Slovenian Supreme Court Rules on Service under Hague Convention

By Jorg Sladic, attorney-at-law and associate professor in Ljubljana.

Summary

In a recent decision (judgement of 19 November 2013 in case III Ips 86/2011) published in March 2014 the Supreme Court of the Republic of Slovenia had to give a ruling in judicial review limited to the points of law of appellate decisions (basically identical to the German *die Revision* and similar to French *la cassation*) on a question of service of documents instituting proceedings (application for payment as debtor's performance of an international sales contract) in Slovenia effected in Belarus on Belarussian defendants according to the Rules of the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The specifics of the Slovenian case are the link between the service of the application instituting proceedings (writ) and the summons to lodge a reply issued by the Slovenian court abroad and a default judgement (without application of Art. 15(2) of the 1965 Hague convention). However, the two issues that will be of importance for international legal community are (i.) the interpretation of the 1965 Hague Convention on service and (ii.) the interpretation of a contractual clause on prorogation of jurisdiction allegedly foreseeing the application of a foreign *lex fori*. The decision can be found on: http://sodnapraksa.si/

Facts

A Slovenian and a Belarussian company had concluded a sales contract on 30 August 2002. The contract contained also the following clause "all disputes by the parties shall be adjudicated before the courts in Ljubljana (*sc.: the capital of Slovenia*) according to the rules of the State of the defendant". The Slovenian seller had supplied the goods, the Belarussian buyer failed to pay for the goods. The Slovenian seller lodged an application for payment as a way of specific performance of buyer's obligations before the competent court in Ljubljana. The application had been served in Belarus on the Belarussian defendant in application of the Hague Convention of 1965 by the Belarussian central authority upon the request of the Slovenian court. The defendant did not lodge a reply, the consequence being a default judgement issued by the Slovenian court of first instance. The default judgement was then contested by an appeal. After the dismissal of the appeal by an appellate court an application for judicial review limited to the points of law was

lodged by the defendant.

Decision

The Slovenian Supreme court first examined the requirement of duly correct service as a precondition for issuing a default judgement (par. 7 of the judgement) and concluded that Slovenia and Belarus are both contracting parties to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, therefore no procedural requirement had been infringed by ordering a service on a foreign defendant according to the cited convention. Referring to the Art. 6 of the 1965 Hague Convention the Supremem Court found that Belarussian judicial authorities did not complete the certificate on service according to the said convention (par. 12). However, considering that Slovenian courts did not issue a special request for service. As the 1965 Hague Convention under Art. 5(1) only provides for two ways of service; namely by methods prescribed by the requested state's internal law for service of documents in domestic actions upon persons who are within its territory (sub-paragraph a), and by a particular method requested by the requesting state (the applicant), unless such a method is incompatible with the law of the state addressed. The interpretation of that provision given by Slovenian Supreme Court is that unless a special method is required by the requesting court (the applicant) then the service abroad is to be performed according to the *lex fori* of the requested or addressed state. If service is performed on a foreign entity according to the *lex fori* of the foreign addressed state, a failure to complete the certificate (on the reverse of the request) has no influence on the whole process of service (par. 13). Perhaps a slightly different approach by the CJEU should be mentioned. Indeed, the CJEU seems to consider that the question whether an application or a document instituting proceedings was duly served on a defendant in default of appearance must be determined in the light of the provisions of the 1965 Hague Convention (CJEU, C-292/10 *de Visser*, par. 54, C-522/03 *Scania Finance France,* par. 30).

The second issue, i.e. an alleged reference to the foreign *lex fori* in the contractual clause on prorogation of jurisdiction has been dealt quite fast. The rules of procedure are always of mandatory nature and belong to the legal order of the court competent for hearing the case and cannot be chosen by the parties. However, even if the parties had agreed on the application of the Belarus procedural law, this would only imply only a partial voidness of the clause on the choice of law and would not have any influence on the choice of substantive law.

No Need to Know Where Malaysia Airlines Flight 370 is...

to initiate court proceedings.

But where?

Trimble on Foreigners in US Patent Litigation

Marketa Trimble (University of Nevada William S Boyd School of Law) has posted Foreigners in U.S. Patent Litigation: An Empirical Study of Patent Cases Filed in Nine U.S. Federal District Courts in 2004, 2009, and 2012 on SSRN.

> *One of the greatest challenges facing patent holders is the enforcement of their rights against foreign (non-U.S.) infringers. Jurisdictional rules can prevent patent holders from filing patent infringement suits where they have the greatest likelihood of success in enforcement, such as where the infringer is located, has his seat, or holds his assets; instead, patent holders must file lawsuits in the country where the infringed patent was issued. But filing a patent lawsuit in a U.S. court against a non-U.S. infringer may be subject to various difficulties associated with the fact that U.S. substantive patent law (particularly as regards its territorial scope) and conflict of laws rules are not always compatible and interoperable with the conflict of laws rules of other countries. Such insufficient compatibility and interoperability can lead to U.S. judgments not being enforceable outside the United States.*
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> *In the Hague Conference's Judgments Project, which the Conference re-launched in 2012, the United States has an opportunity to negotiate internationally uniform conflict of laws rules to improve cross-border litigation, including cross-border patent litigation. This article provides data on cross-border patent litigation that can be used to assess the extent to which the United States should be concerned about cross-border patent litigation problems and the degree to which the United States should be involved in the Judgments Project to improve cross-border patent litigation.*

The statistics in this article are the result of an empirical study of 6,420 patent cases filed in 2004, 2009, and 2012 in nine selected U.S. federal district courts – the federal district courts in which the largest numbers of patent cases per court were filed in 2012. The results show that the numbers of patent cases involving foreign parties are on the rise, although the percentage of such cases in the total number of patent cases filed did not increase from 2009 to 2012. The article brings up to date the author's earlier research on cross-border aspects of patent litigation, contributes to the rapidly growing body of empirical literature on patent litigation (including the literature on the "patent troll" phenomenon), and enriches the literature on foreign litigants in patent disputes and on transnational litigation in general (both of which suffer from a dearth of statistical data).

Internet L@w Summer School in Geneva

The University of Geneva is launching an Internet l@w summer school which will take place from June 16 to June 27, 2014 (www.internetlaw-geneva.ch).

The Internet l@w summer school offers a unique opportunity to learn and discuss Internet law and policies with experts from leading institutions including the Berkman Center for Internet and Society at Harvard University, the Internet Society, the International Telecommunication Union (ITU), the United Nations Commission on International Trade Law (UNCITRAL), the World Economic Forum (WEF), the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), as well as from other prestigious academic or governmental institutions and global Internet companies (eBay and Google). The topics that will be covered include privacy and surveillance, free speech, telecom and Internet infrastructure, intellectual property, antitrust, choice of court & choice of law, on-line contracts, consumer protection, legal issues of social media and cloud computing.

Website: www.internetlaw-geneva.ch

Registration deadline: May 15, 2014 (early bird: April 15).

French Supreme Court Denies Effect to Foreign Surrogacies On the Ground of Fraude a la Loi

On 19 March 2014, the French Supreme Court for civil and criminal matters *(Cour de cassation*) ruled that an Indian surrogacy would be denied effect in France on the ground that it aimed at strategically avoiding the application of French law (*fraude à la loi*), which forbids surrogacy.

A French male had entered into a surrogacy agreement with an Indian woman in Mumbai. After a child was born, the man attempted to register the child as his (and hers) on French status registries. A French prosecutor challenged the registration. A court of appeal rejected the challenge on the grounds that it was not alleged that the applicant was not the father, and that the birth certificate was legal.

The *Cour de cassation* allowed the appeal of the French prosecution service and ruled that the behaviour of the French national and resident aimed at avoiding the application of French law. The Court held:

> *Attendu qu'en l'état du droit positif, est justifié le refus de transcription d'un acte de naissance fait en pays étranger et rédigé dans les formes usitées dans ce pays lorsque la naissance est l'aboutissement, en fraude à la loi française, d'un processus d'ensemble comportant une convention de gestation pour le compte d'autrui, convention qui, fût-elle licite à l'étranger, est nulle d'une nullité d'ordre public selon les termes des deux premiers textes susvisés*

In 2011, the *Cour de cassation* had denied effect to foreign surrogacies on the ground that they violated public policy. Since September 2013, the Court has founded its rulings on the strategic behaviour doctrine.

Paech on Close Out Netting and Insolvency

Philipp Paech (LSE Law) has posted Close-Out Netting, Conflict of Laws and Insolvency on SSRN.

> *Close-out netting is a risk mitigation tool globally employed by financial market participants. It affords a special protection to those being able to use it and is remotely comparable to a super-priority or a security interest. It therefore potentially conflicts with the pari passu principle and its emanations. A number of jurisdictions, often called 'netting-friendly', have solved that conflict more or less comprehensively. As a consequence, close-out netting agreements are generally enforceable in these jurisdictions, even in the event of insolvency of one of the parties.*
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> *However, the financial market is global and the parties, their branches and assets might be located in different jurisdictions. Even if all relevant jurisdictions are netting friendly they differ in their approach to solving the conflict between granting the privilege of close-out netting on the one hand, and preserving the core of pari passu on the other hand. At the core of the issue is the question of whether and to what extent the lex contractus, ie. law governing the close-out netting agreement determines the limits of enforceability in insolvency — or whether the lex fori concursus alone is relevant.*
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> *Countries failed to agree on an international standard for conflict-of laws rules and did not include a relevant principle in the 2013 Unidroit Principles on the operation of of close-out netting provisions. As a result, legal uncertainty will persist in this area despite the fact that the EU is currently improving its regime in this regard.*
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> *This paper shows that it is a fallacy to believe that maintaining ambiguity in the conflict-of-laws regime governing cross-jurisdictional insolvencies of financial institutions is necessary for the sake of preventing the erosion of national mandatory law. States must acknowledge that globalised financial markets cannot work properly and safely against a backdrop of heterogeneous and thus potentially conflicting national frameworks. They should relax their insistence on the primacy of their own insolvency law in cross-jurisdictional situations, at least to some small extent, in exchange for a comprehensive and consistent international framework better able to serve the aims of certainty and stability. Such framework is to be provided by EU law or, ideally, by a global standard.*

Fourth Issue of 2013's Rivista di diritto internazionale privato e processuale

(I am grateful to Prof. Francesca Villata – University of Milan – for the following presentation of the latest issue of the RDIPP)

The fourth issue of 2013 of the Rivista di diritto internazionale privato e processuale (RDIPP, published by CEDAM) was just released. It features two articles and one comment.

Paola Ivaldi, Professor at the University of Genoa, examines the issue of environmental protection in the context of European Union law and private international law in **"Unione europea, tutela ambientale e diritto internazionale privato: l'art. 7 del regolamento Roma II"** (European Union, Environmental Protection and Private International Law: Article 7 of the Rome II Regulation; in Italian).

> *Art. 7 of Regulation No 864/2007 (so called Rome II Regulation) provides for a specific conflict of law rule concerning liability for environmental damage, which empowers the person sustaining the damage to choose between the application of the lex loci damni and the application of the lex loci actus. The present article analyses the rationale underpinning the attribution to only one of the parties concerned (the person sustaining the damage) of the unilateral right to choose the law applicable to their relationship, and it concludes that the provision at issue does not purport to alter the equal balance between such parties, as it rather aims at ensuring a high level of environmental protection, both by preventing a race to the bottom of the relevant national legal standards and by discouraging the phenomenon known as environmental dumping. Furthermore, the article compares the specific provision laid down by Art. 7 of the Rome II Regulation with the general conflict of laws rule provided by Art. 4 and Art. 14 of the same instrument, with particular reference to the role played – in the peculiar context of environmental liability – by party autonomy and to the different relevance attributed by such rules to the lex loci damni and to the lex loci actus.*

Anne Röthel, Professor at the Brucerius Law School in Hamburg, discusses

party autonomy under the Rome III Regulation in **“Il regolamento Roma III: spunti per una materializzazione dell’autonomia delle parti”** (The Rome III Regulation: Inputs for Concretizing Party Autonomy; in Italian).

> *Regulation (EU) No 1259/2010 of December 20th 2010, the so-called “Rome III” Regulation, lays down uniform conflict-of-laws rules on divorce and legal separation. It represents the first case of enhanced cooperation between (part of) the Member States of the European Union, and it became applicable on June 21st 2012. After reporting the criticism of German legal literature, the author points out that the Regulation, although at first sight only aiming at international private law, finally covers substantial matters such as the scope of autonomy when it comes to divorce and legal separation. Her analysis comprises as a first step a comparative view which underlines the existence of deeply rooted legal and cultural differences in the field of divorce. She also presents statistical data regarding the situation in Germany. In this context she highlights the meaning of the “availability” of divorce in the “conservative” legal systems and in the “liberal” ones, that basically depends on whether marriage is conceived entirely as a legal institution or as well as a contract depending on the autonomy of the parties. Secondly, she focuses on Art. 5 of Regulation No 1259/2010 that allows the spouses to determine the law applicable to divorce and legal separation. In this respect, the Regulation goes farther than the existing national rules of international private law. The author questions therefore the legitimacy of party autonomy within private international law. Finally, she examines the conditions for a valid choice of law. The German legislator decided to impose the form of a public (notarial) act for the choice-of-law agreement. The author questions whether the fulfillment of the formal requirements can sufficiently guarantee by itself that the parties are aware of the impact of their decision. She therefore suggests a further judicial control to take place in order to guarantee autonomous decisions in the light of the fundamental rights and the jurisprudence of German Federal Constitutional Court on agreements in matters of matrimonial property regimes.*

In addition to the foregoing, the following comment is also featured:

Ester Di Napoli, PhD in Law, **“A Place Called Home: il principio di territorialità e la localizzazione dei rapporti familiari nel diritto internazionale privato post-moderno”** (A Place Called Home: The Principle of Territoriality and the Localization of Family Relations in Post-Modern Private International Law: in Italian).

> *The way in which space is conceived and represented in private international law is changing. This development reflects, on the one hand, the emergence of non-territorial spaces in the legal discourse (the market, the Internet etc.) and, on the other, the acknowledgment, in various forms*

and subject to different limitations, of the individual's "right to mobility". The interests of States and those of social groups are gradually losing ground to the interests of the individual, the freedom and self-determination of whom is now often likely to be exercised in the form of a choice of law. In the field of family law, European private international law shapes its rules by taking into account the "fluidity" of postmodern society: conflict-of-laws rules become more flexible and "horizontal", while the "myth" of abstract certainty is outweighed by the quest for adaptability and effectiveness.

Indexes and archives of RDIPP since its establishment (1965) are available on the website of the Rivista di diritto internazionale privato e processuale. This issue is available for download on the publisher's website.

Van Den Eeckhout on International Employment Law and European Fundamental Freedoms

Veerle Van Den Eeckhout (Leiden University and University of Antwerp) has posted on SSRN an English version of a paper on international employment law previously published in Dutch in "Tijdschrift Recht en Arbeid" ("TRA", Kluwer, 2009, issue 4).

The paper discusses the relationship between International labour law and European fundamental freedoms, including an analysis from a PIL-perspective of the cases Viking, Laval, Rüffert and C./Luxembourg, and an analysis of the relationship between the Rome Convention, the Rome I Regulation and the Posting Directive. The paper is entitled "International Employment Law Mangled between European Fundamental Freedoms". An extended version (not yet translated into English) of this paper can be found on SSRN (also available here and here) – in this extended version, the relationship between the Rome convention, the Rome I regulation and the Posting Directive is analysed in a more profound way, including also aspects such as: the relationship between the Posting Directive on the one hand, the

applicability of the law of the host State on the other hand, the consequences – seen from the perspective of the protection of the employee – of the *non*-applicability of the Posting Directive etc.

The author is grateful to Ms. Emanuela Rotella for the English translation of the paper.

French Book on PIL Legislation Applicable in France

Dean Sandrine Clavel (University of Versailles Saint Quentin en Yvelines) and Estelle Galland (Paris I University) have published a book gathering the essentials of applicable legislation in the field of private international law in France.

The materials include national legislation, European regulations and directives and international conventions.

> *Traditionnellement d'origine nationale et jurisprudentielle, le droit international privé français s'est enrichi, au cours des dernières décennies, de sources supranationales et textuelles ; ce phénomène s'est encore récemment accentué sous l'influence de l'Union européenne. La transformation des sources s'est accompagnée d'une inflation de celles-ci. Et la multiplication des textes, alliée à la diversité de leurs origines, a rendu l'accès aux sources du droit international privé particulièrement complexe.*
>
> ***L'objectif de cet ouvrage est, pour simplifier la tâche des « usagers » du droit international privé**, qu'ils soient **universitaires, étudiants ou praticiens du droit,** de leur offrir un « portail » des sources textuelles du droit international privé français contemporain, tendant à l'exhaustivité sans toutefois y prétendre.*
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> *Le lecteur y trouvera, le plus souvent en texte intégral, **l'essentiel des règles de conflit de lois et de juridiction, mais aussi des règles matérielles de droit international privé d'origine supranationale et des règles de procédure internationale et d'arbitrage international**, ce aussi bien en matière civile et commerciale qu'en matière familiale, patrimoniale et extrapatrimoniale (à l'exclusion notable des règles régissant la nationalité et la condition des étrangers). L'usage de cet*

ouvrage se veut simplifié par la mise à disposition d'un index thématique qui permet au lecteur d'embrasser, d'un seul coup d'oeil, l'ensemble des textes régissant une question de droit spécifique (par exemple, l'adoption, le transport aérien ou la propriété industrielle, etc.).

More information can be found here.

ECJ upholds National Law Precluding Intervention of Consumer Associations in Enforcement Proceedings of an Arbitration Award

By Anthi Beka, University of Luxembourg

On February 27th, 2014 the Court delivered its ruling in Case C-470/12 *Pohotovost' s.r.o. v Miroslav Vasuta*. The case forms part of the jurisprudential line of the Court on the procedural implications of the Unfair Terms Directive.

The legal issue raised was whether the important role assigned to consumer associations by the Unfair Terms Directive for the protection of consumers should be understood, in conjunction with articles 38 and 47 of the Charter, as precluding national procedural law which does not give standing to consumer associations to intervene in individual disputes involving consumers for the enforcement of a final arbitration award. The Court upholds the compatibility of Slovak procedural law. One more case is currently pending involving the same credit professional, *Pohotovost'*, on the same legal issue (Case C-153/13 *Pohotovost' s.r.o. v Jan Soroka*). In 2010 the Court had also delivered its Order in Case C-76/10 *Pohotovost' s.r.o. v Iveta Korckovska* .

Facts and questions referred

Pohotovost' applied for authorization to enforce a final arbitration award

against the consumer. Its application was partially rejected, as far as the default interest and the costs on the recovery of the debt were concerned and upheld for the remaining debt. While the consumer did not appear in the proceedings, a Slovak consumer association sought leave to intervene. It claimed that the enforcement proceedings should be suspended, on grounds of lack of impartiality of the bailiff appointed by the company, but also, on the reason that the court did not properly apply its *ex officio* obligation to protect the consumer, in accordance with the *Pohotovost'* Order (Case C-76/10) and the ruling in Case C-40/08 *Asturcom*. However, intervention of consumer associations at the stage of enforcement was not admissible under national procedural law. It was in this context, that the referring court asked for an interpretation of the Unfair Terms Directive in light also of articles 38 and 47 of the Charter.

The decision of the Court

Admissibility of the request

Serious doubts were raised as to whether the case was still *pending*. The company had already withdrawn its application for enforcement and appealed against the decision of the reference for preliminary ruling. The national court maintained its request and indicated that the case was still pending. The Court relied on this finding of its "*privileged interlocutor*" (Opinion AG Wahl [37]) and accepted jurisdiction. Reference to a recent Order of the Court in *BNP Paribas* (Case C-564/12) demonstrates the importance attached to the requirement of an **actual existence of a dispute**. The situation in that latter case was again very different from the Hungarian procedural system in *Cartesio* (Case C-210/06) that had been ruled incompatible with the Treaties.

Reasoning on the merits

The Court first reiterates its line of case-law on the obligation of national courts to raise *ex officio* the unfairness of contractual terms as a means to establish an effective balance between the parties and ensure the effectiveness of the protection under the Unfair Terms Directive. Particularly in the context of enforcement of an arbitration award this obligation arises in so far as the national rules of procedure confer on the courts powers to examine the incompatibility of an arbitration award with *national rules of public policy* (par. 42) (which was the case under Slovak law). With regard to the role of consumer associations for the protection of consumers, the Unfair Terms Directive requires that they are given the right to take an action for injunction against the use of unfair terms (*see* Case C-472/10 *Invitel*) (par.43). However this directive contains no provision on the role of consumer associations in individual disputes (par. 45). Thus, the question of a possible right of intervention in such disputes falls upon the national legal order of a Member State in accordance with the principle of procedural

autonomy, framed nevertheless by the principles of equivalence and effectiveness (par. 46). The Court was also asked to make an interpretation in light of articles 38 and 47 of the Charter. The reasoning followed is within the spirit of Case C-413/12 *Asociacion de Consumidores Independientes de Castilla y Leon*, where the procedural position of consumer associations was distinguished from that of individual consumers as not characterized by the same imbalance.

With respect first to **article 38 of the Charter**, the Court finds that since the Unfair Terms Directive "*does not expressly provide for a right for consumer protection associations to intervene in individual disputes involving consumers, Article 38 of the Charter cannot, by itself, impose an interpretation of that directive which would encompass such a right*" (par. 52). This part of the reasoning seems to confirm the qualification of article 38 of the Charter as a **principle** judicially cognisable under the conditions of article 52(5) Charter (Opinion AG Wahl, par.66; *see* Opinion AG Cruz Villalón Case C-176/12 *Association de médiation sociale*). As long as the Unfair Terms Directive – the legislation giving "*specific substantive and direct expression to the content of the principle*" (AG Cruz Villalón, par.63) contained in article 38 Charter – does not establish a right of intervention, such right cannot find a constitutional foundation alone in article 38 Charter.

Quid on article **47 of the Charter** on a right to effective remedy? Reliance on this right is assessed on the one hand for the consumer and on the other hand for the consumer association. As far as the consumer is concerned, the lack of an intervention right of consumer associations does not breach the right to an effective remedy "*to the extent that Directive 93/13 requires that the national court hearing disputes between consumers and sellers or suppliers take positive action unconnected with the actual parties to the contract*" (par. 53). This part of the reasoning appears to elevate the principle of an active judge to a component of effective judicial protection. Intervention of consumer associations is moreover "*not comparable to the legal aid which under Article 47 of the Charter must be made available, in certain cases, to those who lack sufficient resources*" (art. 53).

As far as the consumer association is concerned the refusal to grant it leave to intervene "*does not affect its right to an effective judicial remedy to protect its rights as an association of that kind, including its rights to collective action*" (par.54). Besides, consumer associations can acquire a procedural role in individual proceedings since under national law, they "*may directly represent consumers in any proceedings, including enforcement proceedings, if mandated to do so by the latter*" (par. 55).

In consideration of the above the Court concludes that the Unfair Terms Directive read in conjunction with articles 38 and 47 of the Charter "*must be interpreted as not precluding national legislation which does not allow a consumer protection association to intervene in support of a consumer in*

proceedings for enforcement, against the latter, of a final arbitration award".

It needs to be noted that Opinion AG Wahl drew also conclusions from the minimum harmonization character of the Unfair Terms Directive in that it would in any event not preclude Member States from providing "*supplementary action… to the court's unconnected, positive action required by that directive*" (par.72).