The Moçambique Rule in the New Zealand Court of Appeal

Written by Jack Wass, Stout Street Chambers, New Zealand

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

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

In the course of its
decision, the Court resolved a number of important points of law, some of which had not been addressed in any Commonwealth decisions:

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

Second, it held (reversing
the High Court) that the *Moçambique*
rule does not have reflexive effect. The rule prevents the New Zealand court

from taking jurisdiction over claims in rem involving foreign land out of comity to the foreign court, but does not *require* the New Zealand court to take jurisdiction over cases involving New Zealand land. Although New Zealand will often be the appropriate forum for a case involving New Zealand land, the court is free to send it overseas if the circumstances require, even if the claim asserts legal title in rem.

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

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

Private International Law in Africa: Comparative Lessons

Written by Chukwuma Okoli, TMC Asser Institute, The Hague

About a decade ago, Oppong lamented a "stagnation" in the development of private international law in Africa. That position is no longer as true as it was then – there is progress. Though the African private international law community is small, the scholarship can no longer be described as minimal (see the bibliograhy at the end of this post). There is a growing interest in the study of

private international law in Africa. Why is recent interest on the study of private international law [in Africa] important to Africa? What lessons can be learn't from other non-African jurisdictions on the study of private international law?

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

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

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

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

The systematic study of private international law as we know it today has largely been academically developed by the Member States of the European Union (EU)

and the United States of America ("USA"). The period of industrialization in the 19th century, and the rise of capitalism gave birth to a variety of solutions that could respond to globalization. Indeed, the firm entrenchment of the principle of party autonomy in international dispute settlement in the 20th century was a way of securing the interest of the international merchant who does their business in many jurisdictions. The *privatization* of international law dispute settlement is what gave birth to the name *private* international law.

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

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

It is important to stress that it is the systematic study of private international law by scholars over the years in the US and Member States in the EU and Asia that created the required political will and institutional support to give private international law it's proper place in these countries. In Africa, such systematic study becomes especially important in an environment of growing international

transactions both personal and commercial. This is what propels the study of private international. It is seldom an abstract academic endeavor given the nature and objectives of the subject

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

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

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

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

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

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

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

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

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

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

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

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

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

Michael Douglas, Mary Keyes, Sarah McKibbin and Reid Mortensen published an article on how the implementation of the HCCH Judgments Convention would impact Australian private international law: 'The HCCH Judgments Convention in

Australian Law' (2019) 47(3) Federal Law Review 420. This post briefly considers Australia's engagement with the HCCH, and the value of the Judgments Convention for Australia.

Australia's engagement with the HCCH

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

Australia has acceded to 11 HCCH instruments, especially in family law where its implementation of HCCH conventions leads the Conference. However, with respect to recent significant instruments, it has lagged behind. For example, in 2016, Australia's Commonwealth Attorney-General's Department ('AGD') recommended accession to the 2005 HCCH Choice of Court Convention through an 'International Civil Law Act'; it also recommended that the proposed legislation should give effect to the HCCH's Principles on Choice of Law in International Commercial Contracts. In November 2016, the Australian Parliament's Joint Standing Committee on Treaties supported both recommendations. Despite those recommendations, we are yet to see the introduction of a Bill into Parliament. We remain hopeful that 2020 will see progress.

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

The value of the HCCH Judgments Convention for Australia

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

For Australia, the primary advantage of the Judgments Convention is the capacity to enforce Australian judgments overseas. A party to cross-border litigation who obtains the benefit of an Australian judgment will have a clearer pathway to obtaining meaningful relief. The ability to enforce an Australian civil or commercial judgment internationally is extremely limited, with the exception of New Zealand. The Judgments Convention, if implemented in Australia, would both expand and reposition the ability to project Australian judicial power beyond New Zealand. Certainly, the Convention would enhance the ability to enforce judgments of the courts of the other Contracting States to the Convention in Australia. Equally, as a multilateral Convention, the Judgments Convention would enable Australian judgments to circulate among the other Contracting States to the Convention. That would be a most attractive outcome for the Australian judicial system. Non-money judgments, which currently have almost no extraterritorial reach, would become enforceable through the Convention. The recognition of judgments that emerge when Australian courts exercise special jurisdictions dealing with contractual, non-contractual and trust obligations is also a long overdue reform and would see the law relating to the international enforcement of judgments align more closely with the nature of modern commercial litigation. If adopted widely, the Judgments Convention will provide better access to the assets of judgment debtors and to defendants themselves. This will reduce the risks associated with cross-border litigation, and so with it, the risks to cross-border business.

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

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

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

By Mohak Kapoor

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

minority decisions.

FACTS

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

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

LEGAL FINDINGS

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

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

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

Work on possible future Private International Law instruments on legal parentage (incl. legal parentage established as a result of an international surrogacy arrangement) is making progress

Written by Mayela Celis

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

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

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

documents.

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

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

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

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

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

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

The Report of the Experts' Group is available here.

The HCCH news item is available here.

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

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

Introduction

On 7 November 2019, the CJEU released the very first decision on Regulation 655/2014 establishing a European Account Preservation Order ("EAPO Regulation"). From the perspective of European civil procedure, this instrument is threefold innovative. It is the first uniform provisional measure; it is also the very

first *ex parte* piece of European civil procedure (and reverses the *Denilauer* doctrine); and the first one which, though indirectly, tackles civil enforcement of judicial decisions at European level. This preliminary reference made by a Bulgarian court gave the CJEU the opportunity to clarify certain aspects of the EAPO Regulation.

Facts of the case

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

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

The payment order could not be served on the debtor because his domicile was unknown. In such cases, Bulgarian law prescribes that the debtor must initiate procedures on the substance of the case. If the creditor does not go ahead with such proceedings, the court would repeal/withdraw the payment order. The District Court of Sofia informed the creditor about this, urging the initiation of the proceedings. At the same time, the District Court of Sofia referred to the President of the District Court of Sofia for the commencement of separate proceedings. The President of the District Court of Sofia considered that, for the purposes of the EAPO Regulation, it was not necessary to initiate secondary proceedings. On the president's view, the payment order, albeit unenforceable, constituted an authentic instrument in the sense of the EAPO Regulation. The District Court of Sofia considered that the payment order had to enforceable to be considered an authentic instrument.

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

- *Is a payment order for a monetary claim under Article 410 of the Grazhdanski protsesualen kodeks (Bulgarian Civil Procedure Code; GPK) which has not yet acquired the force of res judicata an authentic instrument within the meaning of Article 4(10) of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014?*
- *If a payment order under Article 410 GPK is not an authentic instrument, must separate proceedings in accordance with Article 5(a) of Regulation*

(EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 be initiated by application outside the proceedings under Article 410 GPK?

- *If a payment order under Article 410 GPK is an authentic instrument, must the court issue its decision within the period laid down in Article 18(1) of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 if a provision of national law states that periods are suspended during judicial vacations?*

The enforceability of the payment order

The answer to the first question constituted the core of the judgment's reasoning. The Court examined if the "enforceability" was a precondition for the payment order to be considered an authentic instrument. As the Court rightly pointed out, the EAPO Regulation does not clearly state if the acts in question (judgments, court settlements, and authentic instruments) have to be enforceable (para. 39). In order to answer this question, the CJEU followed the reasoning of AG Szpunar in his Opinion which is based on a teleological, systemic and historical interpretation of the EAPO Regulation (para. 41). In its teleological analysis, the Court stated that a broad understanding of the concept of title could undermine the balance between the claimants' and the defendants' interests (para. 40). Creditors with a title do not have to prove, for instance, the likelihood of success on the substance of the claim (*fumus boni iuris*). Consequently, including creditors with a non-enforceable title in the more lenient regime would allow a larger number of creditors to more "easily" access an EAPO; ultimately favouring the claimant's position (para. 40). Concerning the systemic analysis, the CJEU referred to Article 14(1) of the EAPO Regulation. This provision is the only one in the EAPO Regulation which acknowledges certain rights to creditors with a non-enforceable title. In the Court's view, this was just an exception. For the rest of the cases, in which there is no such distinction between creditors with and without enforceable titles, only the former would be considered to fit the concept of title. Lastly, the historical analysis was based on the Commission Proposal of the EAPO Regulation. Unlike in the final text of the regulation, the proposal made a clear and explicit differentiation between the regimes applicable to creditors with an enforceable title, and those without one. Creditors without an enforceable title were subject to further prerequisites (e.g. satisfaction of the *fumus boni iuris*). A reading of the final text in the light of these *travaux préparatoires* might

suggest, on the Court's view, that the current differentiation between creditors is also based on the enforceability of title. On this basis, the CJEU concluded that the title necessarily had to be enforceable, in order for an act to be considered an authentic instrument.

Autonomous definition of "substance of the claim"

In the second question, the Bulgarian court asked if, in the event that the payment order were not an authentic instrument, it would be necessary to initiate separate proceedings on the substance of the claim. Preservation orders can be requested before, during, or after proceedings on the substance of the claim. Those creditors who request a preservation order *ante demandam* have a deadline of "30 days of the date on which [they] lodged the application or within 14 days of the date of the issue of the Order, whichever date is the later" (Article 10(1)) in which to initiate proceedings on the substance of the matter. It is not clear what should be understood by "proceedings on the substance of the claim". Recital 13 of the EAPO Regulation, though not a binding provision, states that this term covers "any proceedings aimed at obtaining an enforceable title". In the present case, the creditor obtained a payment order. Nevertheless, such order did not become enforceable because it could not be personally notified to the debtor. The only option left to the creditor was to initiate separate proceedings to pursue the claim. In the event that the creditor did not initiate the proceedings, the payment order would be set aside by the court. In the present case, it was not clear whether the first proceedings by which the creditor obtained a payment order, or the secondary proceedings necessary to maintain the payment order were the proceedings on the substance of the matter. The CJEU relied on the "flexible" interpretation contained in Recital 13. The Court considered the "initial" proceedings in which the creditor obtained a payment order to be proceedings on the substance of the claim. Therefore, for the purposes of the EAPO Regulation, it was not necessary to initiate secondary proceedings.

Time limit to render the decision on the EAPO application

Finally, the CJEU addressed whether a judicial vacation could be considered an "exceptional circumstance" (Article 45), justifying the delivery of the decision on the application of the EAPO outside the due time limit. The first issue concerned the way the question was formulated by the Bulgarian court. The court asks, in the event that the payment order be considered an authentic instrument, whether

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

Conclusions

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

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

In the first question, the Court adopted a pro-defendant approach. As the CJEU rightly remarks, the wording employed was unclear in asserting whether the title has to be enforceable or not. Anecdotally, only the Spanish version of the EAPO Regulation mentions that the authentic instrument has to be enforceable. As I already mentioned in my commentary on the AG Opinion in this case, this might be a mistranslation extracted from the Spanish version of Regulation 805/2004

establishing a European Enforcement Order Regulation. From the defendant's perspective, the EAPO Regulation is relatively aggressive. Since the preservation order is granted *ex parte*, defendants can only react once it is already effective. This puts a lot of pressure on the defendants, especially if they are a business requiring liquidity that might prefer to pay than to apply for a remedy and await to the proceedings on the substance of the case. It is for that reason that it was necessary to establish certain "barriers" to impede potential abuses: the preliminary prerequisites (Article 7). In those cases in which the creditor has already an enforceable title, the EAPO is merely the prelude to an incipient enforcement. However, if there is not such a title, or if the title is not yet enforceable, in that it is for instance a payment order, then the issuance of a preservation order must be the object of further prerequisites, since it is not clear if the right that the creditor claims exists. It is for that reason that the prima facie examination of the application includes an evaluation of the likelihood of success on the substance of the claim, and the provision of a security, which might deter abusive claimants from applying for an EAPO. Opening the most lenient regime to those creditors with a non-enforceable title would tip the balance in favour of the creditors. We might think about how the decision affects creditors who have obtained a title (e.g. judicial decisions) that is not yet enforceable. The existence of a title would serve as evidence of the likelihood of success on the substance of the claim. Regarding the security, judges could except creditors without a title from providing the security "attending to the circumstances of the case" (Article 12(2)). Having a non-enforceable title might be also one of those circumstances. Only, judges might require a later deadline to deliver the decision on the preservation order (Article 10(1)). Therefore, materially, the impact of the decision might not harm the status of creditors with unenforceable titles as much.

For the two remaining (and more technical) questions, the Court stands on the creditors' side. In the second question, the CJEU followed the guidance offered by the Preamble. In this particular case, Recital 13 entails a broad interpretation of "substance of the claim", encompassing summary proceedings. Despite the fact that the recitals of the Preamble are not binding, the Court relied on them. Behind this decision, we might find the CJEU's acknowledgement of the popularity of such proceedings at the domestic level, especially in debt recovery claims, including in regards to the European Payment Order. A decision to the contrary might have discouraged creditors from using the EAPO Regulation.

Concerning the third question, the restrictive understanding of "exceptional circumstances" is not surprising. The CJEU usually tends to adopt a restrictive approach to any "exceptions" foreseen in European legislative provisions, which avoids giving domestic judges leeway to abuse them, which would ultimately undermine the objectives of the Regulation.

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

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

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

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

The Act in question was finally passed on 23 March 2019. Rules on ODR certification were recently detailed in a decree published on 27 October 2019.

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

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

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

Mutual Trust v Public Policy : 1-0

In a case concerning the declaration of enforceability of a UK costs order, the Supreme Court of the Hellenic Republic decided that the 'excessive' nature of the sum (compared to the subject matter of the dispute) does

not run contrary to public policy. This judgment signals a clear-cut shift from the previous course followed both by the Supreme and instance courts. The decisive factor was the principle of mutual trust within the EU. The calibre of the judgment raises the question, whether courts will follow suit in cases falling outside the ambit of EU law.

[Areios Pagos, Nr. 579/2019, unreported]

THE FACTS

The claimant is a Greek entrepreneur in the field of mutual funds and investment portfolio management. His company is registered at the London Stock Exchange. The defendant is a well known Greek journalist. On December 9, 2012, a report bearing her name was published in the digital version of an Athens newspaper, containing defamatory statements against the claimant. The claimant sued for damages before the High Court of Justice, Queens Bench Division. Although properly served, the respondent did not appear in the proceedings. The court allowed the claim and assigned a judge with the issuance of an order, specifying the sum of the damages and costs. The judge ordered the default party to pay the amount of 40.000 ? for damages, and 76.290,86 ? for costs awarded on indemnity basis. The defendant did not appeal.

The UK order was declared enforceable in Greece [Athens CFI 1204/2015, unreported]. The judgment debtor appealed successfully: The Athens CoA ruled that the amount to be paid falls under the category of ‚excessive' costs orders, which are disproportionate to the subject matter value in accordance with domestic perceptions and legal provisions. Therefore, the enforcement of the UK order would be unbearable for public policy reasons [Athens CoA 1228/2017, unreported]. The judgment creditor lodged an appeal on points of law before the Supreme Court.

THE RULING

The Supreme Court was called to examine whether the Athens CoA interpreted properly the pertinent provisions of the Brussels I Regulation (which was the applicable regime in the case at hand), i.e. Article 45 in conjunction with Art. 34 point 1. The SC began its analysis by an extensive reference to judgments of the

CJEU, combined with recital 16 of the Brussels I Regulation, which encapsulates the Mutual Trust principle. In particular, it mentioned the judgments in the following cases: C-7/98, Krombach, Recital 36; C-38/98, Renault, Recital 29; C-302/13, flyLAL-Lithuanian Airs, Recital 45-49; C-420/07, Orams, Recital 55), and C-681/13, Diageo, Recital 44. It then embarked on a scrutiny of the public policy clause, in which the following aspects were highlighted:

- The spirit of public policy should not be guided by domestic views; the values of European Civil Procedure, i.e. predominantly the European integration, have to be taken into consideration, even if this would mean downsizing domestic interests and values. Hence, the court of the second state may not deny recognition and enforcement on the grounds of perceptions which run contrary to the European perspective.
- The gravity of the impact in the domestic legal order should be of such a degree, which would lead to a retreat from the basic principle of mutual recognition.
- Serious financial repercussions invoked by the defendant may not give rise to sustain the public policy defense.
- In principle, a foreign costs order is recognized as long as it does not function as a camouflaged award of punitive damages. In this context, the second court may not examine whether the foreign costs order is 'excessive' or not. The latter is leading to a review to its substance.
- The proportionality principle should be interpreted in a twofold fashion: It is true that high costs may hinder effective access to Justice according to Article 6.1 ECHR and Article 20 of the Greek Constitution. However, on an equal footing, the non-compensation of the costs paid by the claimant in the foreign proceedings leads to exactly the same consequence.
- In conclusion, the proper interpretation of Article 34 point 1 of the Brussels I Regulation should lead to a disengagement of domestic perceptions on costs from the public policy clause. Put differently, the Greek provisions on costs do not form part of the core values of the domestic legislator.

In light of the above remarks, the SC reversed the appellate ruling. The fact that the proportionate costs under the Greek Statutes of Lawyer's fees would lead to a totally different and significantly lower amount (2.400 in stead of 76.290,86 ?) is not relevant or decisive in the case at hand. The proper issue to be examined is

whether the costs ordered were necessary for the proper conduct and participation in the proceedings, and also whether the calculation of costs had taken place in accordance with the law and the evidence produced. Applying the proportionality principle in the way exercised by the Athens CoA amounts to a re-examination on the merits, which is totally unacceptable in the field of application of the Brussels I Regulation.

COMMENTS

As mentioned in the introduction, the ruling of the SC departs from the line followed so far, which led to a series of judgments denying recognition and enforcement of foreign (mostly UK) orders and arbitral awards [in detail see my commentary published earlier in our blog, and my article: Recognition and Enforcement of Foreign Judgments in Greece under the Brussels I-*bis* Regulation, in Yearbook of Private International Law, Volume 16 (2014/2015), pp. 349 et seq]. The decision will be surely hailed by UK academics and practitioners, because it grants green light to the enforcement of judgments and orders issued in this jurisdiction.

The ruling applies however exclusively within the ambit of the Brussels I Regulation. It remains to be seen whether Greek courts will follow the same course in cases not falling under the Regulation's scope, e.g. arbitral awards, third country judgments, or even UK judgments and orders, whenever Brexit becomes reality.

Gender and Private International Law (GaP) Transdisciplinary Research Project: Report on the

kick-off event, October 25th at the Max Planck Institute for Comparative and International Private Law

As announced earlier on this blog, the Gender and Private International Law (GaP) kick-off event took place on October 25th at the Max Planck Institute for Comparative and International Private Law in Hamburg.

This event, organized by Ivana Isailovic and Ralf Michaels, was a stimulating occasion for scholars from both Gender studies and Private and Public international law to meet and share approaches and views.

During a first session, Ivana Isailovic presented the field of Gender studies and its various theories such as liberal feminism and radical feminism. Each of these theories challenges the structures and representations of men and women in law, and helps us view differently norms and decisions. For example, whereas liberal feminism has always pushed for the law to reform itself in order to achieve formal equality, and therefore focused on rights allocation and on the concepts of equality and autonomy, radical feminism insists on the idea of a legal system deeply shaped by men-dominated power structures, making it impossible for women to gain autonomy by using those legal tools.

Ivana Isailovic insisted on the fact that, as a field, Gender studies has expanded in different directions. As a result, it is extremely diverse and self-critical. Recent transnational feminism studies establish links between gender, colonialism and global capitalism. They are critical toward earliest feminist theories and their hegemonic feminist solidarity perception based on Western liberal paradigms.

After presenting those theories, Ivana Isailovic asked the participants to think about the way gender appears in their field and in their legal work, and challenged them to imagine how using this new Gender studies approach could impact their field of research, and maybe lead to different solutions, or different rules. That was quite challenging, especially for private lawyers who became aware, perhaps for the first time, of the influence of gender on their field.

After this first immersion in the world of gender studies, Roxana Banu offered a brief outline of private international law's methodology, in order to raise several questions regarding the promises and limits of an interdisciplinary conversation between Private International Law (PIL) and gender studies. Can PIL's techniques serve as entry points for bringing various insights of gender studies into the analysis of transnational legal matters? Alternatively, could the insights of gender studies fundamentally reform private international law's methodology?

After a short break, a brainstorming session on what PIL and Gender studies could bring to each other took place. Taking surrogacy as an example, participants were asked to view through a gender studies lens the issues raised by transnational surrogacy. This showed that the current conversation leaves aside some aspects which, conversely, a Gender studies approach puts at the fore, notably the autonomy of the surrogate mother and the fact that, under certain conditions, surrogacy could be a rational economic choice.

This first set of questions then prompted a broader philosophical debate about the contours of an interdisciplinary conversation between PIL and Gender studies. Aren't PIL scholars looking at PIL's methodology in its best light while ignoring the gap between its representation and its practice? Would this in turn enable or obfuscate the full potential of gender studies perspectives to critique and reform private international law?

As noted by the organizers, "although private international law has always dealt with question related to gender justice, findings from gender studies have thus far received little attention within PIL". The participants realized that is was also true the other way around: although they were studying international issues, scholars working on gender did not really payed much attention to PIL either.

One could ask why PIL has neglected gender studies for so long. The avowedly a-political self-perception of the discipline on the one hand, and the focus on public policy and human rights on the other, could explain why gender issues were not examined through a Gender studies lens. However, Gender studies could be a useful reading grid to help PIL become aware of the cultural understanding of gender in a global context. It could also help to understand how PIL's techniques have historically responded to gender issues and explore ways to improve them. Issues like repudiation recognition, polygamous marriage or child abductions could benefit from this lens.

It was announced that a series of events will be organized: reading groups, a full day workshop and a conference planned for the Spring of 2020.

If you want to know more about the project, please contact gender@mpipriv.de.

New Book: Recognition of Judgments in Contravention of Prorogation Agreements

Written by Felix M. Wilke, Senior Lecturer at the University of Bayreuth, Germany.

Must a foreign judgment be recognised in which a jurisdiction agreement has been applied incorrectly, i.e. in which a court wrongly assumed to be competent or wrongly declined jurisdiction? Within the European Union, the basic answer is a rather straightforward "yes". Recognition can only be refused on the grounds set forth in Article 45(1) Brussels I*bis* Regulation, and unlike Article 7(1)(d) of the recently adopted HCCH Judgments Convention, none of them covers this scenario. What is more, Article 45(3) Brussels I*bis* expressly states that the jurisdiction of the court of origin, save for certain instances of protected parties, may not be reviewed, not even under the guise of public policy.

Why, then, should one bother to read the book by Niklas Brüggemann, *Die Anerkennung prorogationswidriger Urteile im Europäischen und US-amerikanischen Zivilprozessrecht* (Mohr Siebeck) on the recognition of judgments in contravention of prorogation clauses in European and US-American law? The first and rather obvious reason can be found in the second part of the title. The book contains a concise, yet nuanced overview of the law of jurisdiction

agreements in the US (in German). To the knowledge of this author, it has been 12 years since the last comparable work was published (Florian Eichel, *AGB-Gerichtsstandsklauseln im deutsch-amerikanischen Handelsverkehr* (Jenaer Wissenschaftliche Verlagsgesellschaft) – which dealt with recognition only in passing and was limited to German and US law). Thus, this new book can be recommended to anyone with sufficient command of the German language who is interested in this particular aspect of US civil procedure, whose concepts – if one even dares to use that term – partly differs from European ideas.

The second and main reason to concern oneself with Brüggemann's book, however, is his proposition for a new ground of refusal of recognition: a new Article 45(1)(e)(iii) Brussels I*bis* for which he even offers a draft. To this end, the author comprehensively analyses jurisdiction agreements within the Brussels I*bis* framework. While Article 31(2) Brussels I*bis*, one of the main innovations of the Recast, has indeed "enhance[d] the effectiveness of exclusive choice-of-court agreements" (Recital 22 Brussel I*bis*), Brüggemann argues that the Regulation still safeguards jurisdiction agreements insufficiently. He points out several situations (e.g. asymmetrical agreements, mere derogation agreements) that Article 31(2) Brussels I*bis* does not cover in the first place. He also argues in some detail that the court first seised is allowed to examine the jurisdiction agreement in question with regard to the existence of an agreement and its formal validity; its assessment would be binding upon other courts in line with *Gothaer Allgemeine* (ECJ Case C-456/11). This in turn would lead to a race to the courts and even to a race between the courts. (The latter metaphor is only partially convincing, for it is unlikely that the judges will intentionally accelerate their respective proceedings in order to "beat" the other court.)

Brüggemann goes on to argue that when it comes to jurisdiction agreements it is contradictory to make an exception to the principle of mutual trust in the *lis pendens* context but to strictly adhere to it in the recognition context. He demonstrates that, in particular, default judgments by a derogated court pose a significant risk for the defendant – one with which US civil procedure arguably deals more effectively. Alas, this appears to be the only instance in which the author's comparative analysis, as interesting it is in and of itself, contributes to his broader point. He concludes by pointing out parallels to jurisdiction in insurance/consumer/employment matters (safeguarded at the stage of recognition by Article 45(1)(e)(i) Brussels I*bis*) and exclusive jurisdiction (safeguarded at the

stage of recognition by Article 45(1)(e)(ii) Brussels I*bis*), and by suggesting that a special ground for refusal of recognition would have positive effects on the internal market.

While the abovementioned Judgments Convention is too recent to feature in the book, the author was able to consider its draft in a separate, albeit somewhat oddly positioned, chapter. Conspicuously absent is any specific discussion of the issue of damages for the violation of a choice of court agreement (see this recent post). The omission is certainly justifiable as Brüggemann is only concerned with procedural safeguards for jurisdiction agreements. But maybe such a remedy under substantive law could obviate or at least lessen the need for a separate ground of refusal of recognition? All in all, however, the author has carefully built a compelling case for an addition to Article 45(1) Brussels I*bis*.