The Hague Convention on the Choice of Court Agreements Enters into Force

Last Thursday (1 October 2015), the *Convention of 30 June 2005 on Choice of Court Agreements* (the Convention) entered into force in 28 States (Mexico and all Members of the European Union, except Denmark). This results from Mexico's accession to the Convention in 2007 and the recent approval of the Convention by the European Union. This momentum is set to encourage other States currently considering becoming a party to the Convention.

The Convention has been designed to provide more legal certainty and predictability in relation to choice of court agreements between parties to international commercial contracts. It ensures three things: a court chosen by the parties must, in principle, hear the case; any other court before which proceedings are brought must refuse to hear them; and the judgment rendered by the chosen court must be recognised and enforced in other Contracting States.

As consistently recognised by judges, practitioners and other key players within the international legal community, the application of the Convention will deliver adequate responses to the increasingly pressing need in international transactions for enforceable choice of court agreements and their resulting judgments.

For further information on the Convention click here.

Recent comments on the entering into force by Prof. Pedro de Miguel (Universidad Complutense, Madrid) can be seen here.

25th Meeting of the GEDIP, Luxembourg 18-20 September 2015

Last weekend the GEDIP (Group européen de droit international privé / European Group for Private International Law) met in Luxembourg. The GEDIP defines itself as "a closed forum composed of about 30 experts of the relations between private international law and European law, mainly academics from about 18 European States and also members of international organizations". Nevertheless, as the meeting was hosted by the MPI -together with the Faculty of Law of Luxembourg- I had the privilege of being invited to the deliberations.

The history and purpose of the Group are well known: founded in 1991 (which means that it has just celebrated its 25fh anniversary), the Group has since then met once a year as an academic and scientific think tank in the field of European Private International Law. During the meetings the most recent developments in the area are presented and discussed, together with proposals for improving the European PIL legal setting. Actually, while the latter activity is at the core of the GEDIP gatherings, the combination with the former results in a well-balanced program. At the same time it shows the openness and awareness of the Group to what's happening in other fora (and vice versa): the Commission -K. Vandekerckhove joined as observer and to inform on on-going activities-; the Hague Conference -represented this time by M. Pertegás, who updated us on the work of the Conference-, or the ECtHR -Prof. Kinsch summarized the most relevant decisions of the Strasbourg Court since the last GEDIP meeting.

In Luxembourg we enjoyed as *hors d'oeuvre* a presentation by Prof. C. Kohler on the CJEU Opinion 2/13, Opinion of the Court (Full Court) of 18 December 2014, on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedom. Prof. Kohler started recalling the principle of mutual trust as backbone of the Opinion. From this he moved on to focus on the potential impact of the Opinion on PIL issues, in particular on the public policy clause in the framework of the recognition and enforcement of judgements in civil and commercial matters (here he recalled the recently published decision on C-681/13, where the Opinion is expressly quoted);

and on cases of child abduction involving Member States, where the abolition of exequatur may elicit a doubt on the compliance with the ECHR obligations (see ad.ex. the ECtHR decision on the application no. 3890/11, *Povse v. Austria*). A second presentation, this time by Prof. T. Hartley, addressed the very much disputed issue of antisuit injunctions and the Brussels system in light of the Gazprom decision, case C-536/13. Prof. Hartley expressed his views on the case and explained new strategies developed under English law to protect the effects of choice of court agreements, like the one shown in *AMT Futures Limited* v. *Marzillier,* where the latter is sued for having induced the clients of the former to issue proceedings in Germany and to advance causes of action under German law, and thereby to breach the terms of the applicable exclusive jurisdiction and choice of law clauses. AMT claims damages against Marzillier for their having done so, its claim being a claim in tort for inducement of breach of contract

The heart of the meeting was the discussion on two GEDIP on-going projects: a proposal for a regulation on the law applicable to companies, and another on the jurisdiction, the applicable law, the recognition and enforcement of decisions and the cooperation in divorce matters. The first one is at its very final stage, while the second has barely started. From an outsiders point of view such a divergence is really interesting: it's like assisting to the decoration of a baked cake (companies project), or to the preparation of the pastry (divorce project). Indeed, in terms of the intensity and quality of the debate it does not make much difference: but the fine-tuning of an almost-finished legal text is an amazing *encaje de bolillos* task, a hard exercise of concentration and deploy of expertise to manage and conciliate a bunch of imperative requisites, starting with internal consistency and consistency with other existing instruments. I am not going to reproduce here the details of the argument: a *compte-rendu* will be published in the GEDIP website in due time. I'd rather limit myself to highlight how impressive and strenuous is the work of finalizing a legal document, making sure that the policy objectives represented by one provision are not belied by another (the moment this happens the risk is high that the whole project, the underlying basics of it, is unconsciously being challenged), checking the wording to the last adverb, conjunction and preposition, deciding on what should be part of the text and what should rather be taken up in a recital, and so on. By way of example, let me mention the lively discussion on Sunday on the scope and drafting of art. 10 of the proposal on the law applicable to companies, concerning the overriding mandatory rules: I am really eager to see what the final outcome is after the

heated debate on how to frame them in the context of a project where party autonomy is the overarching principle, at a time when companies are required to engage in the so-called corporate social responsibility whether they want it or not. Only this point has remained open and has been reported to the next meeting of the GEDIP next year.

I wouldn't like to end this post without referring to the commitment of the GEDIP and its members with the civil society concerns. On Saturday Prof. Van Loon presented a document drafted in light of the plight of migrants, refugees, and asylum seekers in Europe. The text, addressed to the Member States and Institutions of the EU, aims to raise awareness of the immediate needs of these groups in terms of civil status and of measures to protect the most vulnerable persons within them. Reworked to take up the comments of the members of the GEDIP, a second draft was submitted on Sunday which resumes the problematic and insists on the role of PIL instruments in that context.

All in all, this has been an invaluable experience, for which I would like to thank the GEDIP and in particular the organizers of the event here, Prof. Christian Kohler and Prof. Patrick Kinsch.

The proceedings of the working sessions and the statements of the Group will soon be posted on its Website and published in various law reviews.

The ECJ on the binding use of standard forms under the Service Regulation

In a judgment of 16 September 2015, in the case of *Alpha Bank Cyprus Ltd* v. *Dau Si Senh* and others (Case C?519/13), the ECJ clarified the interpretation of Regulation No 1393/2007 on the service of judicial and extrajudicial documents in civil or commercial matters (the Service Regulation).

The judgment originated from a request for a preliminary ruling submitted by the Supreme Court of Cyprus in the framework of proceedings initiated by a Cypriot bank against, *inter alia*, individuals permanently resident in the UK.

The latter claimed that the documents instituting the proceedings had not been duly served. They complained, in particular, that some of the documents they had received (namely the order authorising service abroad) were not accompanied by a translation into English and that the standard form referred to in Article 8(1) of Regulation No 1393/2007 was never served on them.

Pursuant to Article 8 of the Service Regulation, the "receiving agency", *ie* the agency competent for the receipt of judicial or extrajudicial documents from another Member State under the Regulation, must inform the addressee, "using the standard form set out in Annex II", that he has the right to refuse to accept a document if this "is not written in, or accompanied by a translation into, either of the following languages: (a) a language which the addressee understands; or (b) the official language of the Member State addressed".

In its judgment, the ECJ held that the receiving agency "is required, in all circumstances and without it having a margin of discretion in that regard, to inform the addressee of a document of his right to refuse to accept that document", and that this requirements must be fulfilled "by using systematically … the standard form set out in Annex II". The Court also held, however, that, where the receiving agency fails to enclose the standard form in question, this "does not constitute a ground for the procedure to be declared invalid, but an omission which must be rectified in accordance with the provisions set out in that regulation".

The ECJ based this conclusion on the following remarks.

Regarding the binding nature of the standard form, the Court noticed that the wording of Article 8 of the Regulation is not decisive, and that the objectives of the Regulation and the context of Article 8 should rather be considered.

As regards the objectives of the Regulation, the Court stated that the uniform EU rules on the service of documents aim to improve the efficiency and speed of judicial procedures, but stressed that those objectives cannot be attained by undermining in any way the rights of the defence of the addressees, which derive from the right to a fair hearing, enshrined in Article 47 of the Charter of

Fundamental Rights of the EU and Article 6(1) of the ECHR.

The Court added, in this regard, that "it is important not only to ensure that the addressee of a document actually receives the document in question, but also that he is able to know and understand effectively and completely the meaning and scope of the action brought against him abroad, so as to be able effectively to assert his rights in the Member State of transmission". It is thus necessary to strike a balance between the interests of the applicant and those of the defendant by reconciling the objectives of efficiency and speed of the service of the procedural documents with the need to ensure that the rights of the defence of the addressee of those documents are adequately protected.

As concerns the system established by the Service Regulation, the ECJ began by noting that the service of documents is, in principle, to be effected between the "transmitting agencies" and the "receiving agencies" designated by the Member States, and that, in accordance with Article 5(1) of the Regulation, it is for the transmitting agency to inform the applicant that the addressee may refuse to accept it if it is not in one of the languages provided for in Article 8, whereas it is for the applicant to decide whether the document at issue must be translated.

For its part, the receiving agency is required to effectively serve the document on the addressee, as provided for by Article 7 of Regulation No 1393/2007. In that context, the receiving agency must, among other things, inform the addressee that it may refuse to accept the document if it is not translated into one of the languages referred to in Article 8(1).

By contrast, the said agencies "are not required to rule on questions of substance, such as those concerning which language(s) the addressee of the document understands and whether the document must be accompanied by a translation into one of the languages" specified in Article 8(1). Any other interpretation, the ECJ added, "would raise legal problems likely to create legal disputes which would delay or make more difficult the procedure for transmitting documents from one Member State to another".

In the main proceedings, the UK receiving agency considered that the order authorising service of the document abroad should not be translated and deduced from that that it was not required to enclose with the document at issue the relevant standard form.

In reality, according to the ECJ, the Service Regulation "does not confer on the receiving agency any competence to assess whether the conditions, set out in Article 8(1), according to which the addressee of a document may refuse to accept it, are satisfied". Actually, "it is exclusively for the national court before which proceedings are brought in the Member State of origin to rule on questions of that nature, since they oppose the applicant and the defendant".

The latter court "will be required, in each individual case, to ensure that the respective rights of the parties concerned are upheld in a balanced manner, by weighing the objective of efficiency and of rapidity of the service in the interest of the applicant against that of the effective protection of the rights of the defence on the part of the addressee".

Specifically, as regards the use of the standard forms, the ECJ observed, based on the Preamble of the Regulation, that the forms "contribute to simplifying and making more transparent the transmission of documents, thereby guaranteeing both the legibility thereof and the security of their transmission", and are regarded by the Regulation as "instruments by means of which addressees are informed of their ability to refuse to accept the document to be served".

The wording of the Regulation and of the forms themselves makes clear that the ability to refuse to accept a document in accordance with Article 8(1) is "a 'right' of the addressee of that document". In order for that right to usefully produce its effects, the addressee of the document must be informed in writing thereof.

As a matter of fact, Article 8(1) of the Regulation contains two distinct statements. On the one hand, the substantive right of the addressee of the document to refuse to accept it, on the sole ground that it is not drafted in or accompanied by a translation in a language he is expected to understand. On the other hand, the formal information about the existence of that right brought to his knowledge by the receiving agency. In other words, in the Court's view, "the condition relating to the languages used for the document relates not to the information given to the addressee by the receiving agency, but exclusively to the right to refuse reserved to that addressee".

The ECJ went on to stress that the refusal of service is conditional, in so far as the addressee of the document may validly make use of the right only where the document at issue is not drafted in or accompanied by a translation either in a

language he understands or in the official language of the receiving Member State. It is ultimately for the court seised to decide whether that condition is satisfied, by checking whether the refusal by the addressee of the document was justified. The fact remains, however, that the exercise of that right to refuse "presupposes that the addressee of the document has been duly informed, in advance and in writing, of the existence of his right".

This explains why the receiving agency, where it serves or has served a document on its addressee, "is required, in all circumstances, to enclose with the document at issue the standard form set out in Annex II to Regulation No 1393/2007 informing that addressee of his right to refuse to accept that document". This obligation, the Court stressed, should not create particular difficulties for the receiving agency, since "it suffices that that agency enclose with the document to be served the preprinted text as provided for by that regulation in each of the official languages of the European Union".

Moving on to the consequences of a failure to provide information using the standard form, the ECJ noted, at the outset, that it is not apparent from any provision of that regulation that such a failure leads to the invalidity of the procedure for service.

Rather, the Court reminded that, in *Leffler* — a case relating to the interpretation of Regulation No 1348/2000, the predecessor of Regulation No 1393/2007 — it held that the non-observance of the linguistic requirements of service does not imply that the procedure must necessarily be declared invalid, but rather involves the necessity to allow the sender to remedy the lack of the required document by sending the requested translation. The principle is now laid down in Article 8(3) of Regulation No 1393/2007.

According to the ECJ, a similar solution must be followed where the receiving agency has failed to transmit the standard form set out in Annex II to that regulation to the addressee of a document.

In practice, it is for the receiving agency to inform "without delay" the addressees of the document of their right to refuse to accept that document, by sending them, in accordance with Article 8(1), the relevant standard form. In the event that, as a result of that information, the addressees concerned make use of their right to refuse to accept the document at issue, it is for the national court in the

Member State of origin to decide whether such a refusal is justified in the light of all the circumstances of the case.

Out Now: Reithmann/Martiny on International Contract Law

Dr. *Christoph Reithmann* and Professor Dr. *Dieter Martiny* (editors) have just published a new edition of their standard treatise on international contract law: Internationales Vertragsrecht – Das internationale Privatrecht der Schuldverträge, 8th. ed., Cologne (Dr. Otto Schmidt) 2015.



This 2348-pages strong volume is universally acknowledged as one of the leading works on international contract law in the German language. It features in-depth analyses not only of the Rome I-Regulation, but also of various aspects not dealt with in Rome I, such as capacity and agency. Moreover, it also contains a chapter on choice of law under the Rome II Regulation. The book has been written by a team that is made up of renowned German and Swiss PIL scholars and practitioners. Highly recommended! For further information, see the publisher's website here.

PILAGG PROGRAM 2015: "PROBING LEGAL KNOWLEDGE

IN GLOBAL PERSPECTIVE: A DANGEROUS METHOD?"

Here is the update for the PILAGG program 2015: past events and the ones foreseen from September 2015 on.

I. GLOBAL PARADIGM AND LEGAL METHOD(S): MARCH 2015

The emergence of a global legal paradigm upsets assumptions/fictions developed within the modern, Westphalian model, which takes the law to be a self-contained, stable and coherent system and designs its method(s) accordingly. To what extent, then do comparative and internationalist perspectives provide plausible alternative legal methodology(ies) within an emerging "global legal paradigm"? Paying critical attention to law in global context is likely to constitute a "dangerous method" with respect to its subversive and emancipatory potential.

- **The Mind and the Method(s)**: Jan Smits (Maastricht)
- **Global Legal Paradigm:** Ralf Michaels (Duke)

II. LAW AND AUTHORITY WITHOUT (STATE) PEDIGREE: MAY 2015

Competing, diffuse, post-Westphalian forms of authority and correlative displacements of power to non-state actors are difficult to capture in legal terms. Is it possible to take seriously – whether to legitimize, challenge, or govern – new, diffuse and disorderly expressions of authority and normativity which do not necessarily fit traditional forms of legal knowledge, nor respond to familiar methods of legal reasoning? Is legal pluralism adequate to assess legitimacy of such claims or to solve conflicts between them? What are the alternative accounts of informal law (s) beyond the state?

- **Transnational Authority**: Max del Mar and Roger Cotterell (Queen Mary, London)

RENTREE 2015:*What are the specific insights of the discipline of the conflict of*

laws in respect of some of the most significant issues which challenge contemporary legal theory, in its attempts to integrate the radical changes wrought by globalisation in the normative landscape beyond (framed outside, or reaching over) the nation-state. Indeed, remarkably, these changes have brought complex interactions of conflicting norms and social systems to the center-stage of jurisprudence. This means that the conflict of laws has a plausible vocation to contribute significantly to a "global legal paradigm" (Michaels 2014), that is, a conceptual structure adapted to unfamiliar practices, forms and "modes of legal consciousness" (Kennedy 2006). Conversely, however, private international legal thinking has all to gain from attention to the other legal disciplines that have preceded it in the effort to "go global". Thus, it needs to undergo a general conceptual overhauling in order to capture law's novel foundations and features. In this respect, it calls for an adjustment of its epistemological and methodological tools to its transformed environment. It must revisit the terms of the debate about legitimacy of political authority and reconsider the values that constitute its normative horizon. From this perspective, the ambition of this paper is to further the efforts already undertaken by various strands of legal pluralism, as an alternative form of "lateral coordination" in global law (Walker 2015), towards the crafting of a "jurisprudence across borders" (Berman 2012). Societal constitutionalism (Teubner 2011), which has explicitly made the connection between transnational regime-collison and the conflict of laws, provides a particularly promising avenue for unbounding the latter, which might then emerge as a form of de-centered, reflexive coordination of global legal interactions.

III. CONFLICTS OF LAWS UNBOUNDED:?THE CASE FOR A LEGAL-PLURALIST REVIVAL. : **25th SEPTEMBER 2015**

- **Horatia Muir Watt** (Sciences-po Ecole de droit) FRIDAY 25 Septembre 2015. Salle de réunion (4e étage), 14h-17h, Ecole de droit, Sciences po, 13 rue de l'Université, 75007 Paris.
- **Discussant : Loic AZOULAI** (Sciences po, Ecole de droit)

(NB Martijn Hesselink will give his talk later on in the term

IV. GLOBAL LEGAL PLURALISM AND THE CONFLICT OF NORMS:

OCTOBER 9th

"It has now been approximately 20 years since scholars first began pushing the insights of legal pluralism into the transnational and international arena. During those two decades, a rich body of work has established pluralism as a useful descriptive and normative framework for understanding a world of relative overlapping authorities, both state and non-state. Indeed, there has been a veritable explosion of scholarly work on legal pluralism, soft law, global constitutionalism, the relationships among relative authorities, and the fragmentation and reinforcement of territorial boundaries »[Berman 2012]. Competing plural and transnational assertions of authority are singled out as the emblematic feature of our complex world, while the defining problem in contemporary legal thought lies in the interactions of legal traditions, social spheres, cultural values, rights and identities, epistemologies or world-visions. Various responses come in the form of a search for consensus (around constitutional values), the promotion of new utopias (the quest for global justice), the celebration of diversity as competition (law and economics), the devising of methodologies designed to mediate or coordinate (systems theory), or renewed definitions of authority and legitimacy (socio-legal studies). At first sight, the conflict of laws would appear to fit quite well among these pluralist strands of thought.

- **Paul Schiff Berman: A jurisprudence across borders**
- Discussant: Jean-Philippe ROBE

V. GLOBAL LAW AND INTERDISCIPLINARY INQUIRY: OCTOBER 16th

Law's status as (empirical) social science, repeatedly mooted then rejected in the name of its "internal" or dogmatic perspective, is arguably the most significant methodological debate in its modern history. But what is it about globalization which makes the need for interdisciplinarity resurface today in view of rethinking legal method? Is global law a relevant object of inquiry for the social sciences? Can the methods of private international law help frame a common problematic?

Alexander Panayatov *attempts an exercise in an inter-disciplinary conceptual clarification. Discussing the impediments to, and conditions for, inter-disciplinary collaboration based on exploring law and political science research cultures, he evaluates "The Legalization and World Politics" (LWP) project that*

*offers a framework for deploying political science methodology to law. He also offers a supplementary framework for studying jurisdictional politics. This framework will specify four dis*tinct mechanisms accounting for the creation of transnational jurisdictional regimes

- **Alexander Panayatov (NYU): Transnational jurisdictional regimes and interdisciplinarity FRIDAY OCTOBER 16th 2015. Salle de réunion (4e étage), 14h-17h, Ecole de droit, Sciences po, 13 rue de l'Université, 75007 Paris.**
- **Discussants : Véronique Champeil-Desplat (Paris X), auteure de *Méthodologies du droit et des sciences du droit*, Dalloz 2014**
- **Jérôme Sgard (Sciences po Paris)**

VI. INTIMATIONS OF GLOBAL LAW: NOVEMBER 13th

Indisputably, globalisation, or its contemporary (fourth?[1]) avatar, is inflicting an identity crisis upon the conflict of laws[2]. One of the reasons for this is that it shows up the link between legal methods elaborated in view of dealing with conflicting norms and the framing of law's origins, functions and objects within a particular legal paradigm. In other words, modes of legal reasoning in the face of conflicting norms and claims to authority reflect various conceptions and expectations as to what law is and does, where it comes from and the types of issues it deals with. Change affecting these assumptions and representations about the world affects established forms of legal knowledge; probing them is, as we know, a distinctly "dangerous method". So what is left of state-bound legal-theoretical conceptions of the law in its "global intimations"?

- **Neil WALKER: The intimations of global law**
- **Mikhail XIFARAS: Further global intimations**

UPCOMING EVENTS :

THE CONSTRUCTION OF GLOBAL LAW : Date to be determined

Various attempts are being from a markedly public law perspective (global administrative law/global constitutionalism) to build a global law. These are all certainly relevant to contemporary "private" international law, to the extent that

the discipline has always had a strong process-orientation (remember "conflicts justice"?) and is currently in the process of renewal from the perspective of fundamental individual and collective rights. Meanwhile (as we have already seen), the new Brussels school has turned to pragmatism in legal philosophy (Benoît Frydmann), while Gunter Teubner's "societal constitutionalism" is a significant contender from an interdisciplinary perspective. Interestingly, both of these use specifically private international tools, methods or approaches (jurisdiction and RSE; conflicts solutions to legal pluralism). The last session discussed the potential contribution of socio-legal theory to this debate, with a view to understanding new forms of transnational authority. But what happens to private law in this process?

THE RIGHT TO JUSTIFICATION IN GLOBAL PRIVATE LAW: Martijn Hesselink, (Amsterdam)

Out now: Commentary on the EU Succession Regulation

Ulf Bergquist, Domenico Damascelli, Richard Frimston, Paul Lagarde, Felix Odersky and Barbara Reinhartz have written an article-by-article commentary on the new EU Succession Regulation that recently entered into force. Authored by members of the Experts Group that drafted the Commission's Proposal for the Regulation the commentary discusses all crucial points of the new legal framework including:

- law applicable to a succession,
- election as to the applicable law,
- recognition and enforcement,
- authentic instruments,
- the European Certificate of Succession.

The commentary is available in English, French and German. More information is available here and here.

The enforcement of judgments imposing a penalty payment in case of breach of rights of access to children

This post has been written by Ester di Napoli.

In a judgment of 9 September 2015 (*Christophe Bohez* v. *Ingrid Wiertz*, Case C-4/14), the European Court of Justice (ECJ) clarified the interpretation of Article 1(2) and Article 49 of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matter (Brussels I), corresponding to Articles 1(2) and 55 of Regulation No 1215/2012 (Brussels I*a*), as well as the interpretation of Article 47(1) of Regulation No 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II*a*). The questions referred to the Court concerned the enforcement of a penalty payment (*astreinte*) issued to ensure compliance with the rights of access to children granted to one of the parents.

While Article 49 of the Brussels I Regulation states that judgments ordering "a periodic payment by way of a penalty" are enforceable in a different Member State "only if the amount of the payment has been finally determined by the courts of the Member State of origin", no equivalent provision may be found in the Brussels IIa Regulation. The latter merely specifies, in Article 47(1), that the enforcement procedure is governed by the law of the Member State of enforcement.

The case from which the judgment originated may be summarised as follows.

Mr Bohez and Ms Wiertz married in Belgium in 1997 and had two children. When they divorced, in 2005, Ms Wiertz moved to Finland. In 2007, a Belgian court rendered a decision on the responsibility over the children. As a means to ensure

compliance with the rights of access granted to the father, the court set at a periodic amount per child to be paid to Mr Bohez for every day of the child's non-appearance, and fixed a maximum amount that the defaulting parent could be requested to pay under the *astreinte*.

The mother failed to comply with the Belgian decision, so the father sought enforcement of the Belgian order in Finland relying on Article 49 of Brussels I Regulation. The Finnish authorities observed that the amount of the payment had not been determined in the Member State of origin, and added that, in any event, the request did not fall within the scope of the Brussels I Regulation but rather within the scope of the Brussels II*a* Regulation.

The ECJ, seised by the Finnish Supreme Court, pointed out that the scope of Brussels I Regulation is limited to "civil and commercial matters", and that the inclusion of interim measures is determined "not by their own nature but by the nature of the rights that they serve to protect". Thus, since the Brussels I Regulation expressly excludes from its scope "the status of natural persons" (notion "which encompasses the exercise of parental responsibility over the person of the child"), the Court held that Article 1 of Brussels I Regulation must be interpreted as meaning that it does not apply to the enforcement of a penalty payment imposed in a judgment concerning matters of parental responsibility.

The ECJ then moved on to consider the interpretation of the Brussels II*a* Regulation.

It recalled that mutual recognition of judgments concerning rights of access is "a priority within the judicial area of the European Union" and observed that, although the Regulation does not contain any provision on penalties, a penalty payment imposed in a judgment concerning rights of access "cannot be considered in isolation as a self-standing obligation, but must be considered together with the rights of access which it serve to protect and from which it cannot be dissociated". Accordingly, its recovery forms part "of the same scheme of enforcement as the judgment concerning the rights of access that the penalty safeguards and the latter must therefore be declared enforceable in accordance with the rules laid down by Regulation No 2201/2003".

The Court stressed that, in order to seek enforcement of the decision ordering a penalty payment, the amount must have been finally determined by the courts of

the Member State of origin. Where the penalty payment has not been determined, "a requirement, in the context of Regulation No 2201/2003, for quantification of a periodic penalty payment prior to its enforcement is consistent with the sensitive nature of rights of access".

No Independent Jurisdiction Requirement for Proceeding to Enforce a Foreign Judgment in Canada

The Supreme Court of Canada has released its decision in *Chevron Corp v Yaiguaje* (available here). The issue before the court was whether the Ontario courts have jurisdiction to recognize and enforce an Ecuadorian judgment (for over $US 18 billion) where the foreign judgment debtor Chevron Corporation ("Chevron") claims to have no connection with the province, whether through assets or otherwise. On one view, because the process for enforcing a foreign judgment is to commence a new domestic proceeding and thereby sue on the foreign judgment, the enforcement proceeding must have its own independent analysis of jurisdiction. Put another way, there cannot be a proceeding in respect of which the court does not have to have jurisdiction. On a different view, because the analysis of the claim on the foreign judgment considers, among other things, the sufficiency of the rendering court's jurisdiction (Chevron defended on the merits in Ecuador), that is the only required analysis of jurisdiction and there is no need for a separate consideration of the enforcing court's jurisdiction. The Supreme Court of Canada, agreeing with the Court of Appeal for Ontario, has held that the latter view is correct.

In summarizing its conclusion (para 3) the court stated "In an action to recognize and enforce a foreign judgment where the foreign court validly assumed jurisdiction, there is no need to prove that a real and substantial connection exists

between the enforcing forum and either the judgment debtor or the dispute. It makes little sense to compel such a connection when, owing to the nature of the action itself, it will frequently be lacking. Nor is it necessary, in order for the action to proceed, that the foreign debtor contemporaneously possess assets in the enforcing forum. Jurisdiction to recognize and enforce a foreign judgment within Ontario exists by virtue of the debtor being served on the basis of the outstanding debt resulting from the judgment."

While the court does not say that NO jurisdictional basis is required, it states that the basis is found simply and wholly in the defendant being served with process (see para 27). This runs counter to the court's foundational decision in *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077 which separated the issue of service of process – a pure procedural requirement – from the issue of jurisdiction. To say the service itself founds jurisdiction is arguably to have no jurisdictional requirement at all.

Interestingly, a recent paper (subsequent to the argument before the court) by Professor Linda Silberman and Research Fellow Aaron Simowitz of New York University (available here) considers the same issue in American law and concludes that the dominant view of courts there remains that an action to enforce a foreign judgment requires a "jurisdictional nexus" with the enforcing forum. They note that only a minority of countries allow enforcement of a foreign judgment without any jurisdictional threshold for the enforcement proceedings. They argue that the New York decisions which subsequently are relied on by the Supreme Court of Canada (para 61) are the outliers.

Had the Supreme Court of Canada required a showing of jurisdiction in respect of the enforcement proceeding, it would have had to address how that requirement would be met. Of course, in most cases it would be easily met by the defendant having assets in the jurisdiction. The plaintiff would not have to prove that such assets were present: a good arguable case to that effect would ground jurisdiction. Evidence that assets might, in the future, be brought into the jurisdiction could also suffice.

While the court is correct to note that the considerations in defending the underlying substantive claims are different from those involved in defending enforcement proceedings (para 48), the latter nonetheless allow reasonable scope for defences to be raised, such as fraud, denial of natural justice or contravention

of public policy. With no threshold jurisdiction requirement, judgment debtor defendants will now be required to advance and establish those defences in a forum that may have no connection at all with them or the judgment.

The enforcement proceedings were also brought against Chevron Canada, an indirect subsidiary of Chevron that does have a presence in Ontario, although it is not a named defendant in the Ecuadorian judgment. The Supreme Court of Canada held that the Ontario court had jurisdiction over Chevron Canada based on its presence, with no need to consider any other possible basis for jurisdiction. The decision is thus important for confirming the ongoing validity of presence-based jurisdiction (see paras 81-87).

On a pragmatic level, eliminating an analysis of the enforcing court's jurisdiction may simplify the overall analysis, but hardly by much. The court notes (para 77) that " Establishing jurisdiction merely means that the alleged debt merits the assistance and attention of the Ontario courts. Once the parties move past the jurisdictional phase, it may still be open to the defendant to argue any or all of the following, whether by way of preliminary motions or at trial: that the proper use of Ontario judicial resources justifies a stay under the circumstances; that the Ontario courts should decline to exercise jurisdiction on the basis of *forum non conveniens*; that any one of the available defences to recognition and enforcement (i.e. fraud, denial of natural justice, or public policy) should be accepted in the circumstances; or that a motion under either Rule 20 (summary judgment) or Rule 21 (determination of an issue before trial) of the Rules should be granted." And in respect of Chevron Canada (para 95), the "conclusion that the Ontario courts have jurisdiction in this case should not be understood to prejudice future arguments with respect to the distinct corporate personalities of Chevron and Chevron Canada. [We] take no position on whether Chevron Canada can properly be considered a judgment-debtor to the Ecuadorian judgment. Similarly, should the judgment be recognized and enforced against Chevron, it does not automatically follow that Chevron Canada's shares or assets will be available to satisfy Chevron's debt."

Deren on Expropriation in Private International Law

Deniz Halil Deren has authored a book (in German) on expropriation in private international law ("Internationales Enteignungsrecht – Kollisionsrechtliche Grundlagen und Investitionsschutzfragen"). Published by Mohr Siebeck the book looks at issues of choice of law and investor protection.

The official abstract reads as follows:

> *Since the 20th century, states have extensively been exercising their right to expropriate private property. These expropriations have involved goods (such as works of art, means of production or natural resources) as well as shares, claims and intellectual property rights. Yet under what conditions does German law recognise expropriations performed by other states and what role does investment protection law play in this context?*

Further information is available on the publisher's website.

The first request for a preliminary ruling concerning the Rome III Regulation

The *Oberlandesgericht* of Munich has recently lodged a request for a preliminary ruling concerning the interpretation of Regulation No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *ie* the Rome III Regulation (Case C-281/15, *Soha Sahyouni* v *Raja Mamisch*).

The request provides the ECJ with the opportunity of delivering, in due course, its

first judgment relating specifically to the Rome III Regulation.

To begin with, the referring court asks the ECJ to provide a clarification as to the scope of the uniform conflict-of-laws regime set forth by the Regulation. In particular, the German court wonders whether the Regulation also applies to 'private divorces', namely divorces pronounced before a religious court in Syria on the basis of Sharia.

If the answer is in the affirmative, the referring court asks whether, in the case of an examination as to whether such a divorce is eligible for recognition in the forum, Article 10 of the Regulation must also be applied. According to the latter provision, where the law specified by the Regulation to govern the divorce or the legal separation "does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex", the *lex fori* applies instead.

Should the latter question, too, be answered in the affirmative, the referring court wishes to know which of the following interpretive options should be followed in respect of Article 10: (1) is account to be taken in the abstract of a comparison showing that, while the law of the forum grants access to divorce to the other spouse too, that divorce is, on account of the other spouse's sex, subject to different procedural and substantive conditions than access for the first spouse? (2) or, does the applicability of Article 10 depend on whether the application of the foreign law, which is discriminatory in the abstract, also discriminates in the particular case in question?

Finally, were the ECJ to assert that the second of these options is the correct one, the *Oberlandesgericht* of Munich seeks to know whether the fact that the spouse discriminated against has consented to the divorce — including by duly accepting compensation — constitutes itself a ground for not applying Article 10.