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*Szymon Zaręba**

DOCUMENTS ISSUED BY UNRECOGNISED ENTITIES – THE APPROACH OF THE POLISH COURTS: COMMENT ON THE JUDGMENT OF THE SUPREME COURT OF 25 JUNE 2020, REF. NO. I NSNC 48/19

Abstract: *This article analyses the judgment of the Supreme Court of Poland of 25 June 2020, in which the Court refused to recognise registered mail receipt forms issued by the authorities of the so-called Turkish Republic of Northern Cyprus (TRNC) as foreign official documents, despite the Public Prosecutor General and the claimant arguing to the contrary. The text attempts to show that the ruling is consistent with earlier Polish practice and the majority view in domestic literature. Still, the international jurisprudence shows that there is no clear rule of public international law that would make non-recognition of documents absolutely mandatory in such cases, and some exceptions could even support their recognition under special circumstances. Also, in similar cases foreign national courts do not always refuse recognition.*

Keywords: documents, non-recognition, *Namibia* exception, Northern Cyprus, recognition, regime, statehood

INTRODUCTION

The judgment of the Supreme Court of Poland discussed below is one of the relatively few examples of how the Polish courts approach the question of recognition of documents issued by unrecognised entities. The most contentious aspect of the case concluded by this judgment was whether the absence of recognition, by Poland and the international community, of the entity issuing the documents affected the status of the documents in question and could prevent a Polish court from treating them as official documents issued by a foreign state. The following comment seeks to show that

* Assistant Professor, Institute of Law Studies, Polish Academy of Sciences; e-mail: s.zareba@inp.pan.pl; ORCID: 0000-0003-3226-4441.

the judgment follows an established line of reasoning already present in other similar Polish judgments and conforms with the majority view of domestic legal scholars. At the same time, the text's aim is also to put this dominant view in perspective by demonstrating other ways in which the subject has been approached by other international and national courts. This general overview of the jurisprudence of other courts makes it possible to demonstrate that at least in some jurisdictions the courts make some exceptions for documents issued by unrecognised entities based on the interests of justice, fairness or humanitarian reasons, although whether these exceptions apply to disputes having a business-related character remains largely uncertain.

1. THE FACTS OF THE CASE AND THE JUDGMENT

The case discussed was essentially a business dispute between a Danish company and a Polish one. The former sought to repeal resolutions adopted by the general meeting of shareholders of the latter, arguing that the motions adopted violated its minority shareholder rights provided for in the Commercial Companies Code.[1] The Regional Court repealed the resolutions, sharing the Danish company's plea that it had not been properly informed about the dates when the general meeting of shareholders was to be held. The Polish company tried to overturn this judgment in two subsequent instances (Regional Court, Court of Appeal), but failed. Then it sought to convince the Public Prosecutor General to bring the extraordinary appeal[2] and when he did, it joined the proceedings.[3]

The most important aspect of the case from the point of view of international law was that the letters containing the information on the dates of the meetings at which the contentious resolutions had been adopted were sent to the Danish company by the majority shareholder from one of its offices which was located in Northern Cyprus. The bone of contention was the status of the registered mail receipt forms provided by the Polish company as proof of dispatch of the letters in question: they were certified by an official of the Turkish Republic of Northern Cyprus (TRNC) – a regime unrecognised by the United Nations and all states except Turkey – and then further certified by two Turkish officials, who affixed the apostille.[4] The Public Prosecutor General and the

[1] Art. 402 § 3 in relation with Art. 341 § 1 and Art. 399 § 3 of Kodeks spółek handlowych [The Commercial Companies Code], Journal of Laws 2000, No. 94, item 1037, as amended.

[2] The extraordinary appeal is a measure recently introduced to the Polish legal system, *see* Ustawa o Sądzie Najwyższym [Law on Supreme Court], Journal of Laws 2019, item 825, as amended. Only a few officials – the Public Prosecutor General among them – are entitled to bring it before the Supreme Court. It allows final judgments to be quashed on the grounds that they violate constitutional human and civil rights and freedoms or grossly violate other Polish laws. These far-reaching consequences have raised concerns of a large group of legal scholars as to the constitutionality of the measure. This question however is without pertinence to the subject matter of the article and will not be further addressed.

[3] *See* the history of the proceedings in Judgment of the Supreme Court, 25 June 2020, I NSNc 48/19, LEX no. 3020700.

[4] The apostille is an official certification which serves to certify a document's validity between the state-parties to the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign

Polish company argued that when deciding on the status of the forms in question, the lower courts should have taken into account the law of the TRNC, according to which these were valid proof of sending. As a consequence, they claimed that the forms amounted to "foreign official documents" within the meaning of the Polish Code of civil procedure and the Danish company was correctly informed about the dates of the meetings. The courts, on the other hand, maintained that a "foreign document" must be "a document originating from a country recognised by Poland or one with which Poland has established diplomatic and consular relations."[5] They refused to take into account the Turkish Cypriot law and to accept the registered mail receipt forms as a valid proof of dispatch. Consequently, they found that the Polish company did not prove that the Danish company had been informed of the dates of the meetings and that its allegation that its rights were violated was substantiated.

In its judgment of 25 June 2020, the Supreme Court dismissed the extraordinary appeal brought by the Public Prosecutor General against the ruling of the court of last instance, which rejected the appeal made by the Polish company.[6] As it observed, both the Regional Court and the Court of Appeal hearing the case did not grossly violate the law. According to the Supreme Court, in light of the non-recognition of the TRNC by both the international community and Poland, they were right to conclude that a document certified by an official of "an unrecognised state" (the court's own term and in inverted commas) was not a foreign official document within the meaning of Polish civil procedure,[7] since it was not drawn up by an official of a "foreign state." The court shared the opinion of the lower instance courts and the majority view in the Polish legal literature that the "non-recognition of a state" results in non-recognition of the documents "issued by the authorities of such a state" as foreign official documents and entails their treatment as "private documents."[8] This conclusion meant that they

Public Documents and removes the need for legalisation of the document by the receiving state officials in order for it to have legal effect in that country. *See e.g.* Ł.D. Dąbrowski, *Moc dowodowa zagranicznych dokumentów urzędowych. Wybrane zagadnienia procesowe* [Evidentiary value of foreign official documents. Selected procedural issues], 14 Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 120 (2016), pp. 122-123.

[5] This was the view expressed by the Court of Appeal and cited verbatim by the Supreme Court. A part of this statement is confusing, since international law scholars are nearly unanimous that at least the establishment of diplomatic relations always results in recognition of the entity involved as a state.

[6] Judgment of the Supreme Court, *supra* note 3. *See* also the judgment of the lower instance, Judgment of the Court of Appeal in Lublin, 3 August 2016, I ACa 866/15, LEX nr 3020699.

[7] There is no legal definition of a "foreign official document" in the Polish Code of Civil Procedure, although the term is present in some provisions, such as Art. 1138. A popular definition by one of the authors states that it is "a document drawn up by an authority of a foreign state acting within the framework of its powers, in a proper form, signed and stamped," *see* T. Demendecki, *Art. 1138 Zagraniczne dokumenty urzędowe* [Foreign official documents], in: A. Jakubecki et al. (eds.), *Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom II. Art. 730-1217*, Wolters Kluwer, Warszawa: 2017.

[8] *E.g.* P. Czubik, *Dokumenty z państw nieuznanych w obrocie cywilnoprawnym* [Documents from non-recognized states in the conduct of civil law transactions], 7 Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 119 (2009), p. 123; K. Mikša, *Consequences of Non-*

did not enjoy the presumption of truthfulness accorded to official documents,[9] and that a party to proceedings which tried to prove its point using them had to prove the authenticity and veracity of the documents in question.[10] As stated by the Supreme Court, the Polish company failed to satisfy this requirement. Consequently, its claims did not deserve favourable consideration.

2. APPRAISAL IN THE LIGHT OF THE EARLIER PRACTICE OF THE POLISH COURTS

The Supreme Court was correct to conclude that the verdicts of the lower instance courts did not grossly violate the law. In fact the reasoning of the Supreme Court and the other courts involved follows the majority approach of Polish international law scholars, who argue that the laws enacted or documents issued by entities which are not recognised as states by the Polish government should generally be refused recognition by the Polish courts or other bodies exercising state authority – unless there are clear indications that a state which is recognised by the international community as a sovereign over the territory *de facto* controlled by another entity at least tolerates such a practice with respect to that entity's laws or documents. This view is based on an assumption that the existence of the legal order of an unrecognised entity over a territory administered and claimed by that entity must not be recognised because there is another legal order – that of the state universally recognised as enjoying sovereignty over the area – which applies.[11] Because of this missing "sovereignty link," the confirmation of the authenticity and truthfulness of the documents by officials of another universally recognised state (in this case Turkey) also does not affect the status of the documents in question.[12]

Recognition of State in Private International Law from the Polish Perspective, 62(2) Osteuropa Recht 150 (2016), pp. 153-154 (although she differs as to the application of laws of unrecognised entities). It must be underlined that this particular official-private documents distinction applies only to civil proceedings and not to, e.g., customs and tax matters. Still, the general issue of recognition vs. non-recognition remains pertinent also in proceedings before other courts, including administrative ones.

[9] According to Art. 1138 of the Polish Code of Civil Procedure, foreign official documents are of equal evidential value as Polish official documents. This means that the party to the proceedings which questions the authenticity or veracity of the document always has to prove it before the court, *see e.g.* Dąbrowski, *supra* note 4, pp. 124-125 and 129.

[10] The Regional Court hearing the case in first instance even went so far as to assert that the documents of "a state which came into being through illegal Turkish occupation of a part of the territory of the Republic of Cyprus" could not be recognised as "legal," linking the illegality under international law with illegality in the domestic legal order.

[11] P. Czubik, *Nieuznawanie urzędowych dokumentów zagranicznych wystawianych w ramach jurysdykcji tzw. państw nieuznanych – przypadek Tureckiej Republiki Północnego Cypru* [Non-recognition of foreign document issued within the jurisdiction on non-recognized states – the case of the Turkish Republic of Northern Cyprus], 15(1) Państwo i Społeczeństwo 11 (2015), p. 20.

[12] *Ibidem*, pp. 15-18.

This approach has already been followed by the Polish courts in other cases. For example, in a case involving, among others, two companies registered in internationally unrecognised Transnistria, the Court of Appeal in Katowice refused to take into account the provisions of the Civil Code enacted by Transnistrian authorities, because Poland did not recognise the statehood of this entity.[13] On the other hand, numerous courts hearing cases brought by Polish companies engaged in business relations with their Taiwanese counterparts did not object to the submission of documents issued by the authorities in Taiwan. For instance, the Voivodship Administrative Court in Warsaw did not even raise the issue of the status of the documents confirming the registration of a trademark in Taiwan.[14] Also, in a number of cases the Supreme Administrative Court did not question the qualification of certificates of origin of goods issued in Taiwan as documents.[15] As mentioned above, one can find the reason for these differences in the treatment of laws and documents in the attitude of the respective territorial sovereigns. In the case of Transnistria, the acceptance of the laws enacted by the regime and the documents it issues by the Republic of Moldova remains inconsistent and unclear.[16] Conversely, the People's Republic of China is known to tolerate recognition of a number of Taiwanese documents and, as a consequence, in practice these are legalised in an unusual way and treated as valid foreign official documents by the Polish courts.[17]

Seen in this context, in the interest of legal certainty the courts hearing the case in question seemed to have no other choice than to refuse to recognise as official the

[13] Judgment of the Court of Appeal in Katowice, 17.02.2015, V ACa 579/14, LEX no. 1658891.

[14] Judgment of the Voivodship Administrative Court in Warsaw, 22 November 2012, VI SA/Wa 1177/12, LEX no. 1338687.

[15] Although at the same time the Court refused to qualify as documents the letters issued by Taiwanese authorities confirming the non-authenticity of the certificates. This was, however, due to specific provisions of Polish Customs Code then in force, and the reasoning of the Court did not leave any doubt that the letters sent by, e.g., analogous Malaysian or Chinese authorities would have been treated in a similar way and not treated as official documents. *See e.g.* Judgment of the Supreme Administrative Court, 9 December 2008, I GSK 110/08, LEX no. 538502.

[16] N. Martsenko, *Peculiarities of Recognition of Judgments and other Acts Issued by Unrecognized Authorities: The Example of the Autonomous Republic of Crimea, and Luhansk and Donetsk Oblasts ("LNR" and "DNR")*, 65(2) Osteuropa Recht 223 (2019), p. 235 argues that Moldova recognises a number of acts and documents of the Transnistrian authorities (e.g. certificates of birth, death, and marriages). Still, as proof she relies on the 2001 Transnistrian-Moldovan agreement, which remains largely a dead letter. This position may be confirmed by, *inter alia*, an article by V. Socor, *De-Sovereignization: Testing a Conflict-Resolution Model at Moldova's Expense in Transnistria (Part Two)*, 15(135) Eurasia Daily Monitor 2018, pointing out that it was in practice a 2018 agreement that allowed, albeit only under certain conditions, recognition of drivers' licenses, car registration documents and university diplomas issued by the Transnistrian authorities (which had been previously covered by the 2001 agreement). To the best knowledge of the Author, no case involving the latter group of documents has so far come before a Polish court.

[17] P. Czubik, *Przyjmowanie dokumentów zagranicznych wystawianych w ramach jurysdykcji tzw. państw nieuznanych (uwagi na tle specyficznego przypadku dokumentów z Tajwanu)* [Accepting foreign documents issued within the jurisdiction of so-called non-recognized states (comments on the specific case of documents from Taiwan)], 52(2) Nowy Przegląd Notarialny 43 (2012), pp. 46 and 48-51, and Czubik, *supra* note 8, pp. 124-125.

documents that had been presented, and to treat them only as "private documents" rather than "foreign official documents." This is because the TRNC remains unrecognised by Poland and other states, including the Republic of Cyprus, which is the territorial sovereign over Northern Cyprus, i.e. the area under control of the Turkish Cypriot regime. Moreover, the Republic of Cyprus persistently objects to recognition of the documents issued by the Turkish Cypriot authorities.[18] So, in essence neither of the two requirements – i.e. recognition of the entity in question by the Polish government and/or the acquiescence of the territorial sovereign – had been fulfilled, and thus non-recognition of the documents was a logical consequence. Seen from this perspective, the position of the Public Prosecutor General may appear surprising, particularly since in Poland this post is currently tied with the position of the Minister of Justice. By arguing for the law of an entity unrecognised by his government to be acknowledged as the effective law over the territory concerned (Northern Cyprus) and for the registered mail receipt forms to be recognised as foreign official documents, he could be seen as acting against the non-recognition policy of the government he is a member of.[19] At the same time however, he was trying to protect the rights of a Polish company.

3. THE INTERNATIONAL CONTEXT

One may wonder whether the view of the Polish courts is in conformity with international law, and whether or not this body of law indeed precludes the recognition of documents issued by unrecognised regimes in all circumstances. Seen only in the light of the most fundamental general principles of international law, the approach which makes the acceptance of such documents conditional on the acquiescence of the territorial sovereign may seem reasonable and consistent with universal principles, such as non-interference into internal affairs and respect for the sovereignty and territorial integrity of other states. If the state which the international community recognises as enjoying sovereignty over the territory objects to the recognition of the documents in question, then such recognition may be seen as inconsistent with the policy of non-recognition by the government of the state where the court has its seat.

However, an inquiry into the jurisprudence of international courts suggests that there are exceptions to this general rule in international law.[20] For the sake of brevity, a few major cases will be just outlined here. The first one which touched on these issues was the International Court of Justice's (ICJ) 1971 advisory opinion in the *Namibia* case. Although the case concerned the consequences of non-recognition of the illegal

[18] Czubik, *supra* note 11, p. 13.

[19] Meanwhile, it does not seem correct to treat the Public Prosecutor General's view as the one of the government, since in the end he did not act as the Minister of Justice in the case at hand.

[20] *See also* S. Zaręba, *Skutki braku uznania państwa w* świetle *prawa międzynarodowego* [The consequences of the lack of recognition of a state from the point of view of international law], Instytut Nauk Prawnych PAN, Warszawa: 2020, pp. 401-412.

acquisition of territory, the conclusions reached by the ICJ are widely considered applicable also to unrecognised entities, particularly those which are refused universal recognition on the grounds of the illegality of their creation. In the part of the opinion most pertinent to present considerations, the ICJ held that although the official acts of the illegal administration over Namibia were invalid, an exception had to be made for "those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants" of the territory.[21] This exception is widely referred to in the literature as the "*Namibia* exception."[22] One may imply from the court's quote that also the documents relating to these acts could or even should be recognised despite the non-recognition of the issuing authority. While there was no clear mention of acts relating to corporate activity, neither were these expressly excluded.

Another court, the European Court of Human Rights (ECtHR), was also faced with the question of recognition of various acts adopted by unrecognised regimes, including the TRNC itself. Interestingly, it accepted a much broader range of laws, administrative decisions, and documents issued by this regime than the ICJ. Some of them could hardly be considered as beneficial to the inhabitants of the territory. For example, in *Protopapa v. Turkey*,[23] the Court assessed the conduct of the applicant in the light of the laws in force in the TRNC and a judgment issued by a domestic court established there. The said judgment was in fact rather detrimental to the applicant, as it convicted her for having entered the territory of the TRNC without permission, but nevertheless it was not rejected by the ECtHR and was widely referred to in the merits of ECtHR's judgment.[24] Once again the cases before the ECtHR did not specifically address business relations, but referred to the human rights of individuals. Still, the permissive approach of the ECtHR with regard to the acts of unrecognised regimes seems to be more prone to justifying the acceptance of documents such as the ones involved in the Polish case discussed. As remarked upon in the literature, the

[21] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Rep 1971, para. 125.

[22] *See e.g.* Y. Ronen, *Transition from Illegal Regimes under International Law*, Cambridge University Press, Cambridge: 2011, pp. 83 et seq.; T. Christakis, A. Constantinides, *Territorial Disputes in the Context of Secessionist Conflicts*, in: M. Kohen, M. Hebie (eds.), *Research Handbook on Territorial Disputes in International Law*, Edward Elgar Publishing, Cheltenham: 2018, p. 357; M. Arcari, *The UN SC, Unrecognised Subjects and the Obligation of Non-recognition in International Law*, in: W. Czapliński, A. Kleczkowska (eds.), *Unrecognised Subjects in International Law*, Wydawnictwo Naukowe Scholar, Warszawa: 2019, pp. 236-237. The remarks of these authors also testify to the doubts regarding the scope of the exception, i.e. the kinds of acts it covers. Although the exception is often framed as a humanitarian one, it cannot be excluded that the court's verdict was motivated by, e.g., reasons of common sense or reasons of fairness as such – in that case it could be applicable also to legal persons.

[23] *See* ECtHR, *Protopapa v. Turkey* (App. no. 16084/90), 24 February 2009, paras. 23-24 and 90-98.

[24] See a thorough and critical analysis of the evolution of this case and the whole line of reasoning in the ECtHR jurisprudence in: A. Czaplińska, *International Courts, Unrecognised Entities and Individuals: Coherence through Judicial Dialogue?*, XXXIX Polish Yearbook of International Law 61 (2019), pp. 74-77 and 84-86.

ECtHR's jurisprudence "provides such a wide exceptional validity under the *Namibia* exception, that little remains of the obligation of non-recognition insofar as internal acts are concerned."[25]

Finally, one needs to look also to the judgments issued by the Court of Justice of the European Union (CJEU) in the so-called "*Anastasiou* saga," which concerned the movement and phytosanitary certificates issued by the TRNC authorities for a company exporting goods to the European Union. Unlike in the other cases mentioned above, the Court dealt directly with documents used in business practice, not by individuals. It held that the authorities in the areas not under effective control of the Republic of Cyprus could not issue valid certificates and refused to recognise them. To substantiate its opinion, it underlined that the acceptance of certificates requires confidence in the system of verification of origin and cooperation between the authorities of the exporting and importing states to prevent fraud, and these objectives could not be met in a case of authorities unrecognised both by the EU and all its members.[26] Although the CJEU refused recognition, one should take into account that it did not address the issue of possible exceptions derived from general international law or practice, and restricted itself to the examination of the EU law alone.[27]

This overview demonstrates that the international courts differ with respect to the issue of how to treat documents issued by unrecognised regimes, with some accepting them to a wider extent, some to a narrower extent, and some refusing them. While the ICJ and the ECtHR have made exceptions to the general principle of non-recognition of such documents, the CJEU has been very strict in this respect. In sum it is possible to conclude that there is no clear rule in international law that would mandate the non-recognition of all these documents without exception. Unfortunately, in the three courts and cases discussed above, only the CJEU has directly dealt with the issue of non-recognition of the acts of unrecognised entities used in business practice.[28] It is thus unclear whether there should be a difference in the treatment of these acts by the courts (including national courts) depending on whether they are used by private or corporate persons, and whether the interests of enterprises engaged in business relations

[25] Ronen, *supra* note 22, p. 99. In general, the Court believes that the human rights of the applicants can, subject to certain conditions, be effectively protected by TRNC's law and courts, and because of that it does not see the recognition of a large number of acts of the TRNC as detrimental to them. The applicants before the ECtHR may also be legal persons.

[26] Case C-432/92 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and others* [1994], ECLI:EU:C:1994:277, paras. 37-41 and 62-65. Later, the CJEU also refused to recognise phytosanitary certificates issued for goods originating in the TRNC by the Turkish authorities, *see* Case C-140/02 *Regina on the application of S.P. Anastasiou (Pissouri) Ltd and Others v. Minister of Agriculture, Fisheries and Food* [2003], ECLI:EU:C:2000:360, paras. 17-24 and 69-75.

[27] *See* a very critical appraisal of these CJEU judgments by S. Talmon, *The Cyprus Question before the European Court of Justice*, 12(4) European Journal of International Law 727 (2001).

[28] There have been at least several cases involving companies and the TRNC before the ECtHR, but they concerned the practice of continuous denial of access to these companies' property and did not deal directly with the regime's laws and documents. *See e.g.* ECtHR, *Eugenia Michaelidou Developments Ltd And Michael Tymvios v. Turkey* (App. no. 16163/90), 31 July 2003.

on the territories controlled by unrecognised entities may also be protected by some exceptions similar to the *Namibia* exception.

Finally, it seems appropriate to take a brief look into practice of other states' domestic courts. In fact they greatly vary in their approach to similar cases. The common law courts have usually tended to stick with the approach taken by the executive with regard to the unrecognised entities, but have allowed some exceptions similar to those of the ICJ in the *Namibia* opinion, or even of a wider scope. In the United Kingdom, the question was undecided for a long time,[29] but was ultimately decided and settled by precedent[30] in the *Emin v. Yeldag* case, where an English court approved an earlier opinion[31] that despite non-recognition of the entity which issued an act – such as a document or a judgment – the British courts were allowed to recognise acts relating to "commercial obligations, private law matters involving individuals, and routine administrative activities."[32] The only caveat was that recognition of the acts in question could not be done against the diplomatic stance of the home country – but in that case the British government did not object. The approach of the US courts has been even more liberal, partly due to a long-standing jurisprudence dealing with the treatment of the acts of the Confederate States of America after its defeat. The courts at the time held that the acts of a state or regime unrecognised by the US should be recognised if they served to maintain peace and order or concerned civil matters, as long as they were not in support of the rebellion.[33] This approach was later reflected in a number of cases, such as *Upright v. Mercury Business Machines*. In that case the court of second instance held that an act of an unrecognised entity could be accepted by American courts "if

[29] The starting point of the debate over exceptions to the principle of non-recognition of documents issued by unrecognised entities was the *obiter dictum* of lord Wilberforce in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* that a British court could recognise laws and acts "where private rights, or acts of everyday occurrence, or perfunctory acts of administration" are involved, "in the interests of justice and common sense." *See* England, House of Lords, *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, 18 May 1966, 43 International Law Reports 23, p. 66. Later it was also mentioned with approval by, *inter alia*, lord Denning in England, Court of Appeal, *Hesperides Hotels Ltd. and Another v. Aegean Turkish Holidays Ltd. and Muftizade*, 23 May 1977, 73 International Law Reports 9, pp. 14-15. One needs to note that they focused mostly on recognition of the laws and acts (including documents) which concerned everyday life, such as marriages, divorces, labour matters or leases by private persons.

[30] At least Y. Ronen in *Recognition of Divorce without Recognition of Statehood*, 63(2) Cambridge Law Journal 268 (2004), p. 268, calls it as a precedent, although she admits that "it went almost unnoticed."

[31] *See* England, Special Commissioners, *Caglar v. Billingham (Inspector of Taxes) and Related Appeals*, 7 March 1996, 108 ILR 510, p. 535.

[32] The judge deciding the case declared however that although he did not dissent with the cited opinion, he would not express the exception "in terms as broad" as cited – unfortunately without clarifying what he meant, *see* England, High Court, Family Division, *Emin v. Yeldag (Attorney-General and Secretary of State for Foreign and Commonwealth Affairs Intervening)*, 5 October 2001, 148 ILR 663, particularly pp. 675 and 678–679.

[33] *See* L.L. Jaffe, *Judicial Aspects of Foreign Relations, in Particular of the Recognition of Foreign Powers*, Harvard University Press, Cambridge, MA: 1933, pp. 172–175. The underlying idea was, it seems, that individuals and private entities should not be considered as wrongdoers if they followed the legal rules governing civil matters.

it affected private rights and obligations arising either as a result of activity in, or with persons or corporations" within the territory controlled by that entity, unless it violated the US public policy.[34] Thus effectively both the British and US courts consider it possible to recognise documents issued by unrecognised authorities, not only in cases involving private persons but also those where business entities or commercial relations are concerned (such as in the Polish case discussed above).[35]

The civil law courts have been much more diverse in their approaches. Some follow or have followed a practice similar to that of their Polish counterparts. For instance, Ukrainian courts have been refusing recognition for years of acts and documents from Transnistria on the grounds of its non-recognition by Ukraine.[36] Starting from 2015 however, they have begun to recognise a number of documents used in private law relations (mostly those confirming births, deaths or marriages) issued by the two regimes established on the Ukrainian territory with the help of Russia – the Donetsk People's Republic and the Luhansk People's Republic – based on the *Namibia* exception.[37] There are also a number of jurisdictions where the courts treatment of documents issued by unrecognised regimes is based on the effectiveness of the legal system in a given territory. German courts apply the laws effectively in force in a territory, as long as this is not contrary to public policy.[38] Thus for example in a case relating to Northern Cyprus, a court of Nürnberg-Fürth found it possible to take into account the law adopted by the TRNC since it had been chosen by the parties of a commercial contract, and did not reject it due to the non-recognition of the TRNC by Germany.[39] It seems plausible that it would take a similar approach with respect to documents. As regards the courts in France or Austria, they are not under an obligation to ask the executive for its view regarding the recognition or non-recognition of the law or documents of a given territorial entity, and when deciding on such matters they usually take into account the

[34] United States, Supreme Court of New York, Appellate Division, First Department, *Upright v. Mercury Business Machines Co.*, 11 April 1961, 32 International Law Reports 65 (1966), pp. 65-66.

[35] In order to increase legal certainty some states, such as the US, Australia or the UK, have even gone so far as to pass legislation allowing the recognition of the laws of some or all unrecognised entities, which of course also affects the recognition of documents which are issued pursuant to these laws. For more, *see* T.D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, Praeger, Westport: 1999, pp. 67-71.

[36] *See* H. Stakhyra, *Applicability of Private Law of De-facto Regimes*, 65(2) Osteuropa-Recht 207 (2019), pp. 215-216.

[37] *Ibidem*, p. 216. Interestingly, the courts did it even though the laws adopted by Ukraine expressly considered the acts of both separatist regimes null and void, and provided for a special procedure for the people living there and wishing. e.g., to have their divorce recognised. Unfortunately, the text cited does not give any information on whether any documents related to business relations were involved.

[38] Germany, Landgericht Nürnberg-Fürth, Judgment of 31 March 1999, p. 13, cited by S. Talmon, *Kollektive Nichtanerkennung illegaler Staaten: Grundlagen und Rechtsfolgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern*, Mohr Siebeck, Tübingen: 2006, p. 475. The text mentions however that non-recognition may be considered by German courts as an argument for the rejection of the acts of a regime in cases of doubt.

[39] *Ibidem*, p. 476.

effectiveness of the legal system.[40] Similarly, the courts in Belgium have been guided mostly by the effectiveness and recognition of public acts concerning the personal status and contracts of private individuals.[41]

To summarise, the jurisprudence on the recognition of the public acts of entities unrecognised by the government of the country of the seat of the court – including documents – varies greatly. This confirms the remark already made that there is no clear rule of international law obliging the courts not to recognise such documents in all circumstances. There may be some exceptions to the rigid rule of non-recognition based on reasons of humanity, justice, or fairness, depending on the jurisdiction and the circumstances of the case. The case law regarding the use of these documents in commercial relations is much more limited, but the courts in some states have also considered them recognisable under certain conditions.

CONCLUSIONS

The judgment of the Supreme Court of Poland discussed in this comment is consistent with the established approach in Poland that a Polish court should not recognise as official the documents issued by a regime unrecognised by Poland (and even more so in cases of non-recognition by virtually the entire international community) unless the sovereign over the territory controlled by that regime at least acquiesces to their recognition. In doing so, it follows the modest previous practice of Polish courts and the mainstream views in Polish literature. The verdict can be viewed positively by legal practitioners as maintaining legal certainty. At the same time however, it makes business relations maintained by Polish companies with entities located or operating in territories controlled by such regimes much riskier compared to companies located in countries where the recognition of such documents is possible.

As demonstrated by the brief comparison with selected approaches of other domestic courts, this view is strict and does not take into account, for example, the effectiveness of the legal system over a given territory. It also does not include any clear exceptions for the benefit of individuals or corporations active within the territory controlled by such an unrecognised entity based on the interests of justice, common sense, or humanitarian reasons (such as those based on the ICJ's *Namibia* exception). It must be noted however that the practice of international domestic courts concerning the recognition of documents in cases relating to business relations – as in the case at hand – is far from uniform and they are not necessarily covered by the exceptions from the principle of non-recognition applied by both national and international courts (reflected for example in the unclear stance of the ICJ in the *Namibia* case and of the ECtHR). Therefore, since international law and jurisprudence do not clearly mandate states to

[40] *See* V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia*, Martinus Nijhoff, Dordrecht-Boston: 1990, p. 305.

[41] D.J. Devine, *Status of Rhodesia in International Law*, Acta Iuridica 109 (1974), p. 172.

exceptionally recognise the documents or other acts of unrecognised entities, particularly in cases involving business entities and not individuals, the approach taken by the Supreme Court may be considered as a correct one.

It needs to be observed that, as regards the grounds for all the verdicts of international courts mentioned above (i.e. of the ICJ, the ECtHR and the CJEU), the Polish judgment discussed, including the judgments of the lower instance courts, were most similar in their treatment of the Turkish Cypriot documents used by respective companies to the judgments issued by the CJEU. Both the Polish and CJEU verdicts considered the absence of recognition of the TRNC as grounds for the strict non-recognition of documents it issued. However, the consequences of non-recognition differed quite significantly. The outcome of the CJEU's rulings was that the certificates issued by the TRNC could not be accepted and used for imports into the EU. In the case of the Supreme Court's ruling, the registered mail receipt forms could be used as evidence, but their accuracy and truthfulness had to be separately proved, thus making them of little practical use. These discrepancies were due to the different aims the documents were used for – judicial review of administrative actions versus commercial litigation. Because of that, different legal rules were applicable: the CJEU cases were based on the rules contained in the EU directives, while the Polish case(s) were based on a domestic legal act – the Commercial Companies Code. As the latter provided for an alternative option in the case of non-recognition of an official document (i.e. its treatment as a "private" one), and there was no comparable solution provided for in the directives, the consequences of non-recognition obviously could not have been the same. Nonetheless, the general compliance of the approach of the Polish courts with that of the CJEU as regards the treatment of documents issued by unrecognised entities should be appreciated, since it is beneficial to the coherence of treatment of similar cases in the EU legal order, at both the national and supranational levels.