Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (I): The law applicable to SLAPPs

Eduardo Álvarez-Armas is Lecturer in Law at Brunel University London and Affiliated Researcher at the Université Catholique de Louvain. He has kindly provided us with his thoughts on recent proposals for amending the Rome II Regulation. This is the first part of his contribution; a second one on corporate social responsibility will follow in the next days.

On December the 3rd, 2020, the EU commission published a call for applications, with a view to putting forward, by late 2021, a (legislative or non-legislative) initiative to curtail "*abusive litigation targeting journalists and civil society*". As defined in the call, strategic lawsuits against public participation (commonly abbreviated as SLAPPs) "*are groundless or exaggerated lawsuits, initiated by state organs, business corporations or powerful individuals against weaker parties who express, on a matter of public interest, criticism or communicate messages which are uncomfortable to the litigants*". As their core objective is to silence critical voices, SLAPPs are frequently grounded on defamation claims, but they may be articulated through other legal bases (as "*data protection, blasphemy, tax laws, copyright, trade secret breaches*", etc) (p. 1).

The stakes at play are major: beyond an immediate limitation or suppression of open debate and public awareness over matters that are of significant societal interest, the economic pressure arising from SLAPPs can "drown" defendants, whose financial resources are oftentimes very limited. Just to name but a few recent SLAPP examples (For further review of cases throughout the EU see: Greenpeace European Unit [O. Reyes, rapporteur], "Sued into silence – How the rich and powerful use legal tactics to shut critics up", Brussels, July 2020, p. 18ff): at the time of her murder in 2017, Maltese journalist Daphne Caruana Galizia was facing over 40 civil and criminal defamation lawsuits, including a 40-million US

dollar lawsuit in Arizona filed by Pilatus Bank (Greenpeace European Unit [O. Reyes, rapporteur], pp. 9-12); in 2020, a one million euros lawsuit was introduced against Spanish activist Manuel García for stating in a TV program that the poor livestock waste management of meat-producing company "Coren" was the cause for the pollution of the As Conchas reservoir in the Galicia region.

In light of the situation, several European civil-society entities have put forward a model "*EU anti-SLAPP Directive*", identifying substantive protections they would expect from the European-level response announced in point 3.2 of the EU Commission´s "*European democracy action plan*". If it crystallized, an EU anti-SLAPP directive would follow anti-SLAPP legislation already enacted, for instance, in Ontario, and certain parts of the US.

Despite being frequently conducted within national contexts, it is acknowledged that SLAPPs may be "*deliberately brought in another jurisdiction and enforced across borders*", or may "*exploit other aspects of national procedural and private international law*" in order to increase complexities which will render them "*more costly to defend*" (Call for applications, note 1, p. 1) Therefore, in addition to a substantive-law intervention, the involvement of private international law in SLAPPs is required. Amongst core private-international-law issues to be considered is the law applicable to SLAPPs.

De lege lata, due to the referred frequent resort to defamation, and the fact that this subject-matter was excluded from the material scope of application of the Rome II Regulation, domestic choice-of-law provisions on the former, as available, will become relevant. This entails a significant incentive for forum shopping (which may only be partially counteracted, at the jurisdictional level, by the "*Mosaic theory*").

De lege ferenda, while the risk of forum shopping would justify by itself the insertion of a choice-of-law rule on SLAPPs in Rome II, the EU Commission´s explicit objective of shielding journalists and NGOs against these practices moreover pleads for providing a content-oriented character to the rule. Specifically, the above-mentioned "gagging" purpose of SLAPPs and their interference with fundamental values as freedom of expression sufficiently justify departing from the neutral choice-of-law paradigm. Furthermore, as equally mentioned, SLAPP targets will generally have (relatively) modest financial means. This will frequently make them "weak parties" in asymmetric relationships with

(allegedly) libeled claimants.

In the light of all of this, beyond conventional suggestions explored over the last 15 years in respect of a potential rule on defamation in Rome II (see, amongst other sources: Rome II and Defamation: Online Symposium), several thought-provoking options could be explored, amongst which the following two:

1st Option: Reverse mirroring Article 7 Rome II

A first creative approach to the law applicable to SLAPPs would be to introduce an Article 7-resembling rule, with an inverted structure. Article 7 Rome II on the law applicable to non-contractual obligations arising from environmental damage embodies the so-called "theory of ubiquity" and confers the prerogative of the election of the applicable law to the "weaker" party (the environmental victim). In the suggested rule on SLAPPs, the choice should be "reversed", and be given to the defendant, provided they correspond with a carefully drafted set of criteria identifying appropriate recipients for anti-SLAPP protection.

However, this relatively straightforward adaptation of a choice-of-law configuration already present in the Rome II Regulation could be problematic in certain respects. Amongst others, for example, as regards the procedural moment for performing the choice-of-law operation in those domestic systems where procedural law establishes (somewhat) "succinct" proceedings (i.e. with limited amounts of submissions from the parties, and/or limited possibilities to amend them): where a claimant needs to fully argue their case on the merits from the very first written submission made, which starts the proceedings, how are they meant to do so before the defendant has chosen the applicable law? While, arguably, procedural adaptations could be enacted at EU-level to avoid a "catch-22" situation, other options may entail less legislative burden.

2nd option: a post-Brexit conceptual loan from English private international law = double actionability

A more extravagant (yet potentially very effective) approach for private-international-law protection would be to "borrow" the English choice-of-law rule on the law applicable to defamation: the so-called double actionability rule. As it is well-known, one of the core reasons why "*non-contractual obligations arising out of violations of privacy and rights relating to personality, including*

defamation" were excluded from the material scope of the Rome II Regulation was the lobbying of publishing groups and press and media associations during the Rome II legislative process (see A. Warshaw, "Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims"). With that exclusion, specifically, the English media sector succeeded in retaining the application by English courts of the referred rule, which despite being "*an oddity*" in the history of English law (*Vid*. D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws,* 9th ed., Swett & Maxwell, 2016, p. 479), is highly protective for defendants of alleged libels and slanders. The double actionability rule, roughly century and a half old, (as it originated from *Philips v. Eyre* [*Philips v. Eyre* (1870) L.R. 6 Q.B. 1.] despite being tempered by subsequent case law) is complex to interpret and does not resemble (structurally or linguistically) modern choice-of-law rules. It states that:

"*As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England … Secondly, the act must not have been justifiable by the law of the place where it was done*" (*Philips v. Eyre*, p. 28-29).

The first of the cumulative conditions contained in the excerpt is usually understood as the need to verify that the claim is viable under English law (*Lex fori*). The second condition is usually understood as the need to verify that the facts would give rise to liability also under foreign law. Various interpretations of the rule can be found in academia, ranging from considering that once the two cumulative requirements have been met English law applies (*Vid*. Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-111), to considering that only those rules that exist simultaneously in both laws (English and foreign) apply, or that exemptions from liability from either legal system free the alleged tortfeasor (*Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885. Similarly, Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-128). Insofar as it is restrictive, and protective of the defendant, double actionability is usually understood as a "*double hurdle*" (*Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885; D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws*, 9th ed., Swett &

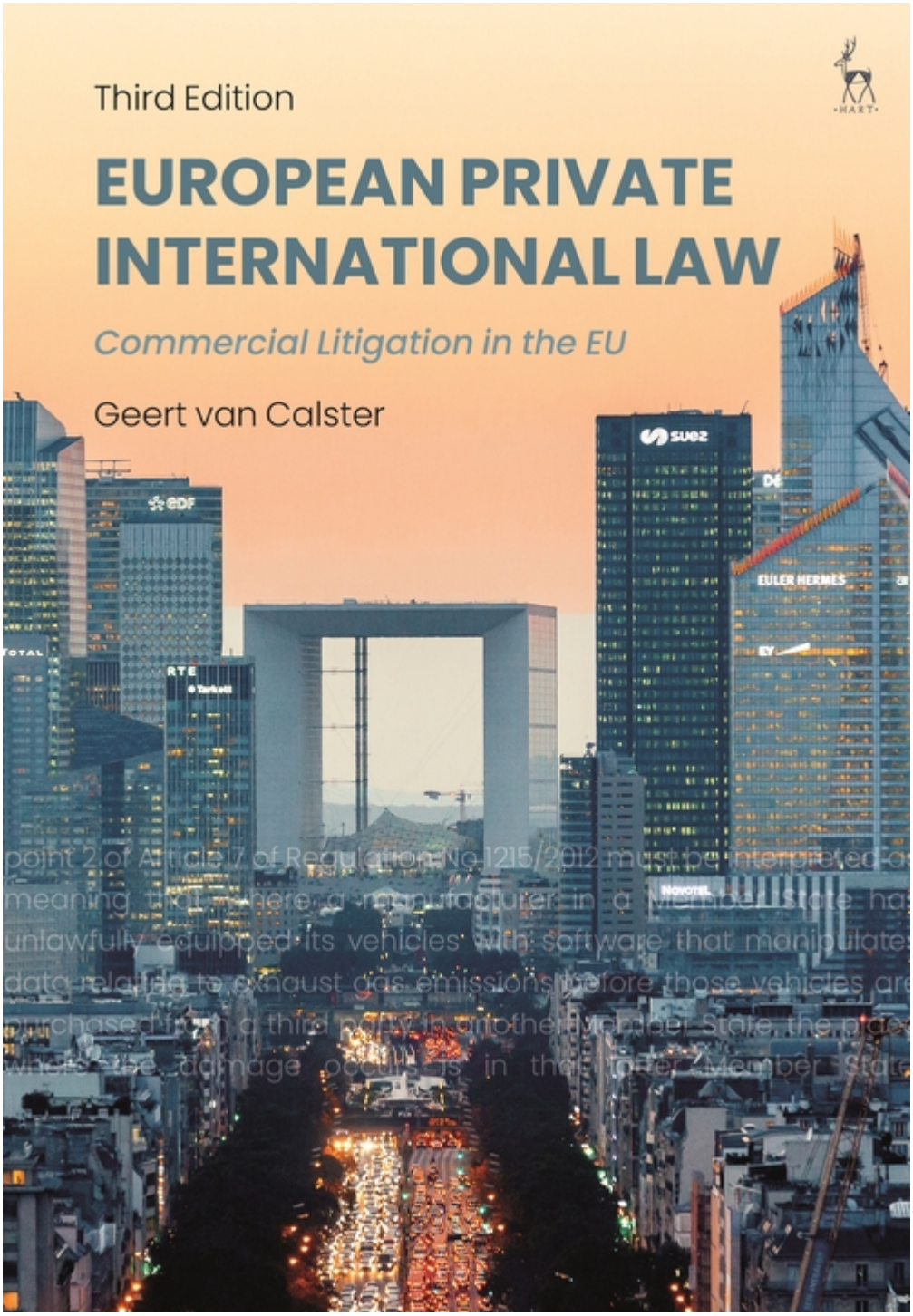
Maxwell, 2016, p. 479) to obtaining reparation by the victim, or, in other words, as having to win the case "*twice in order to win* [only] *once*" (*Vid*. A. Briggs, *The Conflict of Laws*, 4th ed., Clarendon Law Series, OUP, 2019, p. 274). Thus, the practical outcome is that the freedom of speech of the defendant is preserved.

A plethora of reasons make this choice-of-law approach controversial, complex to implement, and difficult to adopt at an EU level: from a continental perspective, it would be perceived as very difficult to grasp by private parties, as well as going against the fundamental dogma of EU private international law: foreseeability. This does not, nevertheless, undermine the fact that it would be the most effective protection that could be provided from a private-international-law perspective. Even more so than the protection potentially provided by rules based on various "classic" connecting factors pointing towards the defendant´s "native" legal system/where they are established (as their domicile, habitual residence, etc).

Truth be told, whichever approach is chosen, a core element which will certainly become problematic will be the definition of the personal scope of application of the rule, i.e. how to precisely identify subjects deserving access to the protection provided by a content-oriented choice-of-law provision of the sort suggested (and/or by substantive anti-SLAPP legislation, for that matter). This is a very delicate issue in an era of "fake news".

European Private International Law

Geert van Calster has just published the third edition of the book titled "European Private International Law: Commercial Litigation in the EU" with Hart.



The blurb reads as follows:

This classic textbook provides a thorough overview of European private international law. It is essential reading for private international law students who need to study the European perspective in order to fully get to grips the subject. Opening with foundational questions, it clearly explains the subject's central tenets: the Brussels I, Rome I and Rome II Regulations (jurisdiction, applicable law for contracts and tort). Additional chapters explore the Succession Regulation, private international law and insolvency, freedom of establishment,

and the impact of PIL on corporate social responsibility. The new edition includes a new chapter on the Hague instruments and an opening discussion on the impact of Brexit.
Drawing on the author's rich experience, the new edition retains the book's hallmarks of insight and clarity of expression ensuring it maintains its position as the leading textbook in the field.

The purpose of the book is to serve as an introductory text for students interested in EU Private International Law. The book can also be appreciated by non-EU students interested in EU Private International Law since it serves as an introductory text. It contains seven core chapters including the introduction. The full table of contents and introduction are provided free to readers and can be accessed respectively here and here

From what I have read so far in the introduction, this book is highly recommended. It brings the subject of EU Private International Law to the doorstep of the uninitiated and refreshes the knowledge of any expert on Private International Law ("PIL"). Though the core foundation of the book is on EU PIL, it contains some comparisons to other systems of PIL especially in the common law, in order to illustrate. Importantly, the introduction ends with the implications of Brexit for EU PIL and some interesting speculations.

More information on the book can be found here

Virtual Workshop (in English!) on 13 January 2020: AG Maciej Szpunar on Extraterritoriality

Since the summer, the Hamburg Max Planck Institute has hosted monthly virtual workshops on current research in private international law. That series, so far held in German, has proven very successful, with sometimes more than 1oo participants.

Starting in January, the format will be expanded. In order to broaden the scope of potential participants, the series will alternate between English and German presentations. The first English language speaker promises to be a highlight: Attorney-General Maciej Szpunar, author of the opinions in the landmark cases Google v CNIL (C-507/17) and Glawischnig-Pieschzek v Facebook Ireland Limited (C-18/18), as well as numerous other conflict-of-laws cases, most recently X v Kuoni (C-578/19). Szpunar will speak about questions of (extra-)territoriality, a topic of much interest for private international lawyers and EU lawyers since long ago, and of special interest for UK lawyers post-Brexit.

AG Maciej Szpunar
"New challenges to the Territoriality of EU Law"
Wednesday (!), 13 January 2021, 11:00-12:30 (Zoom)

As usual, the presentation will be followed by open discussion. All are welcome.

More information and sign-up here.

If you want to be invited to these events in the future, please write to veranstaltungen@mpipriv.de

Update HCCH 2019 Judgments Convention Repository

In preparation of the Conference on the HCCH 2019 Judgments Convention on 13/14 September 2021, planned to be taking place on campus of the University of Bonn, Germany, we are offering here a Repository of contributions to the HCCH 2019 Judgments Convention. Please email us if you miss something in it, we will update immediately…

We all benefited from your contributions at the Video Pre-Conference Roundtable on 29 October 2020. Our sincere thanks go to all the speakers and participants who pushed further the frontiers of our knowledge and understanding.

Update of 10 December 2020: New entries are printed bold.

Please also check the "official" Bibliograghy of the HCCH for the instrument.

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Report on the ERA conference of 29-30 October 2020 on ‘Recent Developments in the European Law of Civil Procedure’

This report has been prepared by Carlos Santaló Goris, a researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and Ph.D. candidate at the University of Luxembourg.

On 29-30 October 2020, ERA – the Academy of European Law – organized a conference on “Recent Developments in the European Law of Civil Procedure”, offering a comprehensive overview of civil procedural matters at the European and global level. The program proved very successful in conveying the status quo of, but also a prospective outlook on, the topics that currently characterise the debates on cross-border civil procedure, including the Brussels I-bis Regulation and 2019 HCCH Judgments Convention, the digitalisation of access to justice, the recent developments on cross-border service of documents and taking of evidence, and judicial cooperation in civil and commercial matters in the aftermath of Brexit.

For those who did not have the opportunity to attend this fruitful conference, this report offers a succinct overview of the topics and ideas exchanged over this two-day event.

Day 1: The Brussels I (Recast) and Beyond

The Brussels regime, its core notions and the recent contributions by the CJEU via its jurisprudence were the focus of the first panel. In this framework, Cristina M. Mariottini (Max Planck Institute Luxembourg) tackled the core notion of civil and commercial matters (Art. 1(1)) under the Brussels I-bis Regulation. Relying, in particular, on recent CJEU judgments, among which C-551/15, *Pula Parking*; C-308/17, *Kuhn*; C-186/19, *Supreme Site Services*, she reconstructed the

functional test elaborated by the CJEU in this area of the law, shedding the light on the impact of recent developments in the jurisprudence of the Court, i.a., with respect to immunity claims raised by international organizations.

Marta Pertegás Sender (Maastricht University and University of Antwerp) proceeded then with a comprehensive overview of the choice-of-court agreement regimes under the Brussels I-bis Regulation and the 2005 Hague Convention on choice of court agreements. Relying, inter alia, on the CJEU case law on Article 25 of the Brussels I-bis Regulation (C-352/13, *CDC Hydrogen*; C-595/17, *Apple Sales*; C-803/18, *Balta*; C-500/18, *AU v. Reliantco*; C-59/19, *Wikingerhof* (pending)), she highlighted the theoretical and practical benefits of party autonomy in the field of civil and commercial matters.

The interface between the Brussels I-bis Regulation and arbitration, and the boundaries of the arbitration exclusion in the Regulation, were the focus of Patrick Thieffry (International Arbitrator; Member of the Paris and New York Bars) in his presentation. In doing so he analysed several seminal cases in that subject area (C-190/89, *Marc Rich*; C-391/95, *Van Uden*; C-185/07, *West Tankers*; C?536/13, *Gazprom*), exploring whether possible changes were brought about by the Brussels I-bis Regulation.

The evolution of the CJEU's jurisprudence vis-à-vis the notions of contractual and non-contractual obligations were at the heart of the presentation delivered by Alexander Layton (Barrister, Twenty Essex; Visiting Professor at King's College, London). As Mr Layton effectively illustrated, the CJEU's jurisprudence in this field is characterized by two periods marking different interpretative patterns: while, until 2017, the CJEU tended to interpret the concept of contractual matters restrictively, holding that "all actions which seek to establish the liability of a defendant and which are not related to a contract" fall within the concept of tort (C-189/87, *Kalfelis*), the Court interpretation subsequently steered towards an increased flexibility in the concept of "matters relating to a contract" (C-249/16, *Kareda*; C-200/19, *INA*).

The principle of mutual trust of the European Area of Freedom, Security and Justice vis-à-vis the recent Polish judicial reform (and its consequential backlash on the rule of law) was the object of the presentation delivered by Agnieszka

Fr?ckowiak-Adamska (University of Wroc?aw). Shedding the light on the complex status quo, which is characterized by several infringement actions initiated by the European Commission (C?192/18, *Commission v Poland*; C?619/18, *Commission v Poland*; C?791/19 R, Commission v Poland (provisional measures)) as well as CJEU case law (e.g. C?216/18 PPU, *Minister for Justice and Equality v LM*), Ms Fr?ckowiak-Adamska also expounded on the decentralised remedies that may be pursued by national courts in accordance with the EU civil procedural instruments, among which public policy, where available, and refusal by national courts to qualify Polish judgments as "judgments" pursuant to those instruments.

The second half of the first day was dedicated to the 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. In this context, it is of note that the EU, among others, has opened a Public Consultation into a possible accession to the Convention (see, esp., Thomas John's posting announcing the EU's public consultation). While Ning Zhao (Senior Legal Officer, HCCH) gave an overview of the *travaux preparatoires* of the 2019 HCCH Convention and of the main features of this instrument, Matthias Weller (University of Bonn) delved into the system for the global circulation of judgments implemented with the Convention, highlighting its traditional but also innovative features and its potential contributions, in particular to cross-border dealings.

The roundtable that followed offered the opportunity to further expound on the 2019 HCCH Judgments Convention. Namely, Norel Rosner (Legal and Policy Officer, Civil Justice, DG for Justice and Consumers, European Commission) explained that the EU has a positive position towards the Convention, notably because it facilitates the recognition and enforcement of EU judgments in third countries and because it will help create a more coherent system of recognition and enforcement in the EU Member States of judgments rendered in other (of course, non-EU) Contracting States. The roundtable also examined the features and objectives of Article 29, which puts forth an "opt-out" mechanism that allows Contracting States to mutually exclude treaty obligations with those Contracting States with which they are reluctant to entertain the relations that would otherwise arise from the Convention. As Ms Mariottini observed, this provision – which combines established and unique characters compared to the systems put forth under the previous HCCH Conventions – contributes to defining the "territorial geometry" of the Convention: it enshrines a mechanism that counterbalances the unrestricted openness that would otherwise stem from the

universality of the Convention, and is a valuable means to increase the likelihood of adherence to the Convention. Matthias Weller proceeded then to explore the consequences of limiting a Contracting State's objection window to 12 months from adherence to the Convention by the other Contracting State and raised the case of a Contracting State whose circumstances change so dramatically, beyond the 12-month window, that it is no longer possible to assure judicial independence of its judiciary. In his view, solutions as the ones proposed by Ms Fr?ckowiak-Adamska for the EU civil procedural instruments may also apply in such circumstances.

Day 2: European Civil Procedure 4.0.

Georg Haibach (Legal and Policy Officer, Civil Justice, DG for Justice and Consumers, European Commission), opened the second day of the conference with a detailed presentation on the ongoing recast of the Service Regulation (Regulation (EC) No 1393/2007). Emphasizing that the main objective of this reform focuses on digitalization – including the fact that the proposed recast prioritises the electronic transmission of documents – Mr Haibach also shed the light on other notable innovations, such as the possibility of investigating the defendant's address.

The Evidence Regulation (Council Regulation No. 1206/2001), which is also in the process of being reformed, was at the core of the presentation delivered by Pavel Simon (Judge at the Supreme Court of the Czech Republic, Brno) who focuses not only on the status quo of the Regulation as interpreted by the CJEU (C-283/09, Wery?ski; C-332/11, ProRail; C-170/11, Lippens), but also tackled the current proposals for a reform: while such proposals do not appear to bring major substantive changes to the Regulation, they do suggest technological improvements, for instance favouring the use of videoconference.

In her presentation, Xandra Kramer (University of Rotterdam and Utrecht University) analysed thoroughly two of the CJEU judgments on "satellite" instruments of the Brussels I-bis Regulation: the EAPO Regulation (Regulation No. 655/2014); and the EPO Regulation (Regulation No. 1896/2006). C-555/18, was the very first judgment that the CJEU rendered on the EAPO Regulation.

Xandra Kramer remarked the underuse of this instrument. In the second part of her lecture, she identified two trends in the judgments on the EPO Regulation (C?21/17, Caitlin Europe; Joined Cases C?119/13 and C?120/13, ecosmetics; Joined Cases C?453/18 and C?494/18, Bondora), observing that the CJEU tries, on the one hand, to preserve the efficiency of the EPO Regulation, while at the same time seeking to assure an adequate protection of the debtor's position.

In the last presentation of the second day, Helena Raulus (Head of Brussels Office, UK Law Societies) explored the future judicial cooperation in civil matters between the EU and the United Kingdom in the post-Brexit scenario. Ms Raulus foresaw two potential long-term solutions for the relationship: namely, relying either on the 2019 Hague Convention, or on the Lugano Convention. In her view, the 2019 Hague Convention would not fully answer the future challenges of potential cross-border claims between EU Member States and the UK: it only covers recognition and enforcement, while several critical subject areas are excluded (e.g. IP-rights claims); and above all, from a more practical perspective, it is still an untested instrument. Ms Raulus affirmed that the UK's possible adherence to the Lugano Convention is the most welcomed solution among English practitioners. Whereas this solution has already received the green light from the non-EU Contracting States to the Lugano Convention (Iceland, Norway, and Switzerland), she remarked that to date the EU has not adopted a position in this regard.

The conference closed with a second roundtable, which resumed the discussions on the future relations between the EU and the UK on judicial cooperation in civil law matters. Christophe Bernasconi (Secretary General, HCCH) offered an exhaustive review on the impact of the UK withdrawal from the EU on all the existing HCCH Conventions. From his side, Alexander Layton wondered if it might be possible to apply the pre-existing bilateral treaties between some EU Member States and the UK: in his view, those treaties still have a vestigial existence in those matters non-covered by the Brussels I-bis Regulation, and thus they were not fully succeeded. In Helena Raulus's view, such treaties would raise competence issues, since the negotiating of such treaties falls exclusively with the EU (as the CJEU found in its Opinion 1/03). As Ms Raulus observed, eventually attempts to re-establish bilateral treaties between the Member States and the UK might trigger infringement proceedings by the Commission against those Member States. The discussion concluded by addressing the 2005 Hague Convention and

it is applicability to the UK after the end of the transition period.

Overall, this two-day event was characterized by a thematic and systematic approach to the major issues that characterize the current debate in the area of judicial cooperation in civil and commercial matters, both at the EU and global level. By providing the opportunity to hear, from renowned experts, on both the theoretical and practical questions that arise in this context, it offered its audience direct access to highly qualified insight and knowledge.

Request for preliminary ruling from Bulgaria: Recognition of foreign birth certificate

The Administrative Court of the City of Sofia, Bulgaria, has recently submitted a request for a preliminary ruling revolving around the recognition of a foreign birth certificate issued by another EU Member State (Case C-490/20):
The case concerns a refusal of a municipality in Sofia to issue a Bulgarian birth certificate to a child of two female same sex mothers of Bulgarian and UK nationality who entered into a civil marriage in Gibraltar, UK. The child was born in Spain, where a birth certificate was issued on which it was recorded that mothers of the child were both a Bulgarian national, designated 'Mother A', and a UK national, designated 'Mother', both persons being female. The municipality refused to issue the requested birth certificate because the applicants did not point out who was the biological mother, intending most probably to issue the certificate only for one mother. Bulgaria is one of the few EU Member States without access to either same sex marriage or any type of civil partnership.

The Bulgarian mother brought legal proceedings before the Administrative Court of the City of Sofia against the refusal by the Sofia municipality, where the court referred the following questions to the CJEU for a for preliminary ruling:

1. Must Article 20 TFEU and Article 21 TFEU and Articles 7, 24 and 45 of the

Charter of Fundamental Rights of the European Union be interpreted as meaning that the Bulgarian administrative authorities to which an application for a document certifying the birth of a child of Bulgarian nationality in another Member State of the EU was submitted, which had been certified by way of a Spanish birth certificate in which two persons of the female sex are registered as mothers without specifying whether one of them, and if so, which of them, is the child's biological mother, are not permitted to refuse to issue a Bulgarian birth certificate on the grounds that the applicant refuses to state which of them is the child's biological mother?

2. Must Article 4(2) TEU and Article 9 of the Charter of Fundamental Rights of the European Union be interpreted as meaning that respect for the national identity and constitutional identity of the Member States of the European Union means that those Member States have a broad discretion as regards the rules for establishing parentage? Specifically:
– Must Art. 4(2) TEU be interpreted as allowing the Member State to request information on the biological parentage of the child?
– Must Article 4(2) TEU in conjunction with Article 7 and Article 24(2) of the Charter be interpreted as meaning that it is essential to strike a balance of interests between, on the one hand, the national identity and constitutional identity of a Member State and, on the other hand, the best interests of the child, having regard to the fact that, at the present time, there is neither a consensus as regards values nor, in legal terms, a consensus about the possibility of registering as parents on a birth certificate persons of the same sex without providing further details of whether one of them, and if so, which of them, is the child's biological parent? If this question is answered in the affirmative, how could that balance of interests be achieved in concrete terms?

3. Is the answer to Question 1 affected by the legal consequences of Brexit in that one of the mothers listed on the birth certificate issued in another Member State is a UK national whereas the other mother is a national of an EU Member State, having regard in particular to the fact that the refusal to issue a Bulgarian birth certificate for the child constitutes an obstacle to the issue of an identity document for the child by an EU Member State and, as a result, may impede the unlimited exercise of her rights as an EU citizen?

4. If the first question is answered in the affirmative: does EU law, in particular the principle of effectiveness, oblige the competent national authorities to

derogate from the model birth certificate which forms part of the applicable national law?

Thank you, Boriana Musseva, for the tip-off!

Update HCCH 2019 Judgments Convention Repository

In preparation of the Conference on the HCCH 2019 Judgments Convention on 13/14 September 2021, planned to be taking place on campus of the University of Bonn, Germany, we are offering here a Repository of contributions to the HCCH 2019 Judgments Convention. Please email us if you miss something in it, we will update immediately…

We all benefited from your contributions at the Video Pre-Conference Roundtable on 29 October 2020. Our sincere thanks go to all the speakers and participants who pushed further the frontiers of our knowledge and understanding.

Update of 17 November 2020: New entries are printed bold.

Please also check the "official" Bibliograghy of the HCCH for the instrument.

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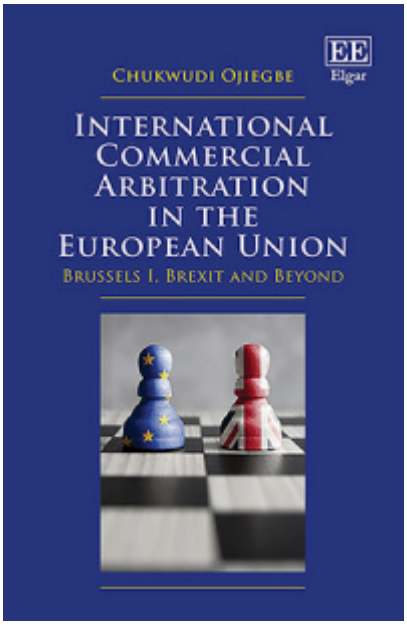
Chukwudi Ojiegbe on International Commercial Arbitration in the European Union

Chukwudi Ojiegbe has just published a book titled: "International Commercial Arbitration in the European Union: Brussels I, Brexit and Beyond" with Edward Elgar Publishing.



The abstract reads as follows:

This illuminating book contributes to knowledge on the impact of Brexit on international commercial arbitration in the EU. Entering the fray at a critical watershed in the EU's history, Chukwudi Ojiegbe turns to the interaction of court litigation and international commercial arbitration, offering crucial insights into the future of EU law in these fields.

Ojiegbe reviews a plethora of key aspects of the law that will encounter the aftermath Brexit, focusing on the implications of the mutual trust principle and the consequences for the EU exclusive competence in aspects of international commercial arbitration. He explores the principles of anti-suit injunction and other mechanisms that may be deployed by national courts and arbitral tribunals to prevent parallel court and arbitration proceedings. Advancing academic debate on the EU arbitration/litigation interface, this book suggests innovative solutions to alleviate this longstanding and seemingly intractable issue.

Arriving at a time of legal uncertainty, this book offers crucial guidance for policymakers and lawyers dealing with the interaction of court litigation and international commercial arbitration in the EU, as well as academics and researchers studying contemporary EU and commercial law.

Anyone interested in the interface between commercial arbitration and the Brussels I regime should read this book – they will find much value in doing so. It is highly recommended.

More information may be found here and here

The Italian Supreme Court on Competence and Jurisdiction in

Flight Cancellation Claims

The case

In a recent decision deposited 5 November 2020 (ordinanza 24632/20), the Italian Supreme Court has returned on the competent court in actions by passengers against air carriers following cancellation of flights.

The case is quite straightforward and can be summarized as follows: (i) passengers used a travel agency in Castello (province of Perugia) to buy EasyJet flight tickets; (ii) the Rome(Fiumicino)-Copenhagen fight was cancelled without any prior information being given in advance; (iii) passengers had to buy a different flight from another air carrier to Hamburg, and travel by taxi to their final destination – thus sustaining additional sensitive costs.

Before the Tribunal (*Tribunale*) in Perugia, the passengers started proceedings against the air carrier asking for both the standardized lump-sum compensation they were entitled under the Air Passenger Rights Regulation following the cancellation of the flight (art. 5 and art. 7), and for the additional damages sustained due to the cancellation.

The relevant legal framework: an overview

Passengers requested Italian courts to adjudicate two different set of claims, each of which has its own specific legal basis.

One the one side, the specific right for standardized lump-sum compensation in case of cancellation of flight is established by the EU Air Passenger Rights Regulation; on the other side, the additional damage for which they sought compensation did fall within the scope of application of the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air.

As it has already been clarified by the Court of Justice of the European Union (see *ex multis* Case C-464/18, para. 24), the Air Passenger Rights Regulation entails no rule on jurisdiction – with the consequence that this is entirely governed by the

Brussels I bis Regulation. On the contrary, to the extent the Brussels I bis Regulation and the 1999 Montreal Convention overlap in their respective scope of application, the latter is to be granted primacy due to its *lex special* character (under the *lex specialis* principle). Hence, the questions of jurisdiction for the two claims have to be addressed separately and autonomously one from the other – each in light of the respective relevant instrument (see CJEU Case C-213/18, para. 44).

The decision of the Italian court

Focusing on international civil procedure aspects of the decision, claimants did start one single proceedings against the air carrier before the *Tribunale* in Perugia, the place where the flight ticket was bought though a travel agency.

The air carrier contested this jurisdiction and competence (as the value of individual claims rather than the value of aggregated claims pointed to the competence *rationae valoris* of the Giudice di pace – Justice of the peace – of Castello in the province of Perugia) up to the Supreme court invoking the Brussels I bis Regulation.

The air carrier supported the view that the competent courts where either those having territorial competence over the airport of departure (i.e. the court in Civitavecchia, under art. 7, Brussels I bis) or arrival (in Copenhagen, always under art. 7 Brussels I bis; cf CJEU Case C-204/08), or courts in London (under art. 4 Brussels I bis).

The passengers insisted on their position invoking the 1999 Montreal Convention assuming that proceedings were brought at the "*place of business through which the contract has been made*", one of the heads of jurisdiction under art. 33 of the Convention. Moreover, the passengers argued that the Convention only contained rules on international jurisdiction and not on territorial competence, this aspect being entirely governed by internal civil procedure.

a. On UK Companies

As a preliminary matter, the Italian Supreme court acknowledges 'Brexit' and the Withdrawal Agreement, yet proceeds without sensitive problems in the evaluation and application of EU law as the transition period has not expired at the time of the decision according to artt. 126 and 127 of the agreement (*point 1, reasoning in law*).

b. Autonomous actions: the proper place for starting proceedings

Consistently with previous case law (CJEU Case C-213/18, para. 44), the Italian Supreme court concludes for the autonomy of the legal actions brought before the courts, arguing that jurisdiction has to be autonomously addressed (*point 3, reasoning in law*).

Actions based on lump-sum standardized compensation in cases of cancellation of flights deriving from the Air Passenger Rights Regulation do entirely and exclusively fall under the scope of application of the Brussels I bis Regulation – art. 7 being applicable. In this case, the Italian territorial competent court is the one having territorial jurisdiction over the airport of departure – (Rome Fiumicino), i.e. the *Giudice di pace* of Civitavecchia.

Actions for additional damages connected to long delays or cancellation of flights, the right for compensation deriving from the Montreal Convention, remain possible before the courts identified under art. 33 of the 1999 Montreal Convention (*point 3, reasoning in law*).

Here, two elements are of particular interests.

In the first place, the Italian Supreme court apparently changes its previous understanding of the Convention as it concedes that rules on jurisdiction therein enshrined are not merely rules on international jurisdiction, but are also rules on territorial competence (*point 6, reasoning in law*; consistent with *Case C-213/18*; overrules Cassazione 3561/2020 where territorial competence was determined according to domestic law).

In the second place, the court dwells – in light of domestic law – on the notion of "*place of business through which the contract has been made*" *ex* art. 33 of the Convention, which grounds a territorial competence (*point 6.3, reasoning in law*).

Distinguishing its decision from cases where passengers directly buy online tickets from the air carriers, it is the court's belief that a travel agency operates under IATA Sales Agency Agreements, hence as an authorized "representative" of the air carrier business for the purposes of the provision at hand. According to the court, the fact that a travel agency may be considered as a ticket office of the air carrier for the purposes of art. 33 of the 1999 Montreal Convention is nothing more than a *praesumptio hominis*; yet such a circumstance was not challenged by the air carrier and thus, under Italian law, considered proven and final. This, with the consequence that competence for damages related to the cancellation of the flight, other than the payment of compensation under the Air Passenger Rights Regulation, is reserved to the Justice of the peace (giudice di pace) competent *rationae valoris* of the place where the travel agency (in Castello, near Perugia) is located, as this place is the "*place of business through which the contract has been made*".

c. Connected actions

The Italian Supreme court acknowledges the impracticalities that may follow from the severability of closely related actions grounded on same facts (*point 6.3, reasoning in law*), in particular where compensation for damages granted from one court under the 1999 Montreal Convention must deduct compensation already granted by another court under the Air Passenger Rights Regulation. In this sense, *in fine* the court mentions the possibility to refer to art. 30 Brussels I bis Regulation, presumably having in mind also art. 30(2).

Open questions

Whereas the decision of the Italian Supreme court largely follows indications of the Court of Justice of the European Union, some passages appear to leave room for discussion.

Firstly, even though correctly primacy to the 1999 Montreal Convention over the Brussels I bis Regulation is granted, the proper disconnection clause is not

analyzed at all in the decision. In a number of previous decisions, the court did address the disconnection clause, arguing in favor of the *lex specialis* invoking art. 71 Brussels I bis Regulation – a provision that grants priority to international conventions in specific matters to which Member States are party to (cf *Cass 18257/2019, and Cass 3561/2020*). However, given that the EU has become part to the 1999 Montreal Convention by way of a Council Decision in 2001, other courts have invoked art. 67 to solve the coordination issue – as this provision is destined to govern the relationship between Brussels I bis and rules on jurisdiction contained in other "*EU instruments*" (cf *LG Bremen, 05.06.2015 – 3 S 315/14*). A position, the latter, that appears consistent with art. 216(2) TFEU, according to which "*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*". In this sense, the Italian Supreme court could have dwelled more on the proper non-affect clause to be applied when it comes to the relationships between the Brussels I bis Regulation and the 1999 Montreal Convention.

Secondly, the final remarks of the Italian Supreme court on related actions in the Brussels I bis also should impose a moment of reflection. In the case at hand there were no parallel proceedings, so the "indications" of the court were nothing more than that.

However, recourse to the rules on related actions of the Brussels I bis Regulation should be allowed only so far no specific rule is contained in the *lex specialis*. Again, an evaluation on the existence of such rules is completely missing in the decision.

More importantly, even though it is generally accepted that Brussels I bis rules on coordination on proceedings can be subject to a somewhat "extensive" interpretation (as current art. 30 on related actions has been deemed applicable regardless of whether courts ground their jurisdiction on domestic law or on the regulation itself – cf Case C-351/89, para. 14), it remains that art. 30 refers to parallel proceedings pending "*in the courts of different Member States*". A circumstance that would not occur where proceedings are pending before two courts of *the same Member State*, as the one dealt with by the Italian supreme court in the case at hand.

The present research is conducted in the framework of the En2Bria project (Enhancing Enforcement under Brussels Ia – EN2BRIa, Project funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 831598). The content of the Brussels Ia – EN2BRIa, Project, and its deliverables, amongst which this webpage, represents the views of the author only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

The Development of Private International Law of Family Law in the UK – Friday 6th November 10.00 – 4.30pm

Online public AHRC workshops on Private International Law after Brexit from global, European, Commonwealth and intra-UK perspectives

Professor Paul Beaumont (University of Stirling), Dr Mihail Danov (University of Exeter) and Dr Jayne Holliday (University of Stirling) are delighted to be able to host the following AHRC funded Research Network workshop.

How to join the online workshop:

- The event will be held using Microsoft Teams.
- The link for the event is – http://stir.ac.uk/44h
- Or click here on Friday 6th November to join the online workshop.

Any queries please contact Dr Jayne Holliday at j.holliday@stir.ac.uk

The Development of Private International Law in the UK post Brexit

AHRC Research Network Workshop II – Family Law – Programme

Friday 6 November 2020

10.00-10.15 – Welcome and introduction by Dr Jayne Holliday (University of Stirling)

10.15-10.45 – Hague Intercountry Adoption Convention – how it should be interpreted and applied by Laura Martínez-Mora (Secretary, Hague Conference on Private International Law)

10.45-11.00 – Discussion

11.00-11.15 – Break

11.15-11.45 – Private International Law of Family Agreements after Brexit by Alexandre Boiché (French advocate, member of the Experts' Group on Family Agreements at the Hague Conference on Private International Law)

11.45-12.15 – International Surrogacy and International Parentage – hopes for a global solution by Professor Giacomo Biagioni (University of Cagliari)

12.15-12.30 – Discussion

12.30-13.30 – Break for lunch

13.30-14.00 – Private International Law of Parental Responsibility (Custody and Access) after Brexit by Professor Thalia Kruger (University of Antwerp)

14.00-14.30 – Private International Law of Divorce after Brexit by Dr Máire Ní Shúilleabháin (University College Dublin)

14.30-14.45 Discussion

14.45-15.00 Break

15.00-16.00 – Keynote speech by Lord Justice Moylan 'International Family Justice – Where are we Going?'

16.00-16.30 – Concluding remarks incorporating some comments on maintenance

after by Brexit by Professor Paul Beaumont (University of Stirling)