Of Hints, Cheats, and Walkthroughs – The Australian Consumer Law, The Digital Economy, and International Trade

By Dr Benjamin Hayward

Those who enjoy playing video games as a pastime (though certainly not in the competitive esports environment) might take advantage of different forms of assistance when they find themselves stuck. Once upon a time, they might have read up on tips and tricks printed in a physical video game magazine. These days, they are more likely to head online for help. They might seek out hints – tidbits of information that help point the gamer in the right direction, but that still allow them to otherwise work out a solution on their own. They might use cheats – which allow the gamer 'to create an advantage beyond normal gameplay'. Otherwise, they might use a walkthrough – which, as the name suggests, might walk a player through the requirements of perhaps even 'an entire video game'.

Despite initial appearances, these definitions do more than just tell us about recreation in general, and gaming culture in particular. They also help us understand the state of play in relation to the Australian Consumer Law's application to the digital economy, and, in turn, the ACL's implications for international digital economy trade.

This video game analogy is actually very apt: gaming set the scene for recent litigation confirming the ACL's application to off-shore video game vendors. In the *Valve* case concerning the Steam computer gaming platform, decisions of the Federal Court of Australia and (on appeal) its Full Court confirmed that reach, via interpretation of the ACL's s 67 conflict of laws provision. The High Court of Australia denied special leave for any further appeal. In the subsequent Sony Europe case, concerning the PlayStation Network, liability was not contested. On the other hand, there was a live issue in Valve – at least at first instance – as to whether or not video games constitute 'goods' for the purposes of the ACL's consumer guarantees. The ACL's statutory definition of goods includes 'computer

software'. Expert evidence, not contested and accepted by the Federal Court, treated computer software as equivalent to executable files; which may work with reference to non-executable data, which is not computer software in and of itself.

Understanding the ACL's definition of 'goods' has significant implications. The 'goods' concept is a gateway criterion: it determines whether or not the ACL's consumer guarantees apply, and in turn, whether it is possible to mislead consumers about the existence of associated rights. So far as digital economy trade is concerned, case law addressing Australia's regular Sale of Goods Acts confirms that purely-digital equivalents to traditional physical goods are not 'goods' at common law. Any change to this position, according to the New South Wales Supreme Court, requires statutory intervention. Such intervention did occur when the *Trade Practices Act 1974* (Cth) transitioned into the *Competition and Consumer Act 2010* (Cth). Now, 'computer software' constitutes a statutory extension to the common law definition of 'goods' that would otherwise apply.

It is against all this context that a very recent decision of the Federal Court of Australia – *ACCC v Booktopia Pty Ltd* [2023] FCA 194 – is of quite some interest. Whilst most of the decision is uncontroversial, one aspect stands out: the Court held, consistently with Booktopia's admission, that eBooks fall within the scope of the ACL's consumer guarantee protections. This finding contributed to an AUD $6 million civil pecuniary penalty being imposed upon Booktopia for a range of breaches of the ACL. But is it actually correct? Whether or not that is so depends upon whether the statutory phrase 'computer software' extends to digital artefacts other than traditional desktop computer programs. There is actually good reason, based upon the expert evidence tendered and accepted in the Valve litigation, to think not.

So what does the Booktopia case represent? It could be a hint – an indication that will eventually lead us to a fully-explained understanding of the ACL's wide reach across the digital economy. In this sense, it might be a pointer that helps us to eventually solve this interpretative problem on our own. Or it could be a cheat – a conclusion possibly justified in the context of this individual case given Booktopia's admissions, but not generalisable to the ACL's normal operation. Either way, given the ACCC's expressed view (not necessarily supported by the ACL's actual text) that '[c]onsumers who buy digital products … have the same rights as those who shop in physical stores', what we really need now is a walkthrough: a clear and reasoned explanation of exactly what 'computer

software' actually means for the purposes of the ACL. This will ensure that traders have the capacity to know their legal obligations, and will also allow Parliament to extend the ACL's digital economy protections if its reach is actually limited in the way that my own scholarship suggests.

All of this has significant implications for international trade, as 'many transfers' of digital assets 'are made between participants internationally'. The increasing internationalisation and digitalisation of trade makes it imperative that this ambiguity be resolved at the earliest possible opportunity. Since, in the words of the Booktopia judgment, ACL penalties 'must be of an appropriate amount to ensure that [their] payment is not simply seen as a cost of doing business', traders – including international traders – do need to know with certainty whether or not they are subject to its consumer protection regime.

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The Fourth Private International Law Conference for Young Scholars in Vienna

Written by Alessa Karlinski and Maren Vogel (both Free University Berlin).

On February 23rd and 24th, 2023, young scholars came together at the Sigmund Freud University, Vienna, to discuss different views on private international law under the theme of "Deference to the foreign – empty phrase or guiding principle

of private international law?". Continuing the success of the previous three German-Speaking Conferences of Young Scholars in PIL from previous years in Bonn, Würzburg and Hamburg, this year's conference was hosted in Austria by Martina Melcher and Florian Heindler who organized the event together with Andreas Engel, Katharina Kaesling, Ben Köhler, Bettina Rentsch, Susanna Roßbach and Johannes Ungerer.

As keynote speaker, ***Professor Horatia Muir Watt (Sciences Po Paris)*** borrowed from the often-used metaphor of the "dismal swamp" to present an "ecosophical" approach to private international law. For this purpose, she engaged anthropological and philosophical insights of Western and indigenous origin on the meaning of law and the regulatory functions of private international law in particular.

Vanessa Grifo (University of Heidelberg) presented possible insights from the theory of the post-migrant society for international family law. Based on sociological accounts of "post-migrant" identities, *Grifo* discussed that a person's cultural identity can form "hybrid" solidarity to different legal systems and oppose the collective national identity of the country of immigration. While previously, according to *Kegel*, connecting factors were understood to build upon certain generally neutral conflict-of-laws interests, cultural identity is becoming a relevant aspect of party interests, which she demonstrated with the help of different recent judgement of the German Federal Court of Justice. This paradigm, *Grifo* argued, shows a shift from the system of the traditional German understanding of connecting factors following Kegel.

Victoria Garin (European University Institute, Florence) examined the connection between private international law and the concept of Relativism. The basis of her analysis is the contemporary private international law attempting to coordinate conflicting regulatory claims of several legal systems. *Garin* identified extraterritoriality, difference and equivalence as assumptions used in private international law to solve this conflict. These assumptions, *Garin* argued, are premised on Relativism in its forms as descriptive and normative theory. Through the lens of Relativism a critical examination of private international law, especially regarding current developments in literature, was made. *Garin* explained to what extent the criticism of Relativism can be applied to private international law theory.

Dr Shahar Avraham-Giller (Hebrew University Jerusalem) presented two seemingly contradictory developments in private international law. First *Avraham-Giller* pointed out, that legal questions are increasingly restrictively categorised as procedural questions in the EU and in common law states which leads to a broader application of foreign law as the *lex causae*. The application of the *lex fori* to procedural questions can itself be understood as an overriding mandatory provision of the forum. On the other hand, as *Avraham-Giller* projected, an increased recourse of courts to the means of other overriding mandatory provisions to safeguard national public interests can be observed. In her opinion, these seemingly contradictory developments can be explained as an answer to the development of a more "private" understanding of civil proceedings, seeking primarily peaceful settlement of private disputes, while enforcing other values and public goals through mandatory overriding provisions at the same time.

Raphael Dummermuth (University of Fribourg) then shed light on deference to the foreign in the context of the interpretation of the Lugano Convention. First, he addressed the question of the implementation of the objective of taking into account the case law of the ECJ by non-EU courts, as stated in Art. 1(1) Protocol 2 Lugano Convention. The application of the Lugano Convention, he pointed out, requires a double consideration of the foreign: the court must consider standards or judgments that are outside the Lugano Convention and in doing so apply a foreign methodology. Nonetheless, the one-sided duty of consideration is limited where the results of interpretation are decisively based on principles of EU law. He came to the conclusion, that precedent effect should therefore only be given to results that are justifiable within the scope of the classical methodology.

The first day of the conference closed with a panel discussion between ***Professor Dietmar Czernich, Professor Georg Kodek*** *and* ***Dr Judith Schacherreiter*** on deference to the foreign in private international legal practice and international civil procedure. The discussants shared numerous insights: from the appointment of expert opinions on foreign law, to deference to the foreign in international commercial arbitration and the practice of legal advice.

Selina Mack (LMU Munich) opened the second day of the conference examining the *ordre public* in the field of succession law using the example of the right to a compulsory portion in Austria and Germany. *Mack* began by comparing similar regulations in Germany and Austria with the so-called family provision in

England. She then contrasted a decision of the Supreme Court of Austria (OGH) with a decision of the German Federal Court of Justice (BGH), both of which deal with the *ordre public* according to Art. 35 of the European Inheritance Regulation when applying English law. The *ordre public* clause under Art. 35 is to be applied restrictively. While the OGH did not consider the *ordre public* to be infringed, the BGH, on the other hand, assumed an infringement. *Mack* concluded that this is a fundamental disrespect of the foreign by the BGH.

Tess Bens (MPI Luxembourg) examined methods of enforcing foreign judgments under the Brussels Ia Regulation. Said Regulation does not, in principle, harmonise enforcement law. She presented the enforcement mechanism as applying the enforcement law of the enforcing state by means of substitution or, insofar as the order or measure was unknown to the enforcement law, by means of transposition. Due to structural differences in the enforcement law of the Member States, as *Bens* outlines, practical problems can nevertheless arise. Especially since the abolition of the exequatur procedure in the case of insufficient concretisation of the enforcement order, the Brussels Ia Regulation does not provide a procedure. Finally, she discussed that these frictions might be mitigated by anticipating differences and requirements of the enforcing by the courts, nonetheless limited due to the difficulty of predictability.

Afterwards, the participants were able to discuss various topics in a small group for one hour in three parallel groups, each introduced by two impulse speeches.

The first group looked at the factor of nationality in private international law. ***Stefano Dominelli (Università di Genova)*** introduced into the current debate on the connecting factor of nationality in matters concerning the personal status. In his opinion, it is debateable whether a shift towards the application of local law really strengthens deference to the foreign. ***Micheal Cremer (MPI Hamburg)*** looked at the handling of so-called golden passports in the EU. He pointed out, that European conflict of laws regularly does not take the purchased nationality into account, being in line with most of the theoretical approaches to the nationality principle.

The second group focused on the influence of political decisions on the application of foreign law. ***Dr Adrian Hemler (University of Konstanz)*** presented the concept of distributive justice as a reason for applying foreign law. He emphasised, that the difference between purely national and foreign

constellations makes the application of foreign law necessary. In his presentation, ***Felix Aiwanger (LMU Munich)*** looked at different standards of control with regard to foreign law. He argued that legal systems that can be considered as reliable are subject to a simplified content review.

The third group discussed the treatment of foreign institutions in international family law. ***Dr Lukas Klever (JKU Linz)*** presented the recognition of decisions on personal status in cases of surrogacy carried out abroad. He discussed differences and possible weaknesses in the recognition under the Austrian conflict of laws and procedural law. ***Aron Johanson (LMU Munich)*** then provided a further perspective with a look at the institute of polygamy. He explained, that while in Germany a partial recognition can be possible, Sweden had switched to a regular refusal of recognition. Subsequently the question of a duty of recognition arising from the free movement of persons as soon as one member state recognises polygamy was asked.

Dr Tabea Bauermeister (University of Hamburg) devoted her presentation to the conflict of laws dimension of the claim for damages in Art. 22 of the European Commission's proposal for a directive on corporate sustainability due diligence (CSDDD), paragraph 5 of which compels the member states to design it as an overriding mandatory provision. She outlined, that regulatory goals can also be achieved through mutual conflict-of-laws provisions. An example of this is the codification of international cartel offence law. *Bauermeister* concluded, that the use of mandatory overriding provisions instead of special conflict-of-laws provisions expresses a distrust of the foreign legislature's competence or willingness to regulate and therefore represents a disregard of the foreign.

Dr Sophia Schwemmer (Heidelberg University) then examined private enforcement under the CSDDD vis-à-vis third-state companies. She stated, that while third-state companies were included in the scope of application insofar as they are active in the EU internal market, the applicability of the CSDDD could normally not be achieved using the classic conflict-of-laws rules. The CSDDD resorts to an overriding mandatory provision for this purpose. However, *Schwemmer* concluded that a different approach, e.g. an extended right of choice of law for the injured party, was also imaginable and preferable.

As last speaker, ***Dr Lena Hornkohl (University of Vienna/Heidelberg University)*** addressed the effects of EU blocking regulations on private law. She

stated that the application of EU blocking statutes as a reaction to extraterritorial third-country regulations can lead to almost irresolvable conflicts in private law relationships. *Hornkohl* then critically examined the ECJ case law that postulates the direct applicability of the Blocking Regulation in private law relationships. Binding private parties to the Blocking Regulation, she concluded, leads to the instrumentalisation of private law at the expense of private parties with the aim of enforcing foreign policy objectives.

A conference volume will be published by Mohr Siebeck Verlag later this year. The next PIL Young Researchers Conference will take place in Heidelberg in 2025.

The Dutch Supreme Court on how to deal with the CISG on appeal (Willemen Infra v Jura)

On 24 February 2023, the Dutch Supreme court has ruled in the case Willemen Infra v Jura, ECLI:NL:HR:2023:313. The ruling clarifies the scope of the Dutch courts' duty to apply the CISG (UN Convention on Contracts for the International Sale of Goods, 1980) ex officio on appeal. The Dutch appellate courts shall not review of their own motion whether the first instance court had to apply the CISG to the dispute, if the question of governing law was not the subject of parties' objections on appeal and thus got "beyond the parties' dispute".

Facts

The facts of this case related to a sale of gutters by a Dutch seller to a Belgian buyer. The gutters were to be used for the renovation of a runway at Zaventem airport. According to the seller's general terms and conditions, the disputes were to be resolved before a Dutch court on the basis of Dutch law.

After the start of performance, the buyer had reasons to assume that that the

seller was unable to timely supply the products of the required quality. The buyer refused to take all the purchased gutters.

Proceedings

The seller disagreed and claimed damages for the loss of profit caused by the breach of contract. In the proceedings, the buyer submitted a counterclaim, invoking partial avoidance of contract and, alternatively, nullity of contract due to vitiation of consent. The buyer submitted namely that it had concluded the contract based on misrepresentation relating to the products' quality (the certificates which the products should have) and the delivery time.

The seller relied on both the CISG and Dutch law in its written submissions, including the statement that the choice for Dutch law in the general terms and conditions should be interpreted as excluding the application of the CISG. During the oral hearing, both parties referred to Dutch law only (see on this the Conclusion of the Advocate General, at [3.4]). The first instance court ruled as follows in relation to applicable law: '*According to the [seller], the contract is governed by Dutch law. (…) 'The court contends that [the buyer] also relies on Dutch law in its arguments, and thus follows [the seller's] reasoning. The court follows the parties in this and shall apply Dutch law*." (the formulation is quoted in *Willemen Infra* v *Jura* at [4.3.1], compare to Advisory Council's Opinion nr 16). The court has then applied the Dutch civil code, not the CISG, to the dispute.

The seller appealed against the decision, but not against the applicable law. Nevertheless, the appellate court considered of its own motion, whether the contract was governed by the CISG. It ruled that the contract fell under the CISG's scope; the Convention was directly applicable on the basis of article 1(1)(a) CISG, as both Belgium and the Netherlands are Contracting States to CISG. Furthermore, the parties to the dispute have not explicitly excluded the CISG's application based on article 6. The appellate court has applied the CISG to the contractual claim, and Dutch law – to the claim relating to the vitiation of consent, as this matter falls outside the Convention's scope. The buyer has labelled the application of the CISG 'surprising', because no claim in appeal targeted applicable law.

In cassation, the Dutch Supreme has ruled that applicable law was indeed "beyond the parties' dispute" on appeal. Therefore, the appellate court was

neither free to determine applicable law anew nor free to apply CISG of its own motion (*Willemen Infra* v *Jura* at [2.1.2]- [3.1.6]).

CISG and procedural ordre public?

The ruling is logical from the point of view of civil procedure. Appellate review follows up on – and is limited by – the points invoked on appeal. Issues "beyond the parties' dispute" are not reviewed, unless these issues fall under the rules of procedural ordre public, which the appellate courts must apply of their own motion. While there is no unanimously accepted definition of the Dutch procedural ordre public, the cassation claim explicitly suggested that 'the CISG is not of ordre public' (see Conclusion of the Advocate General, at [3.3.]). Whereas this element of the cassation claim has been satisfied, neither the Advocate General nor the Court have engaged with the discussion whether procedural ordre public covers direct application (or applicability) of the Convention's uniform substantive sales law, even if it would be confined to establishing whether the parties have opted-out the CISG based on its article 6.

A New Court Open for International Business Soon: The Commercial Court in Cyprus

Written by Georgia Antonopoulou (Birmingham Law School) & Xandra Kramer (Erasmus University/Utrecht University; research funded by an NWO Vici grant, www.euciviljustice.eu).

We are grateful to Nicolas Kyriakides (University of Nicosia) for providing us with very useful information.

The Novel Commercial Court and Admiralty Court in Cyprus

New courts geared to dealing with international commercial disputes have been

established in Europe, the Middle East and Asia, as has also been reported in earlier blogposts in particular on Europe (see, among others, here and here). They have various distinctive features such as the focus on cross-border commercial disputes and the use of the English language as the language of court proceedings. It seems that Cyprus will soon be joining other European countries that have established such courts in recent years, including France, the Netherlands, and Germany.

In May 2022, the House of Representatives in Cyprus passed Law 69(I)/2022 on the Establishment and Operation of the Commercial Court and Admiralty Court. The law creates two new specialised courts, namely the Commercial Court and Admiralty Court, focusing on commercial and maritime law disputes respectively. The courts were planned to open their doors on 1 January 2023. However, the Supreme Court of Cyprus, which is responsible for administrative matters, requested an extension and the courts are expected to be operational in July 2023 (see here).

According to the preamble to this Law, the establishment of these specialised courts aims at expediting the resolution of disputes and improving the efficiency of the administration of justice. In addition, the Courts' establishment is expected to enhance the competitiveness of Cyprus, attract foreign investment, and contribute to its overall economic development. Similar arguments have been put forward in other European countries, notably in the Netherlands (Kramer & Antonopoulou 2022).

The Cypriot Commercial Court shall have jurisdiction to determine at first instance any type of commercial dispute, provided that the amount in dispute or the value of the dispute exceeds 2,000,000 Euros. The law defines commercial disputes broadly and offers an indicative list of such disputes for which the court has jurisdiction. The Commercial Court shall also have jurisdiction over competition law disputes, intellectual property law disputes, and arbitration related matters irrespective of the value of the dispute. The Commercial Court shall have territorial jurisdiction over disputes that have arisen, in part or wholly in Cyprus, as well as over defendants residing in Cyprus. In cross-border disputes parties can agree on the court's jurisdiction in a choice of court agreement. Typically, the Brussels I-bis Regulation would apply to determine the validity of such clause. At the request of at least one party and in the interest of justice, the court shall accept procedural documents in English and shall conduct hearings

and publish judgements in English. The Commercial Court will consist of five judges drawn from the Cypriot judiciary based on their expertise in commercial law disputes and practices and their English language skills.

A Genuine International Commercial Court for Cyprus?

While the definition of an international commercial court is open to interpretation and there are different types of international commercial courts (Bookman 2020; Dimitropoulos 2022), the Commercial Court's specialised focus on high-value commercial disputes as well as the option to litigate in English suggest that Cyprus has just added itself to the growing number of countries that have established an international commercial court in recent years (see also Kramer & Sorabji 2019). This possibility of English-language court proceedings is a key feature of these new courts. However, the degree to which this is possible differs per country. The Netherlands Commercial Court (NCC) uses English throughout the proceedings apart from cassation at the Supreme Court. Due to the lack of a relevant constitutional provision, the use of the English language in NCC court proceedings was made possible by including a new provision in the Dutch Code of Civil Procedure. By contrast, the German Chambers for International Commercial Disputes and the Paris International Chambers limit the use of English in court to documentary evidence or oral submissions and on the basis of a lenient interpretation of existing rules. Cyprus is the first country in Europe that amended its constitution with a view to permitting the use of the English language in court proceedings. The new Article 4(3)(b) provides that the Commercial Court and the Admiralty Court as well as the higher courts ruling on appeals may allow the use of English in court including oral and written submissions, documentary evidence, witness statements and the pronouncement of judgements or orders. In addition, unlike other international commercial courts established as chambers or divisions within existing courts the Commercial Court in Cyprus is structured as a self-standing court. Its jurisdiction is not exclusively limited to cross-border disputes but extends to domestic disputes with territorial links to Cyprus. The court's focus on both cross-border and domestic disputes might be explained by the objective to accelerate trials and increase the efficiency of public court proceedings especially with regard to disputes related to the financial crisis and its aftermath.

The Reasons for Creating the Cypriot Commercial Court

The establishment of international commercial courts in Europe and in Asia has been thus far mainly driven by access to justice and economic considerations. International commercial courts aim at improving commercial dispute resolution by offering litigating parties specialised, faster, and therefore better court proceedings. It has been also underpinned by the aim of improving the business climate, attracting foreign investment, and creating litigation business.

In line with these considerations, Law 68(I)/2022 reiterates the benefits of a specialised commercial court both for the Cypriot civil justice system and the economy. Despite these similarities between the reasons driving the worldwide proliferation of international commercial courts and the establishment of a commercial court in Cyprus, the Cypriot context is slightly different. The financial crisis suggests that the Cypriot international commercial court is also part of a broader array of measures aimed at meeting the particular dispute resolution demands following the crisis (see also Mouttotos 2020). The establishment of the Commercial Court in Cyprus therefore indicates that international commercial courts might no longer be seen as a luxury available to the few countries willing and able to participate in a global competition of courts, but also as an essential measure for countries aiming to recover from a financial crisis. Yet, whether specialised courts bring about direct economic benefits or if they only indirectly benefit national economies by signalling to foreign investors a well-functioning justice system remains open to debate (among others Farber 2002; Coyle 2012).

The DSA/DMA Package and the Conflict of Laws

A couple of weeks ago, I had the pleasure of speaking about the scope of application of the Digital Services Act (DSA) and Digital Markets Act (DMA), which together have been labelled the ‘European constitution for the internet’, at an event at the University of Strasbourg, organized by Etienne Farnoux and

Delphine Porcheron. The preprint of my paper, forthcoming at Dalloz IP/IT, can be found on SSRN.

Disappointingly, both instruments only describe their territorial scope of application through a unilateral conflicts rule (following a strict 'marketplace' approach; see Art. 2(1) DSA and Art. 1(2) DMA), but neither of them contains any wider conflicts provision. This is despite the many problems of private international law that it raises, e.g. when referring to 'illegal' content in Art. 16 DSA, which unavoidably requires a look at the applicable law(s) in order to establish this illegality. I have tried to illustrate some of these problems in the paper linked above and Marion Ho-Dac & Matthias Lehmann have also mentioned some more over at the EAPIL Blog.

Unfortunately, though, this reliance on unilateral conflicts rules that merely define the scope of application of a given instrument but otherwise defer to the general instruments of private international law seems to have become the norm for instruments regulating digital technology. It can be found, most famously, in Art. 3 of the GDPR, but also in Art. 1(2) of the P2B Regulation, Art. 3(1) of the proposed ePrivacy Regulation, and in Art. 1(2) of the proposed Data Act. Instruments that have taken the form of directive (such as the DSM Copyright Directive) even rely entirely on the general instruments of private international law to coordinate the different national implementations.

These general instruments, however, are notoriously ill-equipped to deal with the many cross-border problems raised by digital technology, usually resulting in large overlaps between national laws. These overlaps risk to undermine the regulatory aims of the instrument in question, as the example of the DSM Copyright Directive aptly demonstrates: With some of the most controversial questions having ultimately been delegated to national law, there is a palpable risk of many of the compromises that have been found at the national level to be undermined by the concurrent application of other national laws pursuant to Art. 8 I Rome II.

The over-reliance on general instruments of PIL despite their well-established limitations also feels like a step back from the e-Commerce Directive, which at

least made a valiant attempt to reduce the number of national laws, although arguably not at the level of the conflict of laws (see CJEU, *eDate*, paras. 64–67). The balance struck by, and underlying rationale of, the e-Commerce Directive can certainly be discussed – indeed, given its importance for the EU's ambition of creating a 'Digital Single Market', it should be. The drafting of the DSA/DMA package would arguably have provided the perfect opportunity for this discussion.

The long tentacles of the Helms-Burton Act in Europe (III)

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There has recently been a new and disappointing development in the saga of the Sánchez-Hill, a Spanish-Cuban-US family who filed a lawsuit before Spanish courts against a Spanish Hotel company (Meliá Hotels) for unjust enrichment. Meliá is exploiting several hotels located on land owned by Gaviota S.A., a Cuban company owned by the Republic of Cuba. That land was expropriated by Cuba without compensation, following the revolution of 1959.

In 2019, the First Instance Court of Mallorca (Spain) held that the lawsuit was a means to circumvent the sovereign immunity of Cuba, given the fact that, in order to decide on the right to compensation of the claimants for the unjust enrichment of the defendant, the court would allegedly have to decide on the lawfulness of a sovereign act – i.e. expropriation –, because only if the expropriation had been unlawful could the defendant be exploiting land which did not belong to Gaviota but to the claimants. The court held that the claimants were also arguing that they had a right *in rem* – such as property or possession – over assets of a sovereign state and that such assets were also protected by the rules of sovereign immunity. This alone would have been enough to dismiss the lawsuit but, unnecessarily, the court added that it did not have jurisdiction to decide about property rights concerning real estate assets located outside Spain.

The Court of Appeal of Mallorca disagreed with the lower court. It held that sovereign immunity was not an issue because Cuba had not been named a defendant in the claim. Besides, Spanish courts had jurisdiction because Spain was the place of the domicile of the defendant and the claim was one of unjust enrichment – i.e. a claim in tort –, not one whose subject matter was the existence or scope of a right *in rem* over a real estate asset. In brief, the claimants were not asking Cuba to give back their land and were not asking monetary compensation neither from Cuba nor from Gaviota.

Meliá then filed a motion arguing that the claim was an attempt to eschew the EU Blocking Statute meant to prevent the effectiveness of US court rulings against EU companies, under the Helms-Burton Act of 1996. The defendants further requested that the matter be taken to the European Court of Justice for a preliminary ruling on the scope and correct interpretation of the Blocking Statute. The CJEU may have taken years to issue such a ruling but the Spanish First Instance Court denied the motion.

Later on, Meliá filed another motion requesting that Gaviota and the Republic of Cuba be joined to the lawsuit (*exceptio plurium litisconsortium*) and the First Instance Court granted the motion on the basis, once again, that any ruling on unjust enrichment would previously and necessarily require a decision about the property rights of Gaviota and Cuba, which should therefore be heard in the Spanish proceedings. Probably making a very serious strategic mistake, the claimants did not appeal this decision of the First Instance Court and agreed to join Gaviota and Cuba to their claim with the result that, last January 2023, the First Instance Court once again dismissed the lawsuit on grounds of sovereign immunity, given the fact that, now, a sovereign entity is in fact a defendant in the proceedings.

In the meantime, the Cuban Government had been correctly notified and had claimed that it enjoyed sovereign immunity before foreign courts. Beyond that, Cuba never made an appearance in the proceedings but Gaviota did, requesting that the proceedings be stayed on the basis that it also enjoyed sovereign immunity. Besides, the Spanish Government had also issued a report requested by Spanish law, indicating that the Cuban acts of expropriation must indeed be considered acts *iure imperii*.

The potential implications of a claimants' improbable victory for the Spanish

tourism industry in Cuba are worrisome but, above all, this muddled and already long-lasting lawsuit has given rise to much interest among Spanish scholars, especially conflict of laws specialists. The 2019 decision of the First Instance Court was criticised for applying the doctrine of sovereign immunity in the absence of a sovereign defendant – e.g. something much more similar to the Act of State doctrine, which has no place in Spanish law – and for confusing an action in rem with an action *in personam*. That initial ruling of the First Instance Court may have also inappropriately mentioned and relied on immunity from execution against property of a sovereign state, which is mostly relevant in enforcement proceedings.

Now, however, the Spanish First Instance Court apparently feels vindicated because its recent an relatively short ruling reiterates verbatim practically everything it said in its 2019 decision. The judge also warns the claimants that they had the chance to appeal the ruling granting the motion to join Gaviota and Cuba but did not do so, which means that such decision is now *res judicata*. The logic of the argument is somewhat baffling. The judge initially dismissed the claim on grounds of sovereign immunity, despite the fact that no sovereign was a party. Then, the judge requested that the sovereign be joined as a party and, when the claimant yielded and did so, the judge once again dismissed the claim on grounds of sovereign immunity.

The key to this stage of the proceedings may have been the joinder of Gaviota and Cuba to the claim. Arguably, it was not necessary to do so. In Spanish law, the *exceptio plurium litisconsortium* can be raised in certain cases provided by statute as well as in certain cases provided by case law. Whenever there is a plurality of parties to the same legal relationship, which is the subject-matter of the proceedings, a joinder is obligatory as a condition for a decision on the merits, based on the inseparable nature of that legal relationship. Its justification lies in the right to be heard of all those who might be affected by the ruling on the merits. A joinder is not necessary when the ruling only affects certain individuals or entities in an indirect manner. In the case at hand, the parties to the unjust enrichment are Meliá, i.e. the party who has allegedly enriched itself at the expense of the other party, i.e. the claimants. Cuba is therefore not a party to the alleged unjust enrichment. Moreover, any findings of Spanish courts concerning the unlawfulness of the expropriation would have no bearing on the property rights of Cuba over that land.

In fact, Spanish courts are no strangers to litigation related to the Cuban nationalisation program and, on several occasions, the Supreme Court has taken into consideration the unlawfulness of that nationalisation process with respect to, for instance, ownership rights over trademarks registered in Spain, emphasising that it is not for Spanish courts to decide on such lawfulness but that they can accept or reject some of the extraterritorial effects of the sovereign acts of the foreign state in the territory of the forum. In those cases, the Supreme Court said that the Cuban nationalization was against the public policy of Spain because of the absence of due process and compensation. However, the Supreme Court added that the applicable law to property rights over trademarks registered in Spain was Spanish law, not Cuban law.

The Sánchez-Hill family has just a few more days left to appeal this new decision of the First Instance Court, in proceedings which may potentially have opened a new venue for victims of the Cuban revolution, given the EU Blocking Statute and given the fact that, since the end of the suspension of Title III of the Helms-Burton Act, claims before US Federal Courts based on that piece of legislation have not been very being successful.

Choice of Law in the American Courts in 2022: Thirty-Sixth Annual Survey

The 36th Annual Survey of Choice of Law in the American Courts (2022) has been posted to SSRN.

The cases discussed in this year's survey cover such topics as: (1) choice of law, (2) party autonomy, (3) extraterritoriality, (4) international human rights, (5) foreign sovereign immunity, (6) foreign official immunity, (7) adjudicative jurisdiction, and (8) the recognition and enforcement of foreign judgments. Happy reading!

John Coyle (University of North Carolina School of Law)
William Dodge (University of California, Davis School of Law)
Aaron Simowitz (Willamette University College of Law)

Book: Intolerant Justice: Conflict and Cooperation on Transnational Litigation by Asif Efrat

Summary provided by the author, Asif Efrat

In a globalized world, legal cases that come before domestic courts are often transnational, that is, they involve foreign elements. For example, the case before the court may revolve around events, activities, or situations that occurred in a foreign country, or the case may involve foreign parties or the application of foreign law. Such cases typically present an overlap between the legal authorities of two countries. To handle a transnational case cooperatively, one legal system must cede its authority over the case, in full or in part, to a foreign legal system. This effectively means that a local citizen would be subjected to the laws or jurisdiction of a foreign legal authority, and that raises a host of questions and concerns: Does the foreign legal system abide by the rule of law? Does it guarantee human rights? Will the foreign court grant our citizen the due process and fair treatment they would have enjoyed at home?

The newly published book *Intolerant Justice: Conflict and Cooperation on Transnational Litigation* (Oxford University Press) argues that the human disposition of *ethnocentrism* – the tendency to divide the world into superior in-groups and inferior out-groups – would often lead policymakers to answer these questions negatively. The ethnocentric, who fears anything foreign, will often view the foreign legal system as falling below the home country's standards and, therefore, as unfair or even dangerous. Understandably, such a view would make cooperation more difficult to establish. It would be harder to relinquish the

jurisdiction over legal cases to a foreign system if the latter is seen as unfair; extraditing an alleged offender to stand trial abroad would seem unjust; and the local enforcement of foreign judgements could be perceived as an affront to legal sovereignty that contravenes fundamental norms.

This book examines who expresses such ethnocentric views and how they frame them; and, on the other hand, who seeks to dispel these concerns and establish cooperation between legal systems. In other words, the domestic political debate over transnational litigation stands at the center of this book.

In this debate, the book shows, some domestic actors are particularly likely to oppose cooperation on ethnocentric grounds: the government's political opponents may portray the government's willingness to cooperate as a dangerous surrender to a foreign legal system, which undermines local values and threatens the home country's citizens; NGOs concerned for human rights might fear the human-rights consequences of cooperation with a foreign legal system; and lawyers, steeped in local rules and procedures, may take pride in their legal system and reject foreign rules and procedures as wrong or inferior.

By contrast, actors within the state apparatus typically view cooperation on litigation more favorably. Jurists who belong to the state – such as judges, prosecutors, and the justice-ministry bureaucracy – may support cooperation out of a concern for reciprocity or based on the principled belief that offenders should not escape responsibility by crossing national borders. The ministry of foreign affairs and the ministry of defense may similarly support cooperation on litigation that could yield diplomatic or security benefits. These proponents of cooperation typically argue that legal differences among countries should be respected or that adequate safeguards can guarantee fair treatment by foreign legal authorities. In some cases, these arguments prevail and cooperation on litigation is established; in other cases, the ethnocentric sentiments end up weakening or scuttling the cooperative efforts.

These political controversies are examined through a set of rich case studies, including the Congressional debate over the criminal prosecution of U.S. troops in NATO countries, the British concerns over extradition to the United States and EU members, the dilemma of extradition to China, the wariness toward U.S. civil judgments in European courts, the U.S.-British divide over libel cases, and the concern about returning abducted children to countries with a questionable

human rights record.

Overall, this book offers a useful analytical framework for thinking about the tensions arising from transnational litigation and conflict of laws. This book draws our attention to the political arena, where litigation-related statutes and treaties are crafted, oftentimes against fierce resistance. Yet the insights offered here may also be used for analyzing judicial attitudes and decisions in transnational cases. This book will be of interest to anyone seeking to understand the challenges of establishing cooperation among legal systems.

Comparative Analysis of Doctrine of Separability between China and the UK

Written by Jidong Lin, Wuhan University Institute of International Law

1. **Background**

Separability is a world-recognized doctrine in commercial arbitration. It means that an arbitration clause is presumed to be a separate and autonomous agreement, reflecting contractual commitments that are independent and distinct from its underlying contract.[1] Such a doctrine is embraced and acknowledged by numerous jurisdictions and arbitral institutions in the world.[2]

However, there are different views on the consequences of separability. One of the most critical divergences is the application of separability in the contract formation issue. Some national courts and arbitral tribunals held that in relatively limited cases, the circumstances giving rise to the non-existence of the underlying contract have also resulted in the non-existence of the associated arbitration agreement, which is criticized as an inadequacy of the doctrine of separability.[3] On the contrary, other courts hold the doctrine of separability applicable in such a

situation, where the non-existence of the underlying contract would not affect the existence and validity of the arbitration agreement. This divergence would directly affect the interest of commercial parties since it is decisive for the existence of the arbitration agreement, which is the basis of arbitration.

Two contrary judgements were recently issued by two jurisdictions. The Chinese Supreme People's Court (hereinafter "**SPC**") issued the Thirty-Sixth Set of Guiding Cases, consisting of six guiding cases concerning arbitration. In Guiding Case No. 196 *Yun Yu v. Zhong Yun Cheng*, the SPC explains the Chinese version of separability should apply when the formation of the underlying contract is in dispute.[4] Although the SPC's Guiding Cases are not binding, they have an important persuasive effect and Chinese courts of the lower hierarchy are responsible for quoting or referring to the Guiding Cases when they hear similar cases. On the other hand, the English Court of Appeal also issued a judgement relating to separability, holding this doctrine not applicable in the contractual formation issue.[5]

2. **Chinese judgment**

The Chinese case concerns a share transfer transaction between Yun Yu Limited. (hereinafter "**YY**") and Shenzhen Zhong Yuan Cheng Commercial Investment Holding Co. Limited. (hereinafter "**ZYC**"). On 9th May 2017, YY sent the Property Transaction Agreement (hereinafter "**PTA**") and the Settlement of Debts Agreement (hereinafter "**SDA**") to ZYC. The PTA was based on the Beijing Stock Exchange (hereinafter "**BSE**") model agreement. PTA and SDA included a dispute resolution clause in which the parties agreed that the governing law should be Chinese law and the dispute should be submitted to Beijing Arbitration Commission. On 10th May 2017, ZYC returned the PTA and SDA to YY with some revisions, including a modification on the dispute resolution clause, which changed the arbitration institution to the Shenzhen Court of International Arbitration. On 11st May 2017, YY commented on the revised version of the PTA and SDA but kept the dispute resolution clause untouched. In the accompanying email, YY stated, "Contracts confirmed by both parties would be submitted to Beijing Stock Exchange and our internal approval process. We would sign contracts only if we got approval from BSE and our parent company." On the

same day, ZYC returned the PTA and SDA with its stamp to YY. On 27th October 2017, YY announced to ZYC that the negotiation was terminated. On 4th April 2018, ZYC commenced arbitration based on the dispute resolution clause in PTA and SDA.

The SPC held that separability means the arbitration agreement could be separate and independent from the main contract in its existence, validity and governing law. To support its opinion, the SPC refers to Article 19 of the People's Republic of China's Arbitration Law (hereinafter "**Arbitration Law**"), which stipulates that: "An arbitration agreement shall exist independently, the amendment, rescission, termination or invalidity of a contract shall not affect the validity of the arbitration agreement." SPC submits that the expression "(t)he arbitration agreement shall exist independently" is general and thus should cover the issue of the existence of the arbitration agreement. This position is also supported by the SPC's Interpretation of Several Issues concerning the Application of Arbitration Law (hereinafter "**Interpretation of Arbitration Law**"), [6]Article 10 of which stipulates: "Insofar as the parties reach an arbitration agreement during the negotiation, the non-existence of the contract would not affect the validity of the arbitration agreement." Thus, the SPC concluded that the existence of an arbitration clause should be examined separately, independent from the main contract. Courts should apply the general rules of contractual formation, to examine whether there is consent to arbitrate. If the court found the arbitration clause formed and valid, the very existence of the main contract should be determined by arbitration, unless it is "necessary" for the court to determine this matter. The SPC concludes that the PTA and SDA sent by YY on 11st May 2017 constituted an offer to arbitrate. The stamped PTA and SDA sent by ZYC on the same day constituted an acceptance and came into effect when the acceptance reached YY. Thus, there exists an arbitration agreement between the parties. It is the arbitral tribunal that should determine whether the main contract was concluded.

3. **English judgment**

The English case concerns a proposed voyage charter between DHL Project & Chartering Limited (hereinafter "**DHL**") and Gemini Ocean Shipping Co. Limited

(hereinafter "**Gemini**"). The negotiations were carried on through a broker. On 25th August 2020, the broker circulated what was described as the Main Terms Recap. It is common ground that the recap accurately reflected the state of the negotiations thus far. Within the Recap, both parties agreed that the vessel would be inspected by Rightship. This widely used vetting system aims to identify vessels suitable for the carriage of iron ore and coal cargoes. Also, both parties agreed that the dispute should be submitted to arbitration. There was an attached proforma, including a provision that the vessel to be nominated should be acceptable to the charterer. Still, that acceptance in accordance with detailed requirements set out in clause 20.1.4 "shall not be unreasonably withheld". By 3rd September, however, Rightship approval had not been obtained. DHL advised that "(p)lease arrange for a substitute vessel" and finally, "(w)e hereby release the vessel due to Rightship and not holding her any longer." In this situation, the attached proforma was not approved by DHL, and there is no "clean" fixture, [7]which means the parties did not reach an agreement. After that, Gemini submitted that there is a binding charter party containing an arbitration clause and commenced arbitration accordingly.

The Court of Appeal made a detailed analysis of separability. Combining analysis of numerous cases, including Harbour v. Kansa, [8]Fiona Trust, [9]BCY v. BCZ[10] and Enka v. Chubb, [11]and analysis of International Commercial Arbitration written by Prof. Gary Born, the Courts of Appeal concluded that separability should not be applied if the formation of the underlying contract is in dispute. Separability applies only when the parties have reached an agreement to refer a dispute to arbitration, which they intend (applying an objective test of intention) to be legally binding. In other words, disputes as to the validity of the underlying contract in which the arbitration agreement is contained do not affect the arbitration agreement unless the ground of invalidity impeaches the arbitration agreement itself. But separability is not applicable when the issue is whether an agreement to a legally binding arbitration agreement has been reached in the first place. In this case, the parties agreed in their negotiations that if a binding contract were concluded as a result of the subject being lifted, that contract would contain an arbitration clause. However, based on the analysis of the negotiation and the commercial practice in the industry, the Court of Appeal concludes that either party was free to walk away from the proposed fixture until the subject was lifted, which it never was. Thus, there was neither a binding arbitration agreement between the parties.

4. Comments

Before discussing the scope of the application of separability, one thing needed to be clarified in advance: Separability does not decide the validity or existence of the arbitration agreement in itself. Separability is a legal presumption based on the practical desirability to get away from a theoretical dilemma. However, separability does not mean the arbitration agreement necessarily exists or is valid. It only means the arbitration agreement is separable from the underlying contract, and it cannot escape the need for consent to arbitrate.[12] Therefore, the existence of the arbitration agreement should not be considered when discussing the scope of application of the arbitration agreement.

The justification of the doctrine of separability should be considered when discussing its scope of application. The justification for the doctrine of separability can be divided into three factors: (a) The commercial parties' expectations. Parties to arbitration agreements generally "intended to require arbitration of any dispute not otherwise settled, including disputes over the validity of the contract or treaty. (b) Justice and efficiency in commerce. Without the separability doctrine, "it would always be open to a party to an agreement containing an arbitration clause to vitiate its arbitration obligation by the simple expedient of declaring the agreement void." and (c) Nature of the arbitration agreement.[13] The arbitration agreement is a procedural contract, different from the substantive underlying contract in function. If these justifications still exist in the contract formation issue, the doctrine of separability should be applied.

It is necessary to distinguish the contract formation issue and contract validity issue, especially the substantive validity issue, when discussing the applicability of those justifications. The contract formation issue concerns whether parties have agreed on a contract. The ground to challenge the formation of a contract would be that the parties never agree on something, or the legal condition for the formation is not satisfied. The contract substantive validity issue is where the parties have agreed on a contract, but one party argue that the agreement is invalidated because the true intent is tainted. The grounds to challenge the substantive validity would be that even if the parties have reached an agreement, the agreement is not valid because of duress, fraud, lack of capacity or illegality. The formation and validity issues are two different stages of examining whether

the parties have concluded a valid contract. The validity issue would only occur after the formation of the contract. In other words, an agreement can be valid or invalid only if the agreement exists.

It is argued that separability should be applicable to the formation of contract. Firstly, separability satisfies the parties expectation where most commercial parties expect a one-stop solution to their dispute, irrespective of whether it is for breach of contract, invalidity or formation. Furthermore, the application of separability would achieve justice and efficiency in commerce. Separability is necessary to prevent the party from vitiating the arbitration obligation by simply declaring a contract not concluded. In short, since the justifications still stand in the issue of contract formation, separability should also apply in such an issue.

The English Court of Appeal rejected the application of separability in the formation of contract holding the parties' challenge to the existence of the main contract would generally constitute a challenge to the arbitration clause. However, the same argument may apply for invalidity of the underlying contract. Since the arbitration agreement is indeed concluded in the same circumstances as the underlying contract the challenging to the validity of the contract may also challenge the validity of the arbitration clause, while separability still applies. On the contrary, the Chinese approach probably is more realistic. The SPC ruled that separability applies where the formation of the underlying contract is disputed. But before referring the dispute to arbitration, the SPC separately considered the formation of the arbitration clause. Only after being satisfied the arbitration clause is prima facie concluded, the court declined jurisdiction and referred the parties to arbitration.

[1] Ronan Feehily, *Separability in international commercial arbitration; confluence, conflict and the appropriate limitations in the development and application of the doctrine*, 34 Arbitration International 355 (2018), p. 356.

[2] See Blackaby Niegel, Constantine Partasides et al., *Redfern and Hunter on International Arbitration*, Kluwer Law International; Oxford University Press 2015, pp. 104–107.

[3] See Gary B. Born, International Commercial Arbitration (3rd edition), Kluwer

Law International 2021, pp. 492-493.

[4] The Guiding Case No. 196: Dispute in Validity of Arbitration Agreement between YunYu Limited and Shenzhen ZhongYuanCheng Commercial Investment Holding Co. Limited.

[5] DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd [2022] EWCA Civ 1555 (24 November 2022)

[6] SPC's Interpretation of Several Issues concerning the Application of Arbitration Law, Fa Shi?2006?No. 7.

[7] Clean Fixture is a concept in the maritime area. It means the Parties' confirmation that the contract has been concluded and that there are no further Subjects and/or restrictions to the execution of the agreed Contract. The Fixture is not clean until both parties have waived their subjects/restrictions.

[8] Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] QB 701.

[9] Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40, [2007] 4 All ER 951.

[10] BCY v BCZ [2016] SGHC 249, [2016] 2 Lloyd's Rep 583.

[11] Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38, [2020] 1 WLR 4117

[12] See McNeill M. S. & Juratowitch B., *Agora: Thoughts on Fiona Trust: The Doctrine of Separability and Consent to Arbitrate*, 3 Arbitration International 475 (2008).

[13] See Gary B. Born, International Commercial Arbitration (3rd edition), Kluwer Law International 2021, p. 428.

The standard of human rights review for recognition and enforcement of foreign judgments: ‘due satisfaction’ or ‘flagrant denial of justice’?

Note on *Dolenc v. Slovenia* (ECtHR no. 20256/20, 20 October 2022)

by Denise Wiedemann, Hamburg

1. Facts and Holding

On 20 October 2022, the ECtHR issued a decision that provides guidance regarding the human rights review of recognition and enforcement decisions. The decision concerns the recognition of Israeli civil judgments by Slovenian courts. The Israeli judgments obliged Vincenc Vinko Dolenc, an internationally renowned neurosurgeon, to compensate a former patient for pecuniary and non-pecuniary damage in an amount equivalent to approximately 2.3 million euros (para. 22). Dolenc had performed surgery on the claimant, who was left severely disabled. After Slovenian courts recognized the Israeli judgments, Dolenc applied to the ECtHR. He contended that Slovenia had violated Art. 6(1) ECHR because it had recognized Israeli judgments that resulted from an unfair proceeding. Specifically, he argued that he had been unable to participate effectively in the trial in Israel because the Israeli court had refused to examine him and his witnesses by way of the procedure provided under the Hague Evidence Convention (para. 61).

The ECtHR found that the Slovenian courts had not examined the Israeli proceedings duly and had not given enough weight to the consequences that the non-examination of the witnesses had for the applicant’s right to a fair trial (para. 75). Therefore, the ECtHR unanimously held that Slovenia had violated Art. 6(1) ECHR.

2. Standard of Review

In its reasoning, the Court confirmed the standard of review that it had laid down in *Pellegrini v. Italy* (no. 30882/96, ECtHR 20 July 2001). In *Pellegrini*, the ECtHR found that Contracting States to the ECHR have an obligation to refuse recognition or enforcement of a foreign judgment if the defendant's rights were violated during the adjudication of the dispute in the state of the judgment's origin (para. 40). As in *Dolenc v. Slovenia*, the ECtHR in *Pellegrini* did not examine whether the proceedings before the court of origin complied with Art. 6(1) of the Convention. Instead, the Court scrutinized whether the Italian courts, i.e. courts in the state of enforcement, applied a standard of review in reviewing the foreign judgment which was in conformity with Art. 6(1) ECHR. As regards the standard of review, the ECtHR required the Italian courts to 'duly satisfy' themselves that the proceedings in the state of the judgment's origin fulfilled the guarantees of Art. 6(1) ECHR (para. 40). Thus, when recognizing or enforcing a civil judgment from a non-Contracting State, Contracting States have to verify that the foreign proceedings complied with Art. 6(1) ECHR.

Yet, in respect of other issues, the ECtHR has limited the standard of review from due satisfaction to that of a 'flagrant denial of justice'. In the criminal law context, the ECtHR held in *Drozd and Janousek v. France and Spain* that Contracting States are obliged to refuse the enforcement of a foreign sentence only if 'it emerges that the conviction is the result of flagrant denial of justice' (para. 110). The same limited review has been applied to extradition cases (*Othman (Abu Qatada) v. the United Kingdom*) and to child return cases (*Eskinazi and Chelouche v. Turkey)*. A flagrant denial of justice is a breach that 'goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.' (*Othman*, para. 260).

It has been argued that in cases regarding the recognition or enforcement of a foreign civil judgement, the review should likewise be limited because the fundamental rights violation in the state of recognition or enforcement would be only of an indirect nature (e.g. *Matscher*, 'Der Begriff des fairen Verfahrens nach Art. 6 EMRK' in Nakamura et al. (eds), Festschrift Beys, Sakkoulas, Athens 2003,

pp. 989–1007, 1005). Contrary to this view, the ECtHR confirmed in *Dolenc v. Slovenia* the requirement of an unlimited review of the proceeding in the state of origin; the Court saw 'no reason to depart from the approach set out in *Pellegrini*' (§ 60).

The approach taken in *Pellegrini* and *Dolenc* is convincing with regard to Art. 1 ECHR, which obliges the Contracting States to fully secure all individuals' rights and freedoms. A deviation from the requirement set out in Art. 1 ECHR is not justified by the fact that recognition or enforcement of a decision issued in violation of Art. 6(1) ECHR would only be of an indirect nature; rather, such a recognition or enforcement would exacerbate the violation and would, therefore, be in direct breach of the Convention. The ECtHR explained the restricted level of review in extradition and child return cases with the fact that, unlike in a recognition or enforcement situation, 'no proceedings concerning the applicants' interests [had] yet been disposed of' (see *Eskinazi and Chelouche v. Turkey*).

However, it is not obvious why the ECtHR applies different standards for the enforcement of foreign criminal judgments ('flagrant denial of justice') and the recognition or enforcement of foreign civil judgment ('due satisfaction'). Whereas Contracting States are not required to verify whether a foreign criminal proceeding was compatible with all the requirements of Art. 6(1) ECHR, they are obliged to do so when a foreign civil proceeding is at issue. In justifying the reduced effect of Art. 6(1) ECHR in criminal cases, the Court explained that a review of all the requirements of Art. 6(1) ECHR would 'thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned.' (*Drozd and Janousek v. France and Spain*, para. 110). Thus, the ECtHR seems to place greater importance on cooperation in criminal matters than on cooperation in civil matters. A reason is not apparent.

3. Situations Allowing for a More Limited Review

Despite the confirmation of *Pellegrini v. Italy* in *Dolenc v. Slovenia*, the ECtHR left open the possibility of a more limited review in certain civil recognition and enforcement cases. First, the *Pellegrini* case and the *Dolenc* case concerned judgments emanating from non-Contracting States. If, in contrast, the recognition

or enforcement of a judgment from a Contracting State was at issue, debtors would be obliged to challenge violations of Article 6(1) ECHR in the state of the judgment's origin. If debtors fail to do so – e.g. if they miss the time limit for lodging a complaint at the ECtHR (Art. 35(1) ECHR) –, a further review in the state of enforcement would not be successful. Otherwise, procedural limits for human rights challenges would lose their preclusive effect.

Second, the ECtHR qualified *Pellegrini* as a case having 'capital importance' (para. 40) and *Dolenc* as a case of 'paramount importance to the defendant' (para. 60). While *Pellegrini* concerned a decision annulling a marriage, i.e. determining personal status, the foreign judgment in *Dolenc* caused serious financial and reputational damage to the applicant. However, it is questionable why a judgment for payment of a small amount of money should allow for a more limited review as Art. 1 ECHR does not differentiate between important and less important matters.

Finally, different standards would in any event apply to recognition and enforcement within the EU: In the case of recognition and enforcement under strict EU procedures (without the possibility of refusal), Member States benefit from the 'presumption of compliance' (*Sofia Povse and Doris Povse v. Austria*; *Avoti?š v. Latvia*). With this presumption, the ECtHR seeks to establish a balance between its own review powers vis-à-vis states and its respect for the activities of the EU. In cases with a margin of manoeuvre, in particular through the public policy clause, the ECtHR will not require the Member State of recognition or enforcement to 'duly satisfy' itself that the adjudication proceeding in the Member State of origin complied with Art. 6(1) ECHR. Rather, the ECtHR will assess only whether the application of the public policy clause has been 'clearly arbitrary' (*Royer v. Hungary*, para. 60).