claims before the courts of multiple states in question creating a risk of parallel and inconsistent judgments; the claims against a key defendant (the NATO entities) remain unaddressed; and the RFWG comprises representatives of the defendant completely lacking in objective independence. Perhaps the CoA's decision was driven by the fact that Supreme is a sophisticated commercial party who had voluntarily entered into the BOAs where the standards of a fair trial in the circumstances can be arguably less exacting (CoA Decision, para 6.8.3).

On the scope of Shape's and JFCB's functional immunities, the CoA said that 'if immunity is claimed by SHAPE and JFCB in respect of (their) official activities, that immunity must be granted to them in absolute terms' (CoA Decision, para 6.7.9.1). It went on to find:

> *The purchase of fuels in relation to the ISAF activities, to be supplied in the relevant area of operations in Afghanistan and elsewhere, is directly related to*

> *the fulfilment of the task of SHAPE and JFCB within the framework of ISAF, so full functional immunity exists. The fact that Supreme had and has a commercial contract does not change the context of the supplies. The same applies to the position that individual countries could not invoke immunity from jurisdiction in the context of purchasing fuel. What's more, even if individual countries – as the Court of Appeal understands for the time being before their own national courts – could not invoke immunity, this does not prevent the adoption of immunity from jurisdiction by SHAPE and JFCB as international organisations that, in concrete terms, are carrying out an operation on the basis of a resolution of the United Nations Security Council CoA Decision, para 6.7.9.2).*

Acknowledging that determining the scope of an IO's functional immunity is no easy task, the CoA's reasoning is somewhat surprising. The dispute at hand is a contractual dispute pertaining to alleged non-payment under the BOAs. One may ask the question as to why a classical commercial transaction should attract functional immunity? Indeed, other IOs (international financial institutions) have included express waiver provisions in their treaty arrangements where no immunities exist in respect of business relationships between an IO and third parties (see comments on the Jam v IFC litigation ongoing in United States courts by this author here). While NATO is not a financial institution, it should nevertheless be closely inquired as to why NATO should possess immunities in respect of purely commercial contracts it enters into. This is especially the case as the CoA found that the NATO entities in question did not possess any treaty based immunities (CoA Decision, para 6.6.7), and upheld its functional immunities based on customary international law only (CoA Decision, para 6.7.1), a highly contested issue (see M Wood, 'Do International Organizations Enjoy Immunity Under Customary International Law?' (2013) 10 IOLR 2). It is likely that the CoA Decision would be appealed to the Dutch Supreme Court and any further analysis must await a final outcome.

The Attachment Proceedings

The threshold question in the Attachment Proceedings is whether Dutch courts possess civil jurisdiction under the Brussels Recast to determine the issues in that particular case. If the claim is not considered civil and commercial within the meaning of Article 1 of the Brussels Recast, then no jurisdiction exists under the

rules of private international law and the claim comes to an end, with the issue of immunities against enforcement raised by the NATO entities becoming superfluous. This is because if a power to adjudicate does not exist, then the question on the limitations to its exercise due to any immunities obviously becomes irrelevant. Perhaps more crucially, after the CoA Decision, the ongoing relevance of the Attachment Proceedings has been questioned. As has been noted here:

> *At the public hearing in C-186/19 held in Luxembourg on 12 December, the CJEU could not hide its surprise when told by the parties that the Dutch Appellate Court had granted immunity of jurisdiction to Shape and JCFB. The judges and AG wondered whether a reply to the preliminary reference would still be of any use. One should take into account that the main point at the hearing was whether the "civil or commercial" nature of the proceedings for interim measures should be assessed in the light of the proceedings on the merits (to which interim measures are ancillary, or whether the analysis should solely address the interim relief measures themselves.*

Given that a Supreme Court appeal may still be filed in the Main Proceeding potentially reversing the CoA Decision, the CJEU's preliminary ruling could still be of practical relevance. In any event, in light of the conceptual importance of the central question regarding the scope of the Brussels Recast being considered in the Attachment Proceeding, any future preliminary ruling by the CJEU is of much significance for European private international law. Summarising the CJEU's approach to the question at hand, the Dutch Supreme Court said:

> *The concept of civil and commercial matters is an autonomous concept of European Union law, which must be interpreted in the light of the purpose and system of the Brussels I-bis Regulation and the general principles arising from the national legal systems of the Member States. In order to determine whether a case is a civil or commercial matter, the nature of the legal relationship between the parties to the dispute or the subject of the dispute must be examined. Disputes between a public authority and a person governed by private law may also fall under the concept of civil and commercial matters, but this is not the case when the public authority acts in the exercise of public authority. In order to determine whether the latter is the case, the basis of the claim brought and the rules for enforcing that claim must be examined. For the*

above, see, inter alia, ECJ 12 September 2013, Case C-49/12, ECLI: EU: C: 2013: 545 (Sunico), points 33-35, ECJ 23 October 2014, Case C ? 302/13, ECLI: EU: C: 2014: 2319 (flyLal), points 26 and 30, and CJEU 9 March 2017, case C-551/15, ECLI: EU: C: 2017: 193 (Pula Parking), points 33-34 (see the automated translation of the Supreme Court's decision cited earlier, para 4.2.1).

There is not the space here to explore the case law mentioned above in any detail. Briefly, if the litigation was taken as a whole with the analysis taking into account the nature of the Main Proceedings as informing the characterisation of the Attachment Proceedings , there would be a close interaction between the scope of functional immunity and the concept of civil and commercial. If an excessively broad view of functional immunity is taken (as the CoA has done), then it becomes more likely that the matter will not be considered civil and commercial for the purposes of the Brussels system as the relevant claim/s can said to arise from the exercise of public authority by the defendants. However, as I said earlier, it is somewhat puzzling as to why the CoA decided to uphold the immunity of the defendants in respect of a purely commercial claim.

However, it is worth noting that in some earlier cases, while the CJEU seem to take a relatively narrow approach to the scope of the Brussels system (CJEU Case C-29/76, *Eurocontrol*). More recent case law has taken a broader view. For example, in *Pula Parking*, para. 39, the CJEU said 'Article 1(1) of Regulation No 1215/2012 must be interpreted as meaning that enforcement proceedings brought by a company owned by a local authority…for the purposes of recovering an unpaid debt for parking in a public car park the operation of which has been delegated to that company by that authority, which are not in any way punitive but merely constitute consideration for a service provided, fall within the scope of that regulation'. If the true nature and subject of Supreme's claims are considered, it is difficult to see how they can constitute anything but civil and commercial within the meaning of the Brussels system in light of recent case law, with the issue of IO immunities a distraction from the real issues. It will be interesting to see if the CJEU consolidates its recent jurisprudence or prefers to take a narrower approach.

3 The interaction between public and private international law?

In the Main Proceedings, in so far as civil jurisdiction is concerned, already, the applicable law to the BOAs is Dutch law and Dutch national courts are perfectly suited to take jurisdiction over the underlying substantive dispute given the prevailing connecting factors. As the CoA determined that the NATO entities tacitly accepted the jurisdiction of the Dutch courts the existence of civil jurisdiction does not seem to be at issue (CoA Decision, para 6.5.3.4). Clearly, in a private international law sense, Dutch courts are manifestly the suitable forum to determine this claim.

However, on its face, the norms on IO immunities and access to justice require balancing (being issues relevant to both public and private international law). As the district court found, if an independent mechanism to resolve a purely commercial dispute (such as an arbitration) is not offered to the claimant, IO immunities can give way to ensure access to justice. Indeed, developments in general international law require the adoption of a reinvigorated notion of jurisdiction where access to justice concerns should militate towards the exercise of jurisdiction where not doing so would result in a denial of justice. Mills has said:

> *The effect of the development of principles of access to justice in international law also has implications when it comes to prohibitive rules on jurisdiction in the form of the immunities recognised in international law…Traditionally these immunities have been understood as 'minimal' standards for when a state may not assert jurisdiction — because the exercise of jurisdiction was understood to be a discretionary matter of state right, there was no reason why a state might not give more immunity than required under the rules of international law. The development of principles of access to justice, however, requires a state to exercise its jurisdictional powers, and perhaps to expand those jurisdictional powers as a matter of domestic law to encompass internationally permitted grounds for jurisdiction, or even to go beyond traditional territorial or nationality-based jurisdiction (A Mills, 'Rethinking Jurisdiction in International Law' (2014) British Yearbook of International Law, p. 219).*

The Main Proceedings provide an ideal case where civil jurisdiction under private international law should latch on to public international law developments that encourage the exercise of national jurisdiction to ensure access to justice. Not only private international law should be informed by public international law

developments, the latter can benefit from private international law as well. I have argued elsewhere that private international law techniques are perfectly capable of slicing regulatory authority with precision so that different values (IO independence v access to justice) can both be protected and maintained at the same time (see here). Similarly, in the Attachment Proceedings, a reinvigorated notion of adjudicative jurisdiction also demands that the private and public properly inform each other. Here, it is of importance that the mere identity of the defendant as an international public authority or the mere invocation of the pursuit of public goals (such as military action) does not detract from properly characterising the nature of a claim as civil and commercial. More specifically, any ancillary proceeding to protect a party's rights where the underlying dispute is purely of a commercial nature ought to constitute a civil and commercial matter within the meaning of the Brussels system. Once civil jurisdiction in a private international law sense exists, then any immunities from enforcement asserted under public international law ought to give way to ensure that the judicial process cannot be frustrated by lack of enforcement at the end. It remains to be seen what approach the CJEU takes to these significant and difficult questions where the public and private converge.

To conclude, only a decision on the merits after a full consideration of the evidence can help determine whether Supreme's (which itself is accused of fraud) claims against Shape et al can be in fact substantiated. In the absence of an alternative remedy offered by the NATO entities, if the Dutch courts do not exercise jurisdiction, we may never know whether its claims are in fact meritorious.

Venezuela and the Conventions of the Specialized Conferences on

Private International Law (CIDIP)

written by Claudia Madrid Martínez

On 28 April 2017, the government of Nicolás Maduro deposited with the General Secretariat of the Organization of American States (OAS), a document whereby he expressed his "irrevocable decision to denounce the Charter of the Organization of American States (OAS) pursuant to Article 143 thereof, thereby initiating Venezuela's permanent withdrawal from the Organization."

Before the two years of the transition regime that the OAS Charter provides for cases of retirement from the Organization (art. 143), on 8 February 2019, Juan Guaidó, president of the National Assembly and interim president of the Republic, wrote to the OAS to "reiterate and formally express the decision of the Venezuelan State to annul the supposed denunciation of the OAS Charter, for Venezuela to be able to remain a member state of the Organization."

In its session of 9 April 2019, the OAS Permanent Council accepted the representation appointed by the National Assembly of Venezuela. However, on 27 April of the same year, the Foreign Ministry, representing Nicolás Maduro, issued a statement informing that "With the denunciation of the OAS Charter made by the government of the Bolivarian Republic of Venezuela on 27 April 2017, within the framework of what is contemplated in article 143; as of this date, no instrument signed and / or issued by the OAS will have a political or legal effect on the Venezuelan State and its institutions".

This political situation has impacted the practical application of the Inter-American Conventions issued by the Specialized Conferences on Private International Law (CIDIP, by its acronym in Spanish). Remember that within the framework of CIDIP, Venezuela has ratified fourteen instruments on bills of exchange, promissory notes and bills, international commercial arbitration, letters rogatory, taking of evidence abroad, powers of attorney to be used abroad, checks, commercial companies, extraterritorial enforcement of foreign judgments and arbitral awards, information on foreign law, general rules, international child abduction, and international contracts.

For Venezuela these conventions entered into force once the requirements for their validity established in the Constitution and the Vienna Convention on the

Law of Treaties had been met. The rules of this convention are considered customary, since Venezuela has not ratified this instrument.

We must consider that the Inter-American Conventions are open conventions, which allow the accession of States not party to the OAS. Spain, for example, has accessed to conventions on letters rogatory and on information on foreign law.

Besides that, none of the Conventions has been denounced or incurred in causes of nullity or suspension, nor has there been an impossibility for performance, nor has therebeen a fundamental change in the circumstances, in the terms of articles 53, 57, 58, 60, 61, 62 of the Vienna Convention.

Although Venezuela has broken diplomatic relations with some States parties of the OAS, such relations are not indispensable for the application of Inter-American Conventions, even though in some cases cooperation is regulated through central authorities.

Another important issue is the independence of the Inter-American Conventions. Since the OAS is not an integration system, its treaties must pass the approval and ratification or accession process, because they are not covered by the characteristics of supranationality or its equivalent, such as occurs in the Andean Community or the European Union.

In any case, the situation is not clear. Article 143 of the OAS Charter provides that when "the General Secretariat receives a notice of denunciation, the present Charter shall cease to be in force with respect to the denouncing State, which shall cease to belong to the Organization after it has fulfilled the obligations arising from the present Charter". There is no reference to the treaties approved within it.

Unfortunately, this situation has been reflected in the decisions of our courts. So far there have been two decisions of the highest court in which the Inter-American codification is set aside. In both, exequatur decisions, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards was not applied.

"Although, our Republic has signed the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards with the Republic of Ecuador, it is no less true that, the Bolivarian Republic of Venezuela

formalized its final retirement from the OAS, by letter of 27 April 2019, as a result, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, approved in Montevideo, Uruguay in 1979, endorsed by the Department of International Law of the Organization of American States, ceased to have its effects in our country.

The Civil Chamber of the Supreme Court of Justice issued the first one, under number 0187 on 30 May 2019 (see also here). This decided the exequatur of an Ecuadorian divorce judgment and stated:

Therefore, this exequatur will be reviewed in the light of the Private International Law Act, according to the requirements set forth in article 53 as this is the rule of Private International Law applicable in the specific case".

In this case, the Chamber bases its decision on the fact that in the preamble of the Inter-American Convention, the States parties to the OAS are indicated as participants and that the deposit of the instrument of ratification was made before the OAS. It should be noted that neither this nor any other Inter-American Convention has been denounced by Venezuela.

In the second decision, issued by the Social Chamber of the Supreme Court under number 0416, on 5 December 2019 (see also here) on the occasion of the exequatur of a Mexican divorce judgment, there is not even an argument as to why not apply the Inter-American Convention. In it, the Social Chamber only asserted:

"In this case, it is requested that a judgment issued by a court in the United Mexican States, a country with which the Bolivarian Republic of Venezuela has not signed international treaties on the recognition and enforcement of judgments, be declared enforceable in the Bolivarian Republic of Venezuela through the exequatur procedure; for this reason, and following the priority order of the sources in the matter, the rules of Venezuelan Private International Law must be applied".

The fundamental role of Venezuela in Inter-American codification through the work of Gonzalo Parra-Aranguren and Tatiana B. de Maekelt is not a secret to anyone. It is unfortunate that a political decision attempts to weaken the Venezuelan system of Private International Law. We insist that ignoring the Inter-American Conventions not only constitutes a breach of the obligation of the State

to comply with existing treaties, but also of the internal rules that, like article 1 of the Venezuelan Private International Law Act, require the preferential application of the Public International Law rules, in particular those established in international treaties.

"Promoting Foreign Judgments: Lessons in Legal Convergence from South Africa and Nigeria" (Kluwer Law International B.V. 2019)

Pontian N. Okoli has provided the following extensive summary of the findings of his book, which is a revised version of his PhD thesis, completed at the University of Dundee.

In 2019, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial matters came into being. It is a clear reflection of determined efforts to produce **a global legal framework** that can support the free movement of foreign judgments. One index of success concerning the 2019 Convention would be whether it promotes the free movement of foreign judgments in **different parts of the world including Africa**. Time will tell. For now, it is necessary to reduce the impediments to the free movement of foreign judgments on at least two levels: first, between African and non-African jurisdictions; and second, between African jurisdictions. The legal frameworks that concern both levels are essentially the same in most African jurisdictions. There is no African legal framework that is equivalent to the Brussels legal

regime on the recognition and enforcement of foreign judgments in the European Union. Thus, litigants need to consider relevant legal frameworks in each country. Foreign judgment creditors must be conversant with appropriate laws to ensure recognition and enforcement of foreign judgments. Nigeria and South Africa are two major examples of African jurisdictions where such awareness is required.

Nigeria and South Africa are important for several reasons including their big economies and the fact that they are major political players in their respective regions and have significant influence on the African continent. They also make for interesting comparative study –Nigerian jurisprudence is based on the English common law while South African jurisprudence is mixed – based on Roman Dutch law with a significant influence of English law. Also, Nigeria is not a member of the Hague Conference on Private International Law, but South Africa has been a member since 2002. Understanding why these two jurisdictions adopt their individual approaches to the recognition and enforcement of foreign judgments is critical to unlocking the potential to have rewarding relations with Africa in this regard. It is important to understand what brings both jurisdictions together and what separates both, with a view to determining how common perspectives to foreign judgments enforcement may be attained.

There are several bases for legal convergence. Both jurisdictions have two major legal frameworks on foreign judgments – statutory law and the common law. This two-track system is common in Africa and many parts of the Commonwealth including the United Kingdom which has more than one statute (and the common law) on foreign judgments. In Nigeria, there is still significant uncertainty as to which legal framework should apply to relevant cases. Nigerian case law clearly shows that statutory law remains the most important guide for litigants. Essentially, Nigeria relies on a statute of nearly a century old (the Reciprocal Enforcement of Judgments Act 1922 — Chapter 175, Laws of the Federation and Lagos 158). Conversely, statutory law is of less practical importance in South Africa where the Enforcement of Foreign Judgments Act 32 of 1988 has been extended to Namibia only.

The comparative study finds that it is generally easier for judgment creditors to enforce foreign judgments in South Africa than in Nigeria. Although there is much to discuss concerning legal uncertainties considering the confusing legal framework in Nigeria, case law demonstrates that the South African attitude to

recognition and enforcement foreign judgments is instructive. A liberal legal framework that promotes the recognition and enforcement of foreign judgments should be founded in judicial and legislative attitudes that promote the free movement of foreign judgments. In this context, the theories that underpin the recognition and enforcement of foreign judgments are critical. The theories form the common foundation to which jurisdictions around the world can relate.

The statutory frameworks on foreign judgments are relatively recent. For example, the main Nigerian statute on the subject was patterned on the 1920 UK on the Administration of Justice Act. However, foreign judgments were already being enforced in other jurisdictions as long ago as the nineteenth century through case law (such as *Schibsby v Westenholz* [1870] LR QB 155 and *Hilton v Guyot* 159 US 118 [1895]) which reflected the theories that underpin the recognition and enforcement of foreign judgments. The theories of reciprocity, obligation and comity have been applied with varying degrees of success in different jurisdictions. These theories either clearly apply to Nigerian and South African contexts (for example, through specific legislative provisions in Nigeria) or they have been discussed by the courts in both jurisdictions. The first step should be an agreement on what should drive the recognition and enforcement of foreign judgments. Each of these theories has been criticised rather substantially, and it may be difficult to build on any 'pure theory'. It would be helpful to adopt an approach that encourages the free movement of foreign judgments subject to a consideration of State interests. Such an approach would attach some degree of obligation in the recognition and enforcement of foreign judgments subject to narrow gaps for defence. This can be illustrated through the application of public policy to frustrate the recognition and enforcement of foreign judgments. Such an obligation should be qualified. Apart from drawing on an analysis of the major theories on the subject, adopting this qualified obligation approach has the benefit of a universal standpoint that is shaped by practical and political realities. This is more pragmatic than strictly applying any traditional theory that is entirely constructed within a legal culture or legal system.

Litigants should expect the enforcement of foreign judgments to be the rule rather than an exception. Fairness requires a consideration of litigant and State interests. Any approach that considers only one (or one at the expense of the other) is unlikely to be fair or acceptable to many jurisdictions including those in Africa. Already, the jurisprudence in both countries suggests that it would be fair

to recover debts and there is scope to presume that foreign judgments should be enforced. This perspective of fairness has greatly influenced South African jurisprudence, and this may also partly account for why there is greater success in attempts to enforce foreign judgments even when the law is contested or may at first seem unclear. An example is *Richman v Ben-Tovim* 2007 (2) SA 203 where the respondent did not dispute the debt but argued that his mere presence in England was an insufficient basis for the English court to exercise jurisdiction. The South African Court of Appeal, however, considered that a 'realistic approach' was necessary and enforced the foreign judgment. Although some scholars may criticise this judgment for endorsing 'mere presence' jurisdiction as it divides common law and civil law systems, the rationale behind the decision is instructive. If a 'realistic approach' is to be found, then there is a need to reflect on how to reduce the technicalities that impede the free movement of foreign judgments. Efforts to attain an effective global legal framework that African countries will find useful requires a realistic approach that factors in contextual realities. This realistic approach permeates other aspects of the process that leads to the recognition and enforcement of foreign judgments in Nigeria and South Africa.

An important contextual reality is the characterisation process. How the Nigerian or South African courts characterise a foreign judgment can make a great difference in terms of recognition and enforcement. The way forward is not to create more categories, but to focus on how the foreign judgment may be enforced subject to considerations of fairness to both the litigants and the State. This perspective of 'cosmopolitan fairness' also facilitates the attainment of practical solutions in issues that concern jurisdictional grounds. To ensure a realistic approach, and in considering a fair approach for litigants and the State, it is critical to reflect on what ultimate end should be attained. If that end is promoting the free movement of foreign judgments, then it is reasonable to put the onus on the judgment debtor. This does not mean that foreign judgments would be enforced regardless of potential injustice or unfairness to the judgment debtor. However, placing the onus on the judgment debtor implies that the application of jurisdictional grounds should be based on promoting the free movement of foreign judgments. At least four traditional bases of jurisdiction are common to Nigeria and South Africa: mere presence, residence, domicile and submission. A new perspective to this subject may consider what purpose each jurisdictional ground should serve and the aims that should be achieved. The

Nigerian legal framework, in principle, reflects this approach of considering jurisdictional grounds in a progressive and purposive manner. In Nigeria, doing business or carrying on business is a common thread that runs through all the jurisdictional grounds. There is also a patchwork of jurisprudence concerning individual grounds of jurisdiction. In South Africa, residence needs to be ascertained on a case-by-case basis as neither Nigerian nor South African statutory laws define residence.

In the context of jurisdictional grounds, the lack of interpretational certainty in both countries suggests that there is considerable scope to adopt any approach or combination of approaches that helps to solve problems in a practical way. In dealing with impediments to enforcing foreign judgments in a manner that ensures sustainable progress, there should be a clear consideration of systematic flexibility. In other words, fine demarcations in the context of traditional jurisdictional grounds may not be of practical help in efforts to facilitate the recognition and enforcement of foreign judgments. Any bias against a jurisdictional ground should be re-evaluated in a manner that factors in contextual realities. There should be a consideration of international commercial realities and in a fast-evolving global order that is driven by increasingly complex international commercial transactions. Any approach that focuses on territorial considerations vis-à-vis jurisdictional grounds does not reflect this global order in which increased movement, complex international commercial transactions and the borderless nature of the Internet are important features. This global order requires a result-oriented approach rather than a recourse to any traditional approach that is driven by technicalities. For example, the question should not be whether a judgment debtor was 'present' in the foreign country but what would amount to presence that is effective for the purposes of enforcing foreign judgments. This reasoning may be replicated for residence or domicile as well.

The need for a 'realistic approach' also extends to public policy. There are clear foundations in Nigerian and South African law that support a narrow application of public policy during legal proceedings to recognise and enforce foreign judgments. This is so although there have been significant interpretational difficulties in both jurisdictions and judgment debtors try to frustrate the enforcement of foreign judgments by relying on defences that are anchored to public policy. For example, characterising damages awarded by the foreign court as compensatory rather than punitive could help to ensure judgment creditors do

not go away empty-handed. This is especially so where such judgment creditors are entitled to realising their foreign judgments.

Legal certainty and predictability cannot be driven by a purely circumstantial application of legal principles or consideration of legal issues. But it is also true that the law should not stand still. In this regard, it is instructive that Nigeria and South Africa have areas of possible legal convergence even though they operate considerably different legal cultures. However, the domestic jurisprudence of their different legal cultures does not undermine their common perceptions of fairness and the need to enforce foreign judgments. What is lacking considerably is the right attitude to ensure that the laws already in existence are interpreted progressively and purposively. This requires a robust institutional approach that is driven by the courts. Of course, clear and certain statutory laws should be in place to promote the free movement of foreign judgments. However, legal comparative analysis concerning Nigeria and South Africa demonstrates that the use of statutory laws does not necessarily guarantee legal certainty. The relative success of South Africa in enforcing foreign judgments has been driven by the courts considering the common law. Statutory law has been extended to only one African country. Any foreign legal instrument or convention (at the global or regional level) cannot function effectively without courts that are inclined to recognise and enforce foreign judgments. For example, article 10 of the 2019 Judgments Convention provides that the court addressed may refuse the recognition or enforcement of a foreign judgment if the damages do not actually compensate a judgment debtor for actual loss suffered. The role of the courts is critical to the success of such legal provisions.

The possibility of African countries such as Nigeria (that are not members of the Hague Conference) ratifying the 2019 Convention cannot be discounted. There is a growing trend of countries signing up to Hague Conventions even though they are not members of the Conference. However, both African and non-African countries require robust legal and institutional frameworks that will support the free movement of foreign judgments. Such legal frameworks should be anchored to an appropriate paradigm shift where necessary.

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.