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LEGAL POSSIBILITIES OF USING RUSSIAN CENTRAL BANK ASSETS TO ENFORCE EUROPEAN COURT OF HUMAN RIGHTS JUDGMENTS

Annex: Applicable Laws in Belgium

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This country study is an annex to the report *Legal Possibilities of Using Russian Central Bank Assets to Enforce European Court of Human Rights Judgments* and contains the full analysis of applicable laws in Belgium.

A. ENFORCEMENT OF FOREIGN JUDGMENTS IN BELGIUM

According to Belgian law, the rules applicable to the enforcement of a foreign judgment depend on the state in which said judgment was rendered (i.e., the state of origin). In this respect, judgments from EU member states are directly enforceable in Belgium (in accordance with the Brussels I *bis* Regulation)[1] without the need to be recognized by a Belgian court first, whereas non-EU rulings must be recognized (via an exequatur procedure) before being enforceable on Belgian territory. In that case, depending on the state of origin of the non-EU judgment, the recognition and enforcement proceeding will be either governed by a multilateral or bilateral international convention or by the Belgian Code of Private International Law (BCPIL)[2] if no such convention exists.

As ECtHR judgments are not issued by EU member states and not subject to a bilateral or multilateral convention on recognition and enforcement, the question of enforcing such judgments centers around the application of the general rules under the BCPIL. Hence, only the latter will be discussed in detail.

I. Recognition via exequatur procedure

Under Belgian law, the recognition of foreign judgments, insofar as they relate to civil and commercial matters, is governed by Articles 22 to 26 BCPIL. According to Article 22, §1, (2) BCPIL, foreign judicial decisions as such—legally defined as "any decision rendered by an authority exercising jurisdictional powers"[3] (unofficial translation)—are recognized de plano, i.e., without legal proceedings. However, to enforce a foreign judgment in Belgium by imposing coercive enforcement measures, such as attachment,[4] it is required to first initiate an exequatur procedure, which will "formally assimilate" (unofficial translation) the foreign judgment to a Belgian judgment by affixing an enforcement order ("*la formule exécutoire*" in French) and thus enable its enforcement in Belgium.[5]

In this regard, Article 22, §1, (1) BCPIL indicates that "a foreign judicial decision enforceable in the state where it was rendered shall be declared enforceable in Belgium, in whole or in part, in accordance with the procedure referred to in Article 23" (unofficial translation). While most foreign judicial decisions can be declared enforceable, Article 22, §1, (3) BCPIL sets a limit by providing that "the decision can only be recognized or declared enforceable if it does not contravene the conditions of Article 25" (unofficial translation). The conditions are discussed further below.

Competent court

Pursuant to Article 23 BCPIL, to which Article 570 of the Belgian Judicial Code (BJC)[6] also refers, the court of first instance is competent to rule, regardless of the monetary value of the dispute, on the application for the recognition of a foreign judicial decision (Article 23, §1, (1) BCPIL). The application must be lodged with the Court of First Instance where the defendant is domiciled or, in the absence thereof, with the court at the place of enforcement (Article 23, §2, (1) BCPIL).

Procedure

The exequatur procedure is a formal procedure during which the judge does not review the merits of the foreign judgment for which recognition is sought.[7] According to Article 24 BCPIL, the claimant must produce

(1) an original copy of the decision which meets the requirements for authenticity under the law of the state in which it was rendered,

(2) if the judgment for which exequatur is sought is a judgement by default, the original or a certified copy of the document proving that the proceedings were initiated or an equivalent document served on the defaulting party in line with the state's legal requirements, and

(3) any document establishing that, according to the law of the state in which the decision was rendered, it is enforceable and has been served.

Applications for recognition are ex parte proceedings (Article 23, §3 BCPIL), which means that, if granted, the exequatur decision may be challenged by a third party opposing the decision (within one month of being served) before the same judge who issued it.[8]

The ultimate purpose of the exequatur procedure is to allow Belgium to exercise a (limited) assessment of the foreign judgment before any coercive enforcement measures are undertaken on its territory. Thus, at the end of the procedure, if all conditions below are met, the judge will affix an enforcement order to the foreign judicial decision qualifying it as an enforceable title in Belgium that can be subjected to enforcement.[9]

Requirements for recognition

Article 22 BCPIL sets out specific conditions which relate to the nature of the judgment for which recognition is sought. In this regard, the decision must be (i) of civil and commercial nature, (ii) a foreign judicial decision, and (iii) enforceable. These conditions will be discussed further below.

In addition, the exequatur judge is not competent to review the foreign decision on the merits (Article 25, §2 BCPIL). However, recognition can be refused based on nine limited grounds set out in Article 25, §1 BCPIL, namely:

(i) the decision is incompatible with Belgian public order,

(ii) it violates the rights of defense,

(iii) it has been obtained for the sole purpose of evading the application of a law designated by Belgian private international law,

(iv) the judgment whose recognition is sought is not final,

(v) the judgment is incompatible with a judgment handed down in Belgium or with a decision handed down previously abroad and likely to be recognized in Belgium,

(vi) the claim has been filed abroad after the same claim, which is still pending, was filed in Belgium, between the same parties and on the same subject matter,

(vii) Belgian courts had exclusive jurisdiction to hear the claim, and

(viii) the jurisdiction of the foreign court was based solely on the presence of the defendant or assets in the state of that court, with no direct connection to the dispute. (unofficial translation)

In other words, if the foreign judgment encounters one of the aforementioned grounds, its recognition may be refused, and it will therefore not be enforceable in Belgium.[10]

II Enforcement procedure

When the enforcement order is affixed to the foreign judgment (which means that it is considered as an enforceable title recognized in Belgium), the party seeking enforcement is entitled, under certain conditions, to proceed with coercive enforcement measures. Monetary assets, when properly identified, can be the object of attachment measures, as Belgian law allows creditors, under specific conditions, to freeze and attach assets belonging to a debtor, even if the latter is a foreign state or a central bank (subject to the state immunity doctrine discussed below). It should be noted that initiating any attachment measure would require, first and foremost, identifying assets held by the debtor within Belgian jurisdiction.[11]

However, although this is not the purpose of this paper, we note that following recent case law from the Court of Justice of the European Union,[12] creditors might (in principle) be required to request an exemption from asset freezes by the General Treasury Administration, which is the competent national authority for granting exemptions from financial sanctions. Belgian courts therefore might be reluctant to authorize or confirm attachment measures on assets frozen due to international sanctions.

Under Belgium law, there are two options available to creditors to enforce judgments: (a) executory attachment measures and, to a lesser extent, (b) conservatory attachment measures.

Executory attachments measures

Executory attachment measures are legal mechanisms aimed at obtaining the payment of a sum. Subject to the conditions set out below, these measures enable the creditor to forcibly sell or transfer the assets in question and use the proceeds to cover the debt it owes. Pursuant to Article 1494 BJC, two distinct conditions must be met for a creditor to be able to proceed with an executory attachment.

First, the creditor must hold a claim which is certain, liquid, and due.[13] A claim is certain when it cannot be challenged (or when it is not prima facie challengeable in the context of conservatory attachment measures—see below) and it is liquid when its amount is determined or determinable (i.e., it can be evaluated).[14] In other words, a claim is certain and liquid "when its existence and quantum are established in a precise and indisputable manner"[15] (unofficial translation). It is due when the creditor can "request immediate payment"[16] (unofficial translation). These conditions are assessed rigorously.[17] Thus, a judgment against a debtor, even one that is not enforceable, constitutes the proof par excellence of a claim that is certain, liquid, and due.[18]

Second, the creditor's claim must be enshrined in an enforceable title ("*un titre exécutoire*" in French), which must remain valid at the moment the attachment is sought.[19] An enforceable title is "a written document issued in the name of the sovereign which empowers its holder to enforce the right it establishes"[20] as it is "affixed with the enforcement order"[21] (unofficial translations). Thus, a foreign judgment recognized by Belgian courts and to which an enforcement order has been affixed (following the exequatur process described above) constitutes an enforceable title.

Article 1412quinquies, §2 BJC adds an additional procedural step in the situation of attachment measures directed towards assets belonging to a foreign state. In such a case, the creditor with an enforceable title must apply to the attachment judge, via an ex parte application, to obtain authorization to attach these assets (i.e., obtaining an attachment order). The attachment judge will then have to verify whether or not the assets that the creditor is seeking to attach are protected by the doctrine of state immunity granted to the assets of foreign powers (see below).[22]

Belgian law provides for different types of executory attachment measures. Among them, the most suitable and promising in the case of the enforcement of ECtHR judgments against Russian Central Bank assets appears to be the so-called executory garnishment ("*saisie-arrêt execution*" in French), which is governed by Articles 1539 to 1544 BJC and distinct from the conservatory garnishment examined below. Under Article 1539 BJC, executory garnishments allow a creditor to access assets that are held in the hands of a third party (third-party garnishee). Euroclear (or any other bank) which is holding assets of the Russian Central Bank could be considered such a third-party garnishee.

In practice, initiating these executory garnishment measures involves serving the attachment order on the custodian of the debtor's assets, i.e., the third-party garnishee, such as a financial institution.[23] Once served, the order prevents the third-party garnishee from transferring or allowing the withdrawal of the targeted funds or property until the creditor is paid.[24] The creditor must act through a judicial officer, such as a bailiff, who ensures the legal validity of the procedure, notifies the parties involved, and manages the enforcement process.[25]

Conservatory attachments measures

If it appears that a party is unlikely to obtain an enforcement order in Belgium in a timely manner, an alternative measure to secure the assets to be attached would be to initiate a conservatory attachment. This measure will keep the assets frozen, i.e., they cannot be transferred or withdrawn, pending the issuance of the enforcement order

(or any subsequent proceeding) but must subsequently be converted into an executory attachment measure to enable the creditor to satisfy the debt through the sale of these assets.[26] Assets frozen due to international sanctions are already barred from transfer or withdrawal. However, a conservatory attachment allows the creditors to keep these assets frozen if for instance the sanction were to be lifted. In addition, this measure could be used if a claimant succeeds in identifying additional assets that are not yet subject to sanctions.

Article 1414 BJC does not require a party to hold an enforceable title to obtain a conservatory attachment: "Any judgement, even one that is not enforceable notwithstanding an objection or appeal, is considered to be an authorization to levy a conservatory attachment in respect of the awards imposed, unless otherwise decided"[27] (emphasis added, unofficial translation). This provision means that, on the basis of a foreign judgment, even if it is unenforceable, a party is entitled to freeze the debtor's assets without obtaining a prior authorization from the attachment judge. Thus, the foreign judgment itself serves as authorization for conservatory attachment under Article 1414 BJC, and the recognition through an exequatur process of said decision is not necessary to proceed.[28]

Conservatory attachment can only be initiated if three conditions are met:

First, Article 1413 BJC requires the creditor to demonstrate urgency, i.e., that the debtor's solvency is at risk or that the debtor is likely to attempt to evade its obligation to pay.[29] The court assesses if urgency exists based on objective criteria, and it must be present not only at the time the attachment is made but also during any evaluation of its continuation.[30]

Second, pursuant to Article 1415 BJC, and in the same way as for executory attachment measures (see above), the claimant must hold a valid claim, which must be certain, liquid, and due.[31] However, this second condition is assessed more flexibly than in the case of an executory attachment, as the creditor only needs to demonstrate the prima facie existence of such a claim.

A foreign judgment, insofar as it establishes the existence of a claim, can serve as the basis for a conservatory attachment measure in Belgium under Article 1414 BJC.[32] Conversely, a foreign decision cannot benefit from Article 1414 BJC if the foreign court has not established the existence of a claim, or if its decision does not constitute a sufficiently firm basis to confirm the existence of such a claim.[33]

Third, in the case of a foreign judgment in particular, it must meet the conditions set out above for the recognition of foreign judgments in Belgium.[34] Consequently, if the creditor proceeds with a conservatory attachment without prior authorization from the attachment judge, it is therefore up to the creditor to assess, at their own risk, whether the foreign decision might encounter one of the nine grounds for refusal of recognition highlighted above. In case of doubt, it is therefore wise for the creditor to seek a prior authorization from the attachment judge, so that the creditor does not incur liability in the event of a subsequent lifting of the conservatory attachment measure.[35]

However, in the case of foreign sovereign assets, it is to be noted that pursuant to Article 1412quinquies BJC, which also applies to conservatory attachment measures, the creditor must request a prior authorization from the attachment judge before proceeding with such attachment measures.[36] At this stage, the attachment judge will therefore assess whether the assets are protected by state immunity (discussed below).

It is also worth noting that, if the creditor obtains an authorization to proceed with a conservatory attachment on the debtor's assets, it will later have to convert the conservatory attachment into an executory attachment. In this regard, pursuant to Article 1491 BJC, the service of the enforceable title (such as the foreign decision to which the enforcement order has been affixed) on the debtor results in the automatic conversion of the conservatory attachment into an executory attachment (unless there is a third-party opposition by the debtor).

B. ENFORCEMENT OF ECTHR JUDGMENTS IN BELGIUM

Pursuant to Article 46(1) ECHR, "High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties." Paragraphs 2, 3, and 4 of the same provision entrust the Committee of Ministers (CoM) with the responsibility of "supervis[ing] [the] execution" of the court's final judgments, i.e., supervising compliance by the contracting parties with their obligation under paragraph 1. However, the CoM is not entrusted with the power to enforce the judgments of the ECHR on the territory of the member states.[37]

The convention does not contain provisions regarding the legal effects of the ECtHR's judgments in the domestic legal orders of the contracting parties other than the respondent state concerned. In other words, the ECHR "does not provide for a procedure of forced execution of judgments of the ECtHR."[38]

Domestic courts in Belgium do not appear to have faced requests for the enforcement of an ECtHR judgment rendered against another state. The reason for this might lie in the nature of ECtHR judgments. As the ECtHR itself states, its judgments are "essentially declaratory and leave to the State the choice of the means to be utilized in its domestic legal system for performance of its obligation under Article 53."[39] In this sense, these judgments declare the existence of a breach of an obligation under the ECHR, and by doing so provide an interpretation of the underlying provisions of the convention. That interpretation is presumed to reflect the true meaning of the convention's provision itself. As the Court of Appeal of Mons stated: "[J]udgments of the European Court of Human Rights have the authority of *res interpretata* and are directly applicable in domestic law"[40] (unofficial translation).

The direct applicability of the judgments, as *res interpretata*, is intrinsically linked to the direct application of the convention itself. Indeed, when domestic judges apply the convention, they will do so in light of the relevant interpretations given by the ECtHR to its provisions. In that regard, it is irrelevant whether the ECtHR judgment supporting the interpretation upheld by the domestic judge is a judgment binding under Article 46 ECHR on the state of the national judge involved (respondent state), or whether it was delivered against another contracting party: the ECtHR's authority to interpret the convention ("*autorité de la chose interprétée*") incorporates the court's interpretation in the convention's provision itself and it is the convention, rather than any ECtHR judgment, that is applied by the domestic judge when further applying the convention.

It is thus only in circumstances where the ECtHR judgment orders a payment in terms of just satisfaction pursuant to Article 41 ECHR, and where the state so ordered does not voluntarily comply, that its enforcement through the domestic courts of other contracting

states comes into play. In this scenario, it is accepted that ECtHR judgments are of a "*nature prestatoire*," which means that, according to some scholars, the obligation to pay just satisfaction is "a directly and clearly enforceable obligation."[41]

I. Need for domestic recognition of ECtHR judgments

The question thus arises if just satisfaction awards ordered by the ECtHR need to be recognized in Belgium first before any enforcement measures can be taken. This would not be the case if ECtHR judgments could be considered as directly enforceable. This is disputed among scholars but not yet decided by Belgian courts.

The majority is of the view that while ECtHR decisions imposing on the respondent state the payment of just satisfaction are final and binding, they are "only enforceable within a domestic order if their enforceability is recognized by a national act."[42] In this respect, Belgian legal scholars largely support the view that ECtHR just satisfaction judgments are not directly enforceable in domestic, and more precisely, the Belgian legal order:

- "As they stand, the judgments of the court do not constitute enforceable titles against the respondent state and are not automatically enforceable within the territory of the state parties to the convention. Under the current state of international law, the application of the enforcement order authorizing coercion remains, in the absence of contrary treaty provisions, a state prerogative."[43] (unofficial translation)
- "The decisions of the [ECtHR] do not have legal effects in domestic law. [. . .] To comply with the convention and give a 'satisfaction' decision real significance, the contracting states should, through legislative means, recognize such a measure as an enforceable title under the domestic law of the state."[44] (unofficial translation)
- "Since the judgment awarding just satisfaction to the injured party is not enforceable against the respondent state, its enforcement depends either on the goodwill of the respondent state, which has undertaken 'to abide by the final judgments of the court in the disputes to which (it is a party),', or on recourse to a domestic procedure designed to render it enforceable."[45] (unofficial translation)

This opinion is not limited to the Belgian jurisdiction, but—to the contrary—is more generally shared by the foreign and international doctrine.[46] It has indeed been argued that "since the court has found a violation of the convention, its judgments are not directly enforceable within the territory of the respondent states. This follows from Article 50 of the convention: their execution depends on the states themselves. [. . .]

Only decisions in which the court grants just satisfaction to the injured party (Article 50) [now Article 41] can serve as an enforcement title under the rules of domestic law of the member states"[47] (unofficial translation). Only a minority of scholars argue in favor of the direct enforceability of ECHR judgments.[48]

The majority's view seems to have been confirmed in the Belgian judgment by the Court of First Instance of Brussels in the case *Socobel v. l'Etat Hellenique (Greece) and the Bank of Greece* (April, 30 1951).[49] On August 27, 1925, the Belgian company Socobel and the Hellenic State (Greece) entered into a contract whereby Socobel was entrusted with the construction and renovation of railway lines in Greece. Following Greece's decision to cease payments, Socobel obtained two arbitration awards ordering Greece to pay the amounts still due. Faced with Greece's inaction, Belgium appealed to the Permanent Court of International Justice (PCIJ), the predecessor to the International Court of Justice, which confirmed the binding nature of these awards. On this basis, Socobel succeeded in imposing attachment measures on Greek assets held by a Belgian bank.

The dispute was referred to the Brussels Court of First Instance, which had to rule on the validity of the attachment measures and enforceability of the PCIJ judgment. In support of its position, Socobel argued that the judgment of the PCIJ constituted an enforceable title "automatically binding in Belgium [. . .] and exempt from the exequatur formality"[50] (unofficial translation). However, the Brussels court denied enforceability. Among other reasons, it found that neither the arbitration awards nor the judgment of the PCIJ had been recognized via an exequatur procedure in Belgium. The Brussels court noted that, "while such an exemption from exequatur may appear conceivable, even legitimate, de lege ferenda, it remains clear that, at present, no international arrangement has introduced such a recognition into our institutions"[51] (unofficial translation). The Brussels court's reasoning seems to suggest that judgment of international bodies, such as the PCIJ and by extension the ECtHR, can and must be recognized first before enforcement measures can be taken.

Following the majority opinion on this question, the question to be asked is whether there exist domestic legal proceedings in Belgium to affix an enforcement order to ECtHR judgments to make their enforcement possible. It will be first examined whether these judgements can be recognized via an exequatur proceedings or, failing that, whether the Belgian legal framework would allow a simplified recognition regime.

II. Recognition via exequatur procedure

Under Belgian law, obtaining recognition of a foreign judgment requires going through an exequatur procedure. This process bestows an enforcement order on the judgment in question, thereby enabling its enforcement in Belgium.

Among the conditions set out above that need to be met for recognition, it seems that the main questions and hurdles when considering applying the general regime established by the BCPIL to judgments of the ECtHR lie in (a) whether, under Belgian private international law, ECtHR just satisfaction judgments concern civil and commercial matters, and (b) whether ECtHR judgments can be qualified as enforceable foreign judicial decisions.

Civil and commercial matters

According to Article 2 BCPIL, the BCPIL only applies to "civil and commercial matters." Given the mention of "matters," the only relevant criterion is therefore the subject matter of the dispute, and not—for instance—the (type of) court that handed down the decision. Thus, judgments by the ECtHR would not be ruled out merely on the basis that they are issued by an international court.

Even though the notion of "civil and commercial matters" is not defined by the BCPIL itself, it has already been used for a long time in other contexts, namely, multilateral conventions[52] and various European Union instruments.[53] In an attempt to delineate the contours of "civil and commercial" matters, reference may be made to the specific rules laid down in the BCPIL. In light of these, such matters include rules relating to property, contracts, torts, relationships between spouses and matrimonial property regimes, and filiation, as well as all other specific categories covered by special rules in the BCPIL.[54]

In the case law of the ECtHR, the concept of a "civil case" under Article 6 ECHR is interpreted broadly. It covers any proceedings with a decisive impact on private rights and obligations.[55] This includes all areas defined as private law in continental legal systems, regardless of the type of law involved—whether civil, commercial, or administrative—or the body responsible for resolving the dispute, such as civil, criminal,[56] administrative,[57] or constitutional courts[58] or professional tribunals.[59]

A key factor in determining if Article 6 ECHR applies is whether the case has financial implications.[60] If so, the proceedings are considered as civil. As a result, the scope of "civil rights and obligations" under Article 6 ECHR has expanded to encompass a wide variety of disputes, including those between private individuals and public authorities.

However, Article 6 ECHR does not apply in cases that challenge the state's law-making prerogatives or political rights and obligations, though such exceptions are becoming rare. For example, non-criminal tax disputes are excluded because they are considered as part of the state's "hard core of public authority prerogatives."[61] It should be noted that the ECtHR has itself recognized that its case law has shifted noticeably towards applying the civil limb of Article 6 ECHR to cases that might not initially appear to concern a civil right but may have "direct and significant repercussions on a private right belonging to an individual."[62]

At the EU level, the Court of Justice of the EU (CJEU) has held on many occasions that "although certain actions between a public authority and a person governed by private law may come within the scope of Regulation No 44/2001 [on the recognition and enforcement of judgments in civil and commercial matters], it is otherwise where the public authority is acting in the exercise of its public powers."[63] In order to determine if certain actions fall within "civil and commercial matters," the CJEU assesses the legal relationship between the parties as well as the subject matter of the action, and relies mainly on its Henkel case law,[64] which has classified consumer protection actions as civil matters, regulating private law relationships.

In light of these principles, it seems that ECtHR just satisfaction orders might be considered to fall within "civil and commercial matters." This flows from the tendency within the ECtHR's case law to interpret "civil and commercial matters" as broadly as possible, narrowing the scope of the exercise of public authority prerogatives. The nuanced case law of the CJEU, which keeps an opening in its assessment of the legal relationship between the parties and the subject matter of the action at hand, supports this argument.

It it noteworthy, however, that regarding an action for compensation against a member state on account of acts perpetrated by its armed forces, such as in the situation of Russia's war against Ukraine, the CJEU held that "operations conducted by armed forces are one of the characteristic emanations of State sovereignty. [. . .] It follows that acts such as those which are at the origin of the loss and damage pleaded by the plaintiffs in the main proceedings and, therefore, of the action for damages brought by them [. . .] must be regarded as resulting from the exercise of public powers on the part of the State concerned on the date when those acts were perpetrated."[65] This line of argument could be raised to oppose the civil and commercial character of ECtHR judgments.

Foreign judicial decision

According to Article 22 BCPIL, which is titled "recognition and declaration of enforceability of foreign judicial decisions" (unofficial translation), Belgian law recognizes foreign judicial decisions under certain conditions. The question arises whether judgments of international courts, such as the ECtHR, can rightly be qualified as foreign judicial decisions and therefore fall within the scope of Article 22 BCPIL. This requires first analyzing what comes under the concept of "judicial decision", before looking at the concept of a "foreign" decision.

(1) ECtHR judgments as judicial decisions

The third paragraph of Article 22 BCPIL defines "judicial decisions" as "any decision rendered by an authority exercising a power of jurisdiction"[66] (unofficial translation). This notion is also used in subsequent provisions of the BCPIL, namely, Articles 23, 24, and 25.

It is well established that the decisions referred to in Article 22 BCPIL are decisions of an individual nature.[67] This automatically excludes from the recognition acts of general nature, such as a law or an annulment judgment from a constitutional court, which are addressed to an indeterminate number of persons.[68]

Decisions must come from a "court," in the broadest sense of the term.[69] According to the preparatory works of the BCPIL[70] and several legal scholars, judicial decisions are to be understood broadly, irrespective of the title and denomination of the authority issuing the decision.[71] In practice, judicial decisions encompass any authority acting in a judicial capacity, which includes decisions handed down by administrative or criminal courts as long as they relate to a civil or commercial matter.[72] Additionally, the BCPIL can be relied upon to give effect to religious courts, such as decisions handed down by Vatican tribunals.[73] This section of the BCPIL also applies, by analogy, to decisions rendered in non-contentious matters. It covers both negative and positive foreign decisions, meaning that recognition can be granted to a foreign decision refusing, for instance, a change in a person's status, such as a decision rejecting a divorce application.[74]

Based on the foregoing, it appears that Belgium adopts a very broad conception of what constitutes a judicial decision. The notion encompasses any decision rendered by an authority exercising judicial power, without distinguishing between the types of courts that rendered the judgment.[75] As such, the nature of the decision should be considered, not the court rendering it.[76]

In light of these considerations, it can be argued that ECtHR judgments, which are undoubtedly of a judicial nature, meet the requirement to be qualified as judicial decisions under Belgian private international law.

(2) ECtHR judgments as foreign decisions

In addition to the above, Article 22 BCPIL states that "a foreign court decision that is enforceable in the state where it was rendered may be declared enforceable in Belgium, in whole or in part, in accordance with the procedure set out in Article 23" (unofficial translation). This article therefore establishes a clear requirement of "foreign" by emphasizing that it involves "a foreign court decision" that, moreover, needs to be enforceable "in the state where it was rendered."

It should be noted that Article 22 BCPIL provides that only "enforceable decisions" may be declared enforceable in Belgium. This guarantees that the exequatur procedure does not extend a judgment's effects in Belgium beyond what it carries in its country of origin. As outlined above, while most aspects of ECtHR rulings are (merely) declaratory, just satisfaction orders are, in principle, "clearly enforceable" obligations.[77] In this regard, and for this very limited aspect only, it could be argued that ECtHR judgments granting just satisfaction are "enforceable judicial decisions" within the meaning of Article 22 BCPIL.

With regard to the meaning of a "foreign" court decision that is enforceable in the "state" where it was rendered, a literal interpretation of the notion of "state" would suggest that the intention of the Belgian legislator was to address the enforceability of judicial decisions rendered within other domestic legal systems rather than supranational or international systems. Although the notion of "foreign" was not clearly defined in the BCPIL's preparatory works, these works do refer to the "law of the state of origin of the decision" (unofficial translation) when discussing the enforcement of foreign decisions in Belgium pursuant to Article 23 BCPIL.[78]

In addition, a historical interpretation confirms the view that foreign decisions must have been handed down by a domestic court in order to be recognized in Belgium. For instance, Article 22 BCPIL echoes the wording of Article 570 BJC, which was applicable before the adoption of the BCPIL, and provided that "the foreign decision has res judicata according to the law of the country where it was rendered"[79] (unofficial translation). At the time, Article 570 BCJ was interpreted as meaning that the court decision for which recognition is requested must meet the necessary conditions to be enforced in the country where it was rendered.[80] This view was confirmed by the Belgian Court of Cassation, which ruled that, in order to be enforceable in Belgium, a foreign judgment must have the force of res judicata, i.e., be capable of being enforced in the country where it was rendered in the way that is sought in Belgium.[81] Once again, the multiple references to decisions from a state of origin suggests that decisions from international courts were not contemplated.

This view is also supported by some practical considerations. It is crucial to determine the state of origin of the decision for which recognition is sought, as this determines the applicable recognition regime.[82] As noted earlier, depending on their origin, foreign judgments may fall under the recognition regime established for by the Brussels I bis Regulation (applicable to judgments from EU member states) or under bilateral or multilateral treaties ratified by Belgium. However, these practical considerations alone seem to be insufficient to exclude international judgments from the concept of foreign decisions as it could be argued that, if it is not possible to determine the origin of a judgment, the general regime provided by the BCPIL would apply.

That said, the consensus among scholars seems to be that the concept of foreign decision refers to a decision "emanating from another state."[83] Several scholars go even further, underlining explicitly that the notion of foreign decision excludes decisions from international jurisdictions, such as ECtHR: "[T]he fact that the decision or act must emanate from a state excludes acts and decisions emanating from bodies instituted by a source of international law, such as the International Court of Justice, the European Court of Human Rights, the Court of Justice or the Commission of the European Communities, or an arbitral tribunal instituted by two states"[84] (unofficial translation). Others assert that the recognition regime provided for under Belgian private international law is not designed for individual decisions handed down by international courts, since these courts "are not foreign to the Belgian legal order" and do not constitute a form of "foreign sovereignty"[85] (unofficial translations), the latter being a prerequisite.

In the same vein, a judgment from the Paris Tribunal de Grande Instance dated November 20, 1991, ruled that a judgment from the ECtHR (to which France was a party) is not a foreign judgment and is therefore not subject to an exequatur procedure.[86] On the other hand, the abovementioned judgment of the Court of Instance of Brussels in *Socobel v. l'Etat Hellenique (Greece) and the Bank of Greece* seems to suggest that an exequatur procedure is applicable to international judgments of the PCIJ, and that lacking such a procedure, such judgments could not be enforced in Belgium.[87] This is of particular importance as such a conclusion could apply mutatis mutandis to ECtHR judgment, being judgments from an international court.

However, the Brussels court's argument has been heavily criticized since the decision was rendered. Many scholars are of the view that judgments from international courts should be considered as judgments from higher courts rather than foreign courts and, consequently, in the situation at hand in the *Socobel* case, cannot be subject to recognition through exequatur procedure.[88]

In this respect, allowing a national court to set aside a supranational judgment would contradict the principle established in the *Factory at Chorzów* case in that "it would be attributing to a judgment of a municipal court power indirectly to invalidate a judgment of an international court, which is impossible."[89] It is argued that

> it can be understood that, in the absence of a specific mechanism, the domestic judge may be tempted to refer to the rules applicable to foreign judgments. However, one may question the appropriateness of using exequatur and, in general, the rules of private international law to address issues related to the enforcement of an international judgment. Exequatur indeed makes the recognition of a foreign decision subject to the fulfillment of certain conditions set by the forum state, such as compliance with procedural rules and conformity with public policy. It is difficult to conceive that the enforcement of an international decision should be subject to such a control when the decision is final and binding on the parties to the proceedings. On the contrary, one might expect that it would, a priori, be exempt from such scrutiny.[90] (unofficial translation)

Conclusion on recognition through exequatur procedure

Although the *Socobel* decision could support the opposite view, the fact that the conditions set out in the BCPIL are only partially met a priori makes it conceptually and textually unlikely that ECtHR judgments could be recognized in Belgium through the same exequatur procedure that applies to domestic foreign judgments. Furthermore, the strong doctrinal consensus in favor of an "exclusion from exequatur procedure"[91] for international judgments, including those of the ECtHR, reinforces this conclusion. However, being excluded from the exequatur regime provided for by the BCPIL does not necessarily rule out that ECtHR judgments can be recognized in Belgium with a view to enforcement. Thus, other options are discussed in the following sections.

III. Recognition through simplified procedure

As discussed in the previous section, it seems to flow both from the wording of Article 22 BCPIL and legal scholarship that, under Belgian private international law, recognition of foreign decisions seems limited to judicial decisions rendered by other national legal systems as opposed to supranational decisions. It thus needs to be examined if it might be possible to recognize and enforce a judgment of the ECtHR against a third state through other avenues. As noted by one scholar, "[i]n practice, the majority of legal systems refuse to treat the judgments of a regional human rights court in the same

way as those of a tribunal from another state, and therefore do not subject them to the classic procedure of applying the enforcement order, opting instead for a more flexible procedure"[92] (unofficial translation).

By relying on arguments derived from Belgian case law and certain foundational legal principles, it could be argued—to some extent—that Belgian courts are expected to give effect to the just satisfaction judgments of the ECtHR through a simplified procedure. The idea that a simplified regime should be applied to the recognition of ECtHR just satisfaction judgments in Belgium finds strong support among legal scholars. It has been argued that where the enforcement must take place in the territory of a state that has recognized the compulsory jurisdiction of the ECtHR, the national authorities should only

(i) exercise "material control" by ensuring that the judgment effectively comes from the ECtHR, and

(ii) affix the enforcement order to the ECtHR judgment.[93]

Such an "internal procedure open to the injured party would be different from an exequatur procedure in that its sole purpose would be to have the authenticity of the court's judgment established and the enforcement order appended to it"[94] (unofficial translation). This regime implies that, as long as ECtHR judgments satisfy purely formal requirements, national courts have no ground to refuse the issuance of the enforcement order. This view is supported by others who opine that "the exequatur order must be affixed to the ruling of the court ordering the state to pay just satisfaction in the domestic order. The national authority should, at most, ensure the material existence of the European judgment"[95] (unofficial translation).

Applying this to the Belgian legal order, well-known Belgian scholars state that in the absence of a specific procedure, this matter is governed by the rules of civil procedure in force in the state where the enforcement is sought and the competent authority is the one responsible for the recognition and enforcement of decisions made by foreign judges.[96] Hence, the request for affixing the enforcement order to ECtHR judgements could be submitted to the Court of First Instance,[97] following the exact same procedure as for the recognition of foreign judgments explained above (ex parte proceeding, etc.). Indeed, pursuant to Article 568 BJC, the Court of First Instance has general and residual jurisdiction to hear all claims not assigned by law to another court.

The rationale behind this simplified procedure is that allowing a Belgian national judge to review an ECtHR judgment (for instance, based on the grounds for refusing exequatur) and subsequently refuse to enforce it would be contrary to the principles established in the *Factory at Chorzów* case, which found that a judgment of a national court does not have

the power to invalidate a judgment of an international court.[98] This is all the more justified if the enforcement takes place on the territory of a state party to the proceedings.[99]

Arguments in favor of enforcing ECtHR judgments

A number of arguments can be put forward in favor of this approach. First, in the landmark *Le Ski* case, the Court of Cassation—Belgium's highest judicial court—established the principle of primacy of international law in Belgium, affirming that international treaties take precedence over conflicting domestic laws.[100] The Court of Cassation argued that this primacy results from the "very nature of international treaty law"[101] (unofficial translation). In subsequent case law, the Court of Cassation confirmed that domestic norms conflicting with international provisions must be set aside, provided that the international rule has direct effect.[102] Direct effect is established when the international norm is sufficiently precise and complete to serve as a source of subjective rights and obligations for individuals.[103] Belgian judges, therefore, have a duty to interpret domestic provisions in conformity with international law and to set aside any conflicting national rules.[104] In this regard, in its conclusions preceding the *Le Ski* judgment, the advocate general underlined that "if the rule of international law were not to prevail, it would amount to the condemnation of international law, perpetually at risk of being unable to achieve or maintain its universal character"[105] (unofficial translation).

This principle aligns with principles that can be derived from the ECHR itself and case law by the ECtHR, as domestic judges are bound to apply the convention in accordance with the ECtHR's interpretations. In *Van Oosterwijck v. Belgium*,[106] the ECtHR explicitly referred to the Le Ski judgment, stating that "the Convention forms an integral part of the Belgian legal system in which it has primacy over domestic legislation, whether earlier or subsequent."[107]

Second, decisions handed down by international courts, including ECtHR, "are not foreign to the Belgian legal order"[108] (unofficial translation). This statement finds support in the Belgian case law. For instance, the Court of Appeal of Mons found that "the judgments of the European Court of Human Rights have the authority of res interpretata and **are directly applicable in domestic law**" (unofficial translation, emphasis added).[109] Indeed, state parties to the ECHR have accepted the jurisdiction of the ECtHR and its authority pursuant to the convention itself. This legal reality is distinctly different from foreign courts whose jurisdiction and authority entirely and solely rests on the sovereignty of the foreign state of which they are organs. In that regard, the rules relating to the exequatur of foreign judgments are conceptually inapt for the ECtHR's judgments, and thus a different procedure is required for recognition.

Third, it is acknowledged that the national judge is the guarantor of the effectiveness of the ECHR. Ensuring the effectiveness of the convention could require recognizing the enforceability of just satisfaction judgments, thereby guaranteeing their "real significance."[110] This is all the more true in the case of judgments rendered against Russia, insofar as the respondent state deliberately refuses to execute them. Indeed, in December 2015, Russia adopted a federal law allowing its Constitutional Court to declare decisions of international judicial bodies, including those of the ECtHR, unenforceable on Russian territory if they are deemed contrary to the Russian Constitution.[111] On the basis of this law, the Russian Constitutional Court, on January 19, 2017, declined to enforce a just satisfaction judgment issued by the ECtHR against Russia.[112] As noted by the Venice Commission, an advisory body to the Council of Europe, the Russian authorities have thus "reserved their right" to challenge the decisions of the ECtHR and, consequently, to refuse to enforce them.[113]

If the enforcement of ECtHR just satisfaction judgment can only take place on the territory of the respondent state, and not in third states that are party to the convention, this situation would set a dangerous precedent. The injured parties would be deprived of any means to obtain compensation, thereby stripping just satisfaction judgments of any real effect and, consequently, undermining the effectiveness of the convention, which the states have committed to uphold.

In this regard, the Venice Commission emphasizes that

> the enforcement of the judgments of the ECtHR is a key element of the mechanism of the European Convention. The right of individual petition would be illusory if a final and enforceable judgment of the Court were allowed to remain unenforced. The mechanism established by the Convention for the supervision of the execution of judgments, under the responsibility of the Committee of Ministers (Article 46, paragraph 2 of the Convention), underscores the importance of effective enforcement. The authority of the ECtHR and the credibility of the system depend largely on the effectiveness of this mechanism. [. . .] By ratifying the ECHR and accepting the jurisdiction of the Strasbourg Court, a State undertakes to execute the judgments of the Court. The State is not free to choose whether or not to enforce the judgments of the Strasbourg Court: they are enforceable under Article 46 of the Convention.[114]

Building on these principles, one might argue that the Belgian judge is required—or at least strongly encouraged—to recognize and give effect to the decisions of the ECtHR within its legal order, thereby ensuring the effectiveness of the ECHR. In this regard, the Group of Wise persons, an advisory group to the CoM, urged the national courts to guarantee the effectiveness of ECHR control mechanism, stating that "the Group paid

close attention to the relations between the Court and the national courts. **The latter have responsibility for protecting human rights by upholding the Convention within their sphere of competence**. It should be noted in this connection that **the national courts are called upon in particular to guarantee** the effectiveness of domestic remedies and, where appropriate, **the award of just satisfaction and proper execution of the Court's judgments"**[115] (emphasis added).

Arguments against enforcement of ECtHR judgments

As there is no precedent in Belgium on the question of recognition (and enforcement) of ECtHR judgments, it is worth considering potential arguments that can be raised against a simplified procedure of recognition.

Such a simplified procedure as proposed by some scholars is not (explicitly) provided for in the current domestic law as there is no law or specific (and simplified) legal proceeding to affix the enforcement order to ECtHR judgments. For judgments of the CJEU on the other hand, Belgium introduced a law in 1967 to establish a specific (and simplified) procedure aimed at affixing enforcement orders to judgements of the European Communities (the predecessor to the EU).[116] Under this law, the Minister of Foreign Affairs or a civil servant delegated by the minister verifies the authenticity of CJEU judgments produced to seek their enforcement in Belgium (Article 1er and 2). Once authenticated, the document is transmitted to the Brussels Court of Appeal to affix an enforcement order (Article 3).

One of the main reasons for the adoption of this law was that, at the time, the Belgian legislator considered that CJEU judgments could not be equated with foreign judgments due to their supranational nature and the fact that, under the European treaties, they are directly applicable in EU member states, and that therefore a separate basis—from the exequatur proceeding for foreign decision—needed to be created in order to grant enforceability to CJEU judgments. These judgments are "directly applicable" in Belgium in the sense that, "formally, [they] must be enforced in the member state as a judicial decision of a community nature, and materially, the national judge will have no authority to modify the content of the court's decisions"[117] (unofficial translation).

Since CJEU judgments do not require any form of recognition to become part of the Belgian legal order, they do not need to be subject to an exequatur procedure (although there was no BCPIL at the time and the procedure was different from the one applied today). However, the EU does not have the power to enforce CJEU's judgments within the territories of the member states. For this, it must necessarily rely on the national authorities of those states.[118] For this reason, the Belgian legislator defined in this law

the national authorities and simplified procedures to enable the enforcement of CJEU judgments in Belgium.[119]

Critics could contend on the basis of the existence of the 1967 law (on execution of judgments and decisions of the European Communities) that legislative intervention is necessary for international judgments (against other states) to be declared enforceable on Belgian territory. Thus, it could be argued that a law needs to be adopted for the judgments of the ECtHR to be enforced in Belgium or, at the very least, to benefit from a more simplified regime than the exequatur procedure.

However, while legislative intervention would ensure legal certainty and clarity, it does not appear to be impossible to persuade the Court of First Instance to affix the enforcement order to an ECtHR just satisfaction judgment. The strong doctrinal consensus highlighted above, combined with the case law arguments presented in the previous section, should not be set aside by the absence of a specific law. It has been expressed that "[i]n the absence of such provisions regarding the judgments of the European Court of Human Rights, it is, in our view, the Court of First Instance that would have to rule on the request of the injured party"[120] (unofficial translation).

It should also be noted that existing laws do not prohibit this approach. In fact, Article 34 of the Belgian Constitution stipulates that "exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law."[121] If it could be argued that such "specific powers" or mechanisms were "assigned" by virtue of the mere fact of acceding to the ECHR, it would speak for the direct execution on Belgian territory of just satisfaction judgments rendered by the ECtHR (even vis-à-vis other states), and a specific legislative act would arguably not be required. Whether acceding to the ECHR did indeed constitute the assignment of "specific powers to an institution of public international law" is likely contentious or at least open to debate. However, it would—if accepted—serve to suggest that legislative action, though possible and useful, may not be strictly necessary to ensure the national enforceability of such international decisions.

Another argument against the recognition and enforcement of ECtHR judgments could be that since the state parties to the ECHR did not include a regime for coercive enforcement measures in the convention, this reflects an intention to exclude any possibility of enforcing ECtHR judgments. Indeed, certain international conventions explicitly provide for systems of recognition and enforcement. For instance, in the specific context of investment arbitration, Article 54(1) of the International Centre for Settlement of Investment Disputes Convention (ICSID) sets out that "each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in

that State." In particular, it should be noted that Article 54(2) ICSID provides a simplified procedure for recognition and enforcement, as the party seeking enforcement is merely required to present "a copy of the award certified by the Secretary-General."

However, the absence of any mention of recognition and enforcement procedures in the ECHR is not sufficient in itself to rule out such a possibility in Belgium. It is indeed rare for international conventions to contain explicit provisions on this matter, and ECHR is not an exception.[122] In this regard, since it might prove complicated for national judges to interpret the related provisions of the convention (as they are nonexistent), it will be up to them to assess whether such a possibility exists in their own legal order. Belgium has ratified the ICSID Convention and thus the simplified procedure it provides. Combined with the rationale behind the adoption of the 1967 law (on execution of judgments and decisions of the European Communities), this could suggest that Belgium is favorable to the enforcement of international decisions on its territory through a simplified recognition procedure.

Further, it could be argued that the execution of ECtHR judgments by states is only voluntary (subject to the supervision of the CoM on the basis of Article 46 ECHR) and therefore cannot be "forced"[123] given that neither the CoM nor the ECtHR has been granted such power. It is true that the CoM has no enforcement power as such, since the only task assigned to the CoM is to "monitor the execution" of ECtHR judgments and not to take the measures necessary to ensure their effective implementation.[124] However, the majority doctrine (highlighted above) maintains that, in order to enforce ECtHR judgments, domestic procedures involving national courts must be relied upon, which necessarily implies that enforcement of ECtHR judgments is possible, at least on the respondent state's territory (if such domestic procedure exists). This view is also supported by the Group of Wise persons to the CoM.[125]

Article 46(1) ECHR states that "High Contracting Parties undertake to abide by the final judgments of the Court in any cases **to which they are parties**" (emphasis added). In this regard, it could be argued that ECtHR judgments are only binding on the respondent state and therefore can only be enforced on that territory. While it is undisputed that the ECtHR judgment for which enforcement would be sought in Belgium legally binds only the respondent state, the binding nature of an ECtHR judgment must not be confused with its enforceability. In other words, the arguments put forward for a simplified procedure do not establish that Belgium would be obliged to enforce this judgment. Belgium is in fact free to confer the status of an enforceable title to an ECtHR judgment on its territory, even for a judgment to which it is not a party. As well, since Belgium is a signatory to the convention and the judgments of the ECtHR are considered part of its legal order, there seems to be little (and perhaps no) reason for Belgium to refuse to confer them such status.

The view that the courts of (other) state parties to the ECHR could participate in the enforcement of ECtHR judgments on their territory has scholarly support:

> As they stand, the judgments of the court do not constitute an enforceable title against the respondent state and are not automatically enforceable within the territories of the state parties to the convention. In the current state of international law, in fact, the affixing of the enforcement clause authorizing coercion remains, in the absence of contrary treaty provisions, a state privilege. [. . .] In our view, for an ECtHR judgment granting just satisfaction to constitute an enforceable title, it must, upon the request of the injured party, be affixed with the enforcement clause by a national authority. [. . .] When the enforcement is to take place within the territory of a state that has recognized the court's compulsory jurisdiction, the role of the national authority must be limited to two points.[126] (unofficial translation).

When it is argued that judgments are enforceable "on the territory of the state parties to the convention" or "on the territory of a state that has recognized the court's compulsory jurisdiction," this can be understood as confirming that they are enforceable within the territories of all state parties, provided that the enforcement order is affixed through a domestic procedure.

In conclusion, while these issues remain yet to be decided by Belgian courts, a number of arguments can be brought forward in support of a simplified procedure for the recognition of ECtHR judgments (as a precursor to seeking enforcement measures), and thus such a procedure should not be ruled out as a possible alternative avenue to the traditional recognition via an exequatur procedure.

IV. Enforcement procedure for ECtHR judgments

If the recognition of an ECtHR judgment is successful and the enforcement order affixed to such a decision, the enforcement procedure could follow the general rules for foreign judgments. Individuals seeking to obtain executory or conservatory attachment measures before Belgian courts using an ECtHR just satisfaction judgment as an enforceable title would therefore have to demonstrate that all the conditions outlined above are met. Based on the foregoing, it appears that ECtHR judgments awarding sums to individuals by way of just satisfaction could constitute claims that meet the requirements of the Belgian Judicial Code as they are certain, liquid, and due.

C. STATE IMMUNITY

In Belgium, in conformity with international law, states benefit from the principles of state immunity both from jurisdiction and from enforcement, which are regulated primarily by the rules of customary international law. Concerning state immunity from enforcement, two provisions of the Belgian Judicial Code are also of particular relevance, which respectively relate to the protection afforded to foreign central bank assets and the protection afforded to property belonging to foreign powers. The doctrine of state immunity generally allows for exceptions. In this regard, Belgian law provides for specific exceptions that could potentially be invoked in the case of enforcement of ECtHR judgments.

I. Scope of state immunity

Protection for foreign central bank assets

Article 1412quater BJC provides for state immunity from enforcement to the benefit of assets held or managed by foreign central banks and international monetary authorities:[127]

> §1. **Subject to the application of the mandatory provisions of a supranational instrument**, assets of any kind, including foreign exchange reserves, which foreign central banks or international monetary authorities hold or manage in Belgium for their own account or for the account of third parties are exempt from attachment measures.
>
> §2. By way of derogation from § 1, a creditor in possession of an enforceable title may lodge a request with the attachment judge for authorization of attachment measures on the assets referred to in § 1, **on condition that they demonstrate that the assets are exclusively assigned to an economic or commercial activity under private law**. (emphasis added, unofficial translation)

Protection for property belonging to foreign power

Article 1412quinquies BJC applies in situations where the debtor is a foreign state (as would be the case for an ECtHR judgment against Russia).[128] This article provides that[129]

> § 1 **Subject to the application of mandatory supranational and international provisions**, property belonging to a foreign power which is on the territory of the kingdom, including bank accounts held or managed there by that foreign power, in particular in the exercise of the functions of the foreign power's diplomatic mission or its consular posts, its special missions, its missions to international organizations, or its delegations to bodies of international organizations or to international conferences, is exempt from attachment.

§ 2 By way of derogation from paragraph 1, **a creditor in possession of an enforceable title or an authentic or private title** which, as the case may be, forms the basis of the attachment measures, may submit a request to the attachment judge for authorization to attach the assets of a foreign power referred to in paragraph 1, **provided that he demonstrates that one of the following conditions is met:**

1° if the foreign power has expressly and specifically consented to such property's amenability to attachment;

2° if the foreign power has reserved or assigned such property to the satisfaction of the claim which is the subject of the enforceable title or the authentic or private document which, as the case may be, forms the basis of the attachment;

3° if it has been established that these assets are specifically used or intended to be used by the foreign power other than for non-commercial public service purposes and are located within the territory of the kingdom, provided that the attachment measures relate only to assets that have a link with the entity covered by the enforceable title or the authentic or private document which, as the case may be, forms the basis of the attachment measures. (emphasis added, unofficial translation)

Under this provision, the creditor of a foreign power in possession of an enforceable title or an authentic or private title may seek the prior authorization of the attachment judge in three different (noncumulative) circumstances:

(i) in the event of an express and specific waiver by the foreign power of its immunity;

(ii) the foreign power has reserved or assigned the goods to the satisfaction of the debt recognized by the enforceable title or authentic or private title; or

(iii) when the goods are specifically used or intended to be used by the foreign power other than for noncommercial public service purposes, and the attachment measures relate only to goods connected with the entity covered by the enforceable title or the authentic or private document justifying the attachment measure.[130]

In the latter case, the use to which the assets are put plays a central role in determining whether the assets are covered by immunity, in that the creditor may request authorization for attachment measures on the foreign power's assets if they demonstrate that the assets are "specifically used or intended to be used by the foreign power other than for noncommercial public service purposes"[131] (unofficial translation).

In theory, Articles 1412quater and 1412quinquies BJC could be applied concurrently (in case the debtor is a foreign state and the assets are managed by a central bank). In practice, however, the authorization of the attachment judge will be sought solely on the basis of Article 1412quinquies.[132]

Compatibility of state immunity with right to effective remedy

It should be noted that Belgian case law holds that the immunity from enforcement provided for in Article 1412quater BJC must comply with Article 6 ECHR (right to effective remedy). In other words, the protection of certain sovereign assets against attachment must serve a legitimate purpose and the resulting restrictions on the right to an effective remedy must be proportionate to the legitimate aim pursued. As noted by the Court of Cassation,

> in order to determine whether the infringement of fundamental rights is admissible under Article 6, §1 [ECHR], it is important to examine, in accordance with the case law of the European Court of Human Rights, whether the person against whom immunity from jurisdiction is invoked has other reasonable means of effectively protecting the rights guaranteed to him by the convention.[133] (unofficial translation)

In this respect, scholars comment that "for the Court of Cassation, the proportionality required in this area must be assessed in each case in the light of the particular circumstances of the case. Among these circumstances, it is important to examine whether or not the person against whom immunity from enforcement is invoked has other reasonable means of effectively protecting the rights guaranteed to them by the convention"[134] (unofficial translation). Recent cases (which remain rare) indicate that the approach and criteria employed by Belgian courts and tribunals to assess whether a given state's immunity from enforcement needs to be set aside under Article 6 ECHR remain vague and incoherent.[135]

II. Exceptions to state immunity under Belgian law

Mandatory provisions of supranational instruments

According to Article 1412quater §1 and Article 1412quinquies §1 BJC, protection of foreign sovereign assets under both provisions is "subject to the application of mandatory supranational and international provisions" (unofficial translation).

The preparatory works for Article 1412quater BJC[136] only contain the following passage on this exception without providing more details on its scope: [137]

> In order to avoid conflicts between the proposed law and certain international instruments, it has been specified that the proposed law will not apply if imperative supranational provisions oppose it. This refers to international instruments which either provide for broader immunities, or subject such immunities to an exception, for example in the context of an embargo. (unofficial translation)

The preparatory works of Article 1412quinquies BJC[138] merely confirm that this provision is intended to mirror Article 1412quater BJC as far as is possible without shedding light on the scope of the exception.

Scholars consider that this caveat in both articles implies that the mandatory provisions of supranational instruments have primacy, such as, for example, the United Nations Convention on Immunities, if and when it enters into force.[139]

Belgian courts have not yet ruled on the question of whether the enforcement of a just satisfaction order by the ECtHR could be regarded as an "application of the mandatory provisions of a supranational instrument" and thereby lift state immunity protection for Russian Central Bank assets. While the wording does not explicitly mention judgments by international courts, it could be argued that an internationally binding treaty like the ECHR should be considered a "supranational instrument." As set out above, based on ECHR provisions, just satisfaction orders by the ECtHR are binding on the respondent state.

The above-mentioned need to ensure compatibility between state immunity protection and the right to an effective remedy under Article 6 ECHR might serve as a factor to strengthen the argument for an exception. The creditor in the situation of a just satisfaction award issued by the ECtHR against Russia would have no other remedy to seek enforcement by the respondent state, in light of Russia's domestic laws that rule out any payments to satisfy such ECtHR judgments.

Procedural conditions to invoke exceptions

The above-mentioned articles of the BJC contain exceptions to the principle of state immunity, which are subject to two procedural conditions:

- on the one hand, the creditor must be in possession of an enforceable title or, in the case of Article 1412quinquies BJC only, an authentic or private title; and
- on the other hand, the creditor must seek prior authorization from the attachment judge before any attachment measures.[140]

Besides, it is worth mentioning that the Court of Cassation has ruled, with regard to Article 1412quater BJC, that the prior authorization of the attachment judge constitutes a material formality, and that the defect resulting from its absence cannot be remediated.[141] Scholars consider that this applies by analogy to Article 1412quinquies BJC as well.[142]

D. CONCLUSION

Whether ECtHR just satisfaction awards can be enforced by attaching Russian Central Bank assets held in Belgium is uncertain due to the lack of a precedent. Attempts to pursue this would face two main challenges, namely (1) if the ECtHR judgment could be recognized to transform it into an enforceable title under Belgian law, and (2) if central bank assets are protected by state immunity.

While the answers to both questions currently remain uncertain, arguments can be put forward for both that would potentially open the pathway for enforcement. On the question of recognition, the adoption of a simplified procedure to affix an enforcement order on the ECtHR judgment could be argued. On the question of state immunity, the particular formulation of Belgian law on the protection of sovereign assets might allow for an exception in the case of ECtHR judgments. Overall, it can be concluded that challenges exist but may not be insurmountable.

ENDNOTES

1 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 L 351, December 20, 2012, https://eur-lex.europa.eu/eli/reg/2012/1215/oj/eng, 1–32.

2 Loi portant le Code de droit international privé, July 16, 2004, https://www.ejustice.just.fgov.be/img_l/pdf/2004/07/16/2004009511_F.pdf (hereinafter BCPIL); for an unofficial English translation, see https://www.ipr.be/sites/default/files/tijdschriften_pdf/Engelse%20vertaling%20WIPR_augustus%202018.pdf.

3 Article 22, §3 BCPIL.

4 In criminal procedures, the term "confiscation" ("confiscation des biens") refers to the transfer of ownership of property as a result of a criminal offense; see https://justice.belgium.be/fr/themes_et_dossiers/jugement_penal_et_consequences/types_de_peines/peines_accessoires/confiscation_des_biens.

5 Article 22 BCPIL.

6 Code Judiciaire, October 10, 1967, https://www.ejustice.just.fgov.be/img_l/pdf/1967/10/10/1967101052M_F.pdf (hereinafter BJC).

7 Article 25, §2 BCPIL.

8 Articles 1025, 1033, and 1034 BJC.

9 G. de Leval, *Traité des saisies* (Faculty of Law of Liège, 1988), 490–91.

10 P. Wautelet, "Le jugement étranger comme fondement d'une saisie conservatoire: status quaestionis," *Revue de Droit Commercial Belge*, 1 (2021): 72.

11 F. Georges, "Chapitre 4—*La saisie-arret des avoirs bancaires en droit belge," in La saisie bancaire en Europe / The bank account payment order in Europe*, Brussels, ed. E. Guinchard & G. Payan (Bruylant, 2023), 158.

12 See for instance Judgment of the Court of Justice (First Chamber), *Bank Sepah v. Overseas Financial Limited and Oaktree Finance Limited*, C-340/20, November 11, 2021, ECLI:EU:C:2021:903, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A62020CJ0340, indicating that relevant European Union law must be interpreted as "precluding the implementation of protective measures, without prior authorisation from the competent national authority, in respect of funds or economic resources that have been frozen in the context of the common foreign and security policy, which establish a right to be paid on a priority basis in favour of the creditor concerned in relation to other creditors, even if such measures do not have the effect of removing assets from the debtor's estate."

13 F. Georges, "Chapitre 4—Règles communes aux voies d'exécution," in *Droit judiciaire—Tome 2: Procédure civile—Volume 3: Saisies conservatoires, voies d'exécution et règlement collectif de dettes Arbitrage, médiation et droit collaboratif Procédure électronique*, ed. G. de Leval, 2nd ed., (Larcier, 2021), 139–40.

14 Ibid., 98–99.

15 Ibid., 140.

16 Ibid., 140.

17 de Leval, *Traité des saisies*, 423.

18 Georges, "Chapitre 4–Règles communes aux voies d'exécution," 96.

19 Ibid., 142.

20 Ibid., 142.

21 de Leval, *Traité des saisies*, 420.

22 F. Dopagne, "L'immunité de saisie des biens de l'État étranger et de l'organisation internationale: notes sur l'article 1412 *quinquiesdu* Code judiciaire," *Journal des Tribunaux* 4, no. 6632 (2016): 61.

23 Precautionary attachment may be effected either by notification of the registry of the authorization order if this has been applied for (Articles 1447 to 1449 BJC), or by service of a writ by a bailiff (Article 1450 BJC). In the case of attachment in execution of a judgment, only a writ of summons may be served (Article 1539 BJC).

24 Georges, "Chapitre 4—La saisie-arret des avoirs bancaires en droit belge," 176.

25 See Article 519 §3 BJC on the bailiff's role.

26 See Articles 1491 and 1497 BJC.

27 Original text: "*Tout jugement, même non exécutoire nonobstant opposition ou appel, tient lieu d'autorisation de saisir conservatoirement pour les condamnations prononcées, à moins qu'il n'en ait été autrement décidé*."

28 Wautelet, "Le jugement étranger," 69.

29 See Article 1413 BJC.

30 Georges, "Chapitre 4—Règles communes aux voies d'exécution," 141.

31 See Article 1415 BJC.

32 Wautelet, "Le jugement étranger," 72.

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126 Ergec, *Convention européenne des droits de l'homme*, 1131–32.

127 Original text:

"*§ 1er. Sous réserve de l'application des dispositions impératives d'un instrument supranational, les avoirs de toute nature, dont les réserves de change, que des banques centrales étrangères ou des autorités monétaires internationales détiennent ou gèrent en Belgique pour leur propre compte ou pour compte de tiers sont insaisissables.*

§ 2. Par dérogation au § 1er, le créancier muni d'un titre exécutoire peut introduire une requête auprès du juge des saisies afin de demander l'autorisation de saisir les avoirs visés au § 1er à condition qu'il démontre que ceux-ci sont exclusivement affectés à une activité économique ou commerciale de droit privé."

128 F. Dopagne, "Fonds souverain géré par une banque centrale étrangère, simulation et immunité d'exécution," June 29, 2021, *Revue Belge d'Arbitrage* 1 (2022): 112–13.

129 Original text:

"§ 1er Sous réserve de l'application des dispositions impératives supranationales et internationales, les biens appartenant à une puissance étrangère qui se trouvent sur le territoire du Royaume, y compris les comptes bancaires qui y sont détenus ou gérés par cette puissance étrangère, notamment dans l'exercice des fonctions de la mission diplomatique de la puissance étrangère ou de ses postes consulaires, de ses missions spéciales, de ses missions auprès des organisations internationales, ou de ses délégations dans les organes des organisations internationales ou aux conférences internationales, sont insaisissables.

§ 2 Par dérogation au paragraphe 1er, le créancier muni d'un titre exécutoire ou d'un titre authentique ou privé qui, selon le cas, fonde la saisie, peut introduire une requête auprès du juge des saisies afin de demander l'autorisation de saisir les avoirs d'une puissance étrangère visés au paragraphe 1er à condition qu'il démontre qu'une des conditions suivantes est remplie:

1° si la puissance étrangère a expressément et spécifiquement consenti à la saisissabilité de ce bien;

2° si la puissance étrangère a réservé ou affecté ces biens à la satisfaction de la demande qui fait l'objet du titre exécutoire ou du titre authentique ou privé qui, selon le cas, fonde la saisie;

3° s'il a été établi que ces biens sont spécifiquement utilisés ou destinés à être utilisés par la puissance étrangère autrement qu'à des fins de service public non commerciales et sont situés sur le territoire du Royaume, à condition que la saisie ne porte que sur des biens qui ont un lien avec l'entité visée par le titre exécutoire ou le titre authentique ou privé qui, selon le cas, fonde la saisie."

130 M. Draye and B. Jesuran, "Retour à la case départ! ou l'autorisation du juge des saisies comme préalable obligatoire à toute saisie de biens ou avoirs de puissances étrangères, de banques centrales étrangères, et d'autorités monétaires internationals," *Revue de Droit Commercial Belge* 5 (2020): 638.

131 Dopagne, "Fonds souverain," 114.

132 The issue of the cumulative application of these two provisions arose in the context of a case between investors and the Republic of Kazahstan; see Dopagne, "Fonds souverain," 112–13.

133 Court of Cassation, *Union de l'Europe occidentale v. S.M.*, December 21, 2009, S.04.0129.F/1, 21, https://juportal.be/JUPORTAwork/ECLI:BE:CASS:2009:ARR.20091221.7_FR.pdf: *"[P]our déterminer si l'atteinte portée aux droits fondamentaux est admissible au regard de l'article 6, § 1er, il importe d'examiner, conformément à la jurisprudence de la Cour européenne des droits de l'homme, si la personne contre laquelle l'immunité de juridiction est invoquée dispose d'autres voies raisonnables pour protéger efficacement les droits que lui garantit la convention."*

134 G. Laguesse and P. Proesmans, "Baromètre de jurisprudence en droit bancaire: 2019," *Droit des affaires* 137 (2021): 42.

135 A. Lagerwall and A. Louwette, "La reconnaissance par le juge belge d'une immunité à un Etat ou à une organisation internationale viole-t-elle le droit d'accès à un tribunal?," *Revue de Droit Commercial Belge* 30 (2014): 48–50.

136 Doc 54-1241/001, July 2, 2015.

137 Original text:

"En vue d'éviter les conflits entre la proposition de loi et certains instruments internationaux, il a été précisé que la proposition de loi ne s'appliquerait pas si des dispositions supranationales impératives s'y opposaient. Sont visés ici les instruments internationaux qui, soit prévoiraient des immunités plus larges, soit soumettraient ces immunités à une exception, par exemple dans le contexte d'un embargo."

138 Doc 54-1241/001, July 2, 2015.

139 Draye and Jesuran, "Retour à la case départ!," 641.

140 Ibid., 634.

141 Court of Cassation, *KBC Bank, BNP Paribas Fortis v. Miminco LLC, J.D.T., I.J.M*, December 20, 2019. C.19.0071.F/1 and C.19.0072.F and C.19.0194.F, https://juportal.be/JUPORTAwork/ECLI:BE:CASS:2019:ARR.20191220.1F.3_FR.pdf.

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