

Enforcement of foreign rulings against Supreme Court state ruling

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Litigation, Spain

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Introduction

On 3 October 2019 the Supreme Court ruled on an interesting matter concerning two elements of international law:

- state immunity from enforcement; and
- declarations of enforceability.

This ruling is significant because it states that the only precedent on the topic of enforcement immunity is a decision of 13 June 2005.

Further, the ruling applies the United Nations Convention on Jurisdictional Immunities of States and Their Property, which was signed in New York on 2 December 2004 but is not yet in force.⁽¹⁾

The ruling is also significant with regard to its interpretation of an 'enforceability declaration', which differs from that provided for in the applicable EU regulation.

Facts

An individual filed several claims against Argentina in Germany. His claims were successful and the claimant sought enforcement of the German rulings in Spain. The applicable enforcement regime was provided for by the EU Brussels Regulation (44/2001), as opposed to the recast EU Brussels Regulation (1215/2012). One of the differences between these regulations is that an enforceability declaration is required under EU Regulation 44/2001, but not EU Regulation 1215/2012.

Decisions

The Spanish court issued an enforcement order, which was challenged by Argentina on the basis that:

- the Spanish courts lacked jurisdiction since Argentina enjoys enforcement immunity; and
- the necessary enforceability declaration had not been included in the enforcement order.

The challenge was dismissed, but Argentina successfully appealed the decision before the Madrid Court of Appeals on the grounds that:

- the court had not issued an enforceability declaration, as provided for by EU Regulation 44/2001; and
- this omission had prevented Argentina from opposing the claim in accordance with EU Regulation 44/2001.

However, the claimant then filed an appeal before the Supreme Court, arguing that:

- the judge had not infringed enforcement immunity because Argentina was allowed to designate assets which were unrelated to its public activities; and
- the enforceability declaration was no longer required under EU Regulation 1215/2012.

The appeal was upheld and the first-instance decision was thus confirmed.

Analysis

Immunity

When considering the first argument, the Supreme Court applied the United Nations Convention on Jurisdictional Immunities of States and Their Property. Although the ruling acknowledges that the convention is not yet formally in force, the court considered that it must be applied because it reflects customary principles of international law. Notably, Argentina is not a signatory to the convention.

The ruling supports the doctrine issued by the Constitutional Court regarding the enforcement of state assets by distinguishing between assets used for public and private state activities.

The Supreme Court considered that immunity could have been infringed had the court seized a specific asset belonging to Argentina (which would have been used for purposes relating to its sovereignty). However, it merely issued the enforcement order, which does not entail the seizure of assets *per se*.

Accordingly, the matter of immunity will be dealt with at a later stage of the proceedings, when the claimant seeks the seizure of specific assets.

General enforcement order and enforceability declaration

The Supreme Court considered that the enforceability declaration was necessary since EU Regulation 1215/2012 was not applicable. However, the enforcement order was deemed to have the same effects as the enforceability declaration.

The Spanish courts issue an enforcement order once they have confirmed that:

- the procedural legal requirements have been met;
- the ruling has no irregularities; and
- the requested enforcement actions are consistent with those established in the ruling.

Spanish procedural law includes no additional provisions which apply to foreign decisions. Thus, an enforcement order is not intended to replace the enforceability declaration set out in EU Regulation 44/2001. Spanish scholars have stated that the enforceability declaration is the result of an *exequatur* procedure and that such procedure must not be confused with an enforcement order issued within the framework of enforcement proceedings. **(2)** Both proceedings entail different, fixed grounds for non-enforcement. Thus, allowing enforcement proceedings to continue without conducting the previous *exequatur* procedure prevents the defendant from invoking the grounds for denial of the *exequatur*.

The Supreme Court's confirmation that the claimant can avoid the *exequatur* procedure is surprising given that it held that EU Regulation 1215/2012 is not applicable. Ultimately, the court has removed the requirement for a previous *exequatur* procedure as if EU Regulation 1215/2012 applied.

Although EU Regulation 1215/2012 is already in force, any defendants who have unfavourable rulings rendered abroad in proceedings filed before January 2015 must take this ruling into account, as the Spanish first-instance courts now have additional grounds on which to circumvent the *exequatur* procedure.

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Endnotes

(1) Spain signed the convention on 11 September 2001.

(2) Virgós Soriano, M and Garcimartín Alférez, FJ, *Derecho procesal civil internacional. Litigación internacional*, p 667.

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