The ECJ and ECHR Judgments on Povse and Human Rights – a Legislative Perspective

by Dorothea van Iterson

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In the contributions published last month on this topic, the blame for what is felt to be the unsatisfactory operation of article 11 Brussels II bis is put on the parties who negotiated the relevant provisions of the Regulation. For those who are unfamiliar with the history of the Regulation and wish to participate in the debate about a possible recast of Brussels II bis, it may be helpful to recall how these provisions came into being[2].

The articles of Brussels II bis relating to the return of a child who has been wrongfully abducted reflect a political compromise which was reached with great difficulty after discussions of 2 ½ years in the Council working party dealing with the topic. This explains some of the ambiguities in the text. The main elements of the compromise were the following:

1) The 1980 Hague Child Abduction Convention, to which all Member States of the EU are parties, was preserved in relationships between Member States. Consequently, the courts of the Member State of the child's refuge continues to have jurisdiction in respect of requests for the return of an abducted child. The procedures under the 1980 Hague Convention seek to ensure a speedy voluntary return of the child. If a voluntary return cannot be secured, the courts of that State are required to hand down an order restoring the *status quo ante****[3]***. There are very limited grounds for refusing the child's return. Return orders under the Convention are no judgments on the merits of custody. No decision on the merits may be taken by the courts of the child's State of refuge until it has been determined that the child is not to be returned under the Convention (article 16). As long as such determination has not been made, the courts of the child's habitual residence at the time of the removal are competent to deal with the merits of the custody issue. The conditions for the passage of jurisdiction as to the

merits to the courts of the Member State of refuge are specified in article 10 of the Regulation.

2) Article 11, paras 2 to 5, Brussels II bis were agreed upon as a complement to the Hague system. They reflect policy guidelines developed over the years. These paragraphs were intended for the courts of the Member State of refuge of the child, not for the courts of the Member State of the child's habitual residence prior to the removal.

3) Article 11, paras 6 to 8, as included in the compromise, specifically address the situation in which the courts of the Member State of refuge have handed down a non-return order based on article 13 of the Convention. The three paragraphs were accepted as a package. Paragraph 7 cannot be isolated from paragraphs 6 and 8. The competent court in the Member State of the child's habitual residence prior to the removal has to be informed of any non-return order given in the Member State of refuge. This court can then examine the merits of custody. The Council compromise did not purport to provide for immediate "automatic" enforceability abroad of a *provisional* return order handed down by those courts. "Any subsequent judgment which requires the return of the child", as referred to in paragraph 8, was to be understood as "any decision on the merits of custody which requires the return of the child"[4]."Custody" comprises the elements stated in article 2, point 11, sub b, which corresponds to article 5 of the Hague Convention. It includes, among other rights and duties, the right to determine the child's residence.

4) Abolition of exequatur was accepted by way of an experiment for a very narrow category of judgments. According to the Council compromise, exequatur was to be abolished only for judgments *on the merits of custody* entailing the return of the child handed down following the procedural steps described in article 11, paras 6 and 7. It was considered that the issue of the child's residence should be finally resolved as part (or as a sequel) of the other custody arrangements and that the judgment on custody should put an end to the proceedings between the parents on the child's place of residence following the abduction. Successive provisional changes of residence were considered to be contrary to the child's interests.

5) Abolishing exequatur in this context means that once a certificate has been issued in accordance with article 42 Brussels II bis, the judgment is enforceable

by operation of law in another Member State. No recourse can be had in the Member State of refuge to the grounds of non-recognition (and enforceability) stated in article 23. The tests mentioned in article 23 are carried out by a judge of the court which has handed down the judgment and who is asked to issue the certificate (article 42, second paragraph). The issuance of a certificate is therefore unlikely to be refused. The Aguirre/Pelz ruling of the ECJ has shown that questions may then arise about the statements made in the certificate.

6) "Enforceability by operation of law" means that the judgment is eligible for enforcement as if it had been given in the Member State where enforcement is sought (article 47 Brussels II bis). The judgment is not enforced "automatically", as the procedures for enforcement are governed by the law of the requested Member State. The enforcement laws of the EU Member States were left untouched by the Brussels II bis Regulation. Many of those laws make enforcement conditional on a court decision in the requested State. Enforcement may be stayed or stopped in exceptional cases where human rights are in issue. The radical interpretation given by the ECJ in the Povse and Aguirre/Pelz rulings leaves us with questions regarding the meaning of article 47 and the actual approach to be taken by enforcement bodies if they find that there is an immediate danger for the child. Is it realistic to require them to enforce "automatically" a provisional order which contradicts an order of the same type which has just been handed down by the courts of their own country?

7) The implication of the Council compromise was that a *provisional* return order handed down by the courts of the Member State of the child's habitual residence prior to the removal should be enforceable in the Member State of refuge *only* after the issuance of an exequatur in the latter State. The intention was that the checks provided for in article 23 should to be made in the exequatur proceedings.

8) The proceedings before the ECHR on Povse were about the judgment *on the merits of custody* which was finally handed down in Italy. See the ECHR judgment, point 69. The ECHR did not dwell on the provisional return order on which the ECJ answered a number of preliminary questions. Would the outcome of the ECHR proceedings have been the same if it had been asked to assess the provisional return order?

9) On the face of it, the ECJ's ruling that article 11, para 8, Brussels II bis

applies to a provisional return order of the courts of the Member State of habitual residence prior to the removal, seeks to reinforce the return mechanism of the 1980 Hague Convention. In reality it brings the EU closer to an abandonment of the Hague system. This is a matter for regret. If, in the forthcoming revision of Brussels II bis, exequatur were abolished in all matters relating to parental responsibility, the left-behind parent would resort to the courts of his own country immediately rather than seeking to obtain a return order in the State of refuge. It may be questioned whether such an approach would be conducive to balanced solutions which would, in the end, be accepted by the parties involved in an abduction case[5].

[1] The views expressed in this post are personal views of the author.

[2] For a detailed account see Peter McEleavy, The New Child Abduction Regime in the European Union, Journal of Private International Law, 2005, Vol.1, No.1.

[3] See the Explanatory Report by E. Perez-Vera, para 106, which states: "..the compulsory return of the child depends in terms of the Convention on a decision having been taken by the competent authorities of the requested State".

[4] Cf. the ECJ's correct statement in the Povse judgment that a "judgment on custody that does not entail the return of the child" in article 10 is to be understood as a final decision.

[5] See, on another regrettable development, Mr J.H.A. van Loon and S. De Dijcker, LL.M., The role of the International Court of Justice in the Development of Private International Law, Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht, No. 140, 2013, p. 109-110.

Cuniberti on the New Provision of

the Unidroit Principles on Contracts Infringing Mandatory Rules

I (University of Luxembourg) have posted A Critical Appraisal of Article 3.3.1 of the PICC on Contracts Infringing Mandatory Rules (*Le Nouvel Article 3.3.1 Des Principes Unidroit 2010 Sur Le Contrat Violant Une Règle Impérative: Un Regard Critique Du Point De Vue Du Droit International Privé*) on SSRN. The English abstract reads:

> *The 2010 UNIDROIT Principles of International Commercial Contracts include several new provisions on illegality. This paper offers a critical appraisal of one of them, Article 3.3.1 on Contracts Infringing Mandatory Rules. First, the paper wonders the extent to which applicable mandatory rules will tolerate the attempt of Article 3.3.1 to regulate their application. The paper then focuses on the distinction between effects of the infringement upon the contract expressly prescribed by the applicable mandatory rule and effects non expressly prescribed. It argues that, while the distinction makes sense in the context of the American Restatement (Second) on Contracts, which inspired the drafters, it does not in the context of a private instrument which will essentially be used by arbitrators to decide particular disputes. Finally, the paper discusses the relevance of the distinction between effects of the infringement of a mandatory rule upon the contract and the right to exercise remedies under the contract.*
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> *Note: Downloadable document is in French.*

The paper is forthcoming in the *Uniform Law Review*.

Fourth Issue of 2013's ICLQ

The fourth issue of *International and Comparative Law Quarterly* for 2013 includes several pieces on private international law.

Simon Camilleri, Recast 12 of the Recast Regulation: a New Hope?

> *This article seeks to consider the EU's new approach to arbitration as set out in Recital 12 of the Brussels I Regulation (Recast). The article first considers the Court of Justice of the European Union's West Tankers decision and the foremost English authority applying that case (The Wadi Sudr) in order to provide some background to the problem which gave rise to Recital 12. Following this, the article goes on to consider whether Recital 12 does in fact act as a solution to the problem created by the West Tankers decision.*

Justine Pila, The European Patent: an Old and Vexing Problem.

> *In December 2012, the European Parliament supported the creation of a European patent with unitary effect. For the next year at least, the international patent community will be on the edge of its proverbial seat, waiting to see whether the proposal becomes a reality. If it does, it will be a significant event in both the long and rich history of patent law, and in the equally rich and understudied history of attempts to create a European patent system. In this article I consider the three post-war European patent initiatives of the most direct and enduring relevance in that regard with a view to answering the following questions. First, what drove them? Second, what issues confronted them? And third, how were those issues resolved and with what ultimate effect? In the concluding section I relate the discussion back to the present by offering some remarks on the current European patent proposal in light of the same.*

Csongor István Nagy, The Application Ratione Temporis of the Insolvency Regulation in the New Member States.

Third Issue of 2013´s Belgian PIL E-Journal

The third issue of the Belgian bilingual (French/Dutch) e-journal on private international law *Tijdschrift@ipr.be / Revue@dipr.be* is out. It does not contain any articles, only case law.

PILAGG/LSE Round Table Seminar

PILAGG (SciencesPo) / Transnational Law Project (LSE)

Tuesday 19 November 2013

Private Citizens of the World.
Citizenship beyond the State: Past, Present and Future.

Speaker:
Prof. Karen Knop, University of Toronto (Law)

Discussants:
Dr. Annabel Brett, University of Cambridge (History)
Dr. Floris De Witte, LSE (Law)

Date & time: Tuesday 19 November 2013, 16:00 – 18:00

Venue:
London School of Economics and Political Science
Old Building, Graham Wallas Room (5th floor)
Houghton Street, London, WC2A 2AE

All PILAGG / conflictoflaws.net subscribers are very welcome to attend. Please contact the organizers – Jacco Bomhoff (j.a.bomhoff@lse.ac.uk) or Jan Kleinheisterkamp (j.kleinheisterkamp@lse.ac.uk) – beforehand. We will provide

you with an invitation to show to LSE security staff upon your arrival, and with directions to the seminar room.

What Are the Most Influential English Language Journal Articles or Papers in Private International Law?

As part of an ongoing research project, I am in the midst of compiling the most influential Engligh language papers in the field of private international law. Given the expertise of our readership, I wanted to solicit your thoughts on this question. Please feel free to post responses in the comments or via email to me. I will happily share the compiled results in a future post. Many thanks!

On MNCs and Human Rights: an Overall Picture (Article)

"Las Empresas Multinacionales y Su Responsabilidad en Materia de Derechos Humanos: Una Visión de Conjunto" (click here) is the title of a new article by Professor Zamora Cabot, of the University of Castellón, on multinational coroporations and human rights.

An Introductory Part (Part I), places this work in the field of governance of global public interests. In Part II the author critically reviews the recent decision of the USSC in *Kiobel* case, contesting the projection to the human rights ATCA

litigation of the canon against the extraterritoriality of laws as applied in *Morrison;* the history-based interpretation made by Chief Justice Roberts is also contested in that it fossilizes the ATCA in its origins, thus difficulting a judicial reading of the Act adapted to our time. In Part (III), after having considered several cases in some European countries, the author evaluates critically the European legal framework, especially in relation to the jurisdiction of the Courts and the applicable law. In Part (IV) Professor Zamora Cabot studies a new interesting field: the Extraterritorial Obligations of States (ETOs) and how they operate as regard the responsibility of transnational corporations, either through international regulations or by national initiatives; among the latter the author highlights some Acts passed in the United States on trafficking of human beings or on transparency in the supply chain. In Part (V), the author focuses on the extractive industry and its problems related to indigenous minorities, as well as on the implementation in Spain of the United Nations Guiding Principles by means of a National Plan on Business and Human Rights being currently developed. Professor Zamora Cabot finishes with a Part VI, where he recalls his view on the US *Kiobel* case as a step backward in the field of human rights protection; however, as a partial compensation to this judicial decision, he highlights the increasing awareness of the problem in many other countries, where public authorities and other stakeholders are advancing some proper solutions to the challenges posed by transnational corporations regarding the protection and development of human rights.

Ps: this article adds to one of the main lines of research of Prof. Zamora Cabot, focused on the liability of multinational enterprises as regards human rights. The work reflects a Report presented to the 25th Congress of the AEPDIRI, celebrated in September 2013 in the University Pompeu Fabra of Barcelona.

International Seminar on Private International Law, Madrid 2014. Call for Papers

A new edition of the International Seminar on Private International Law (Universidad Complutense de Madrid) organized by Prof. Fernández Rozas and Prof. de Miguel Asensio, will take place on the 8 and 9 May 2014, at the faculty of Law of the Universidad Complutense of Madrid – although some sessions may be held elsewhere in Madrid.

The seminar will combine a general approach focusing on recent developments and future prospects in various fields of private international law, and a specific one, meaning that special attention is to be paid to issues which are currently being discussed, or which are in need of particular study. In this edition special attention will be given to the legislative process of revision affecting the EU insolvency regulation, to the unification of private international law in matrimonial matters, to and the forthcoming implementation of the Brussels I bis Regulation. New trends outside Europe, with special attention to projects identified in America, will also be addressed.

As in previous editions the main lectures of the seminar will be in charge of well-known scholars, such as Stefania Bariatti (Milano), Dário Moura Vicente (Lisbon) Hans Van Loon (former General Secretary of the Hague Conference), Bertrand Ancel (Paris II) and Johan Erauw (Gent). Nonetheless, the seminar is open to all scholars, either Spanish or foreigners, willing to participate with brief presentations. Papers can be presented in Spanish, English or French. Proposals including both the title and a brief summary are to be sent as soon as possible, and at any rate no later than the 2nd December, to Patricia Orejudo Prieto (patricia.orejudo@der.ucm.es). Subject to prior scientific evaluation, papers will be included in volume XIII (2013) of the *Anuario Español de Derecho Internacional Privado*. The final version of the accepted presentations is to be submitted before 14 April, 2014.

The registration deadline to attend the seminar will be announced in due time.

For more information see here.

Anuario Español de Derecho Internacional Privado (2012)

The last volume of the *Anuario Español de Derecho Internacional Privado* (2012), has just been released: for the table of contents click here.

Backed by the most prominent Spanish scholars on private international law, by lawyers, practitioners from the judiciary and other bodies of the State administration, the purpose of this volumen of the *Anuario* is to provide the Spanish legal community with a theoretical and a practical overview of the legal phenomena, related to cross-border situations linked to our country, that have taken place in 2012 in the fields of commercial arbitration, business law, labor law, social security law, criminal law, procedural law, nationality, immigration, family and inheritance law, foreign investment and exchange control regulations. This outline is aimed to work as point of reference for the doctrinal and practical Spanish developments to be presented to foreign academia.

With this aim the publication is divided into different sections, starting with an ambitious doctrinal one gathering the most important scientific contributions from Spanish and foreign authors, published after a prior comprehensive control by the members of the Editorial Board specialized therein. Also, the volume highlights the most interesting Spanish decisions, legislative reforms and international agreements signed by Spain in 2012, all of them accompanied by a deep and critical comment. News are given about the work of various international forums, such as the Hague Conference. A systematized set of the several hundred decisions delivered by the Spanish courts last year, as well as a comprehensive chronicle of the Spanish literature in the field of private international law (in a broad sense) completes the Yearbook.

El Derecho Inglés y los Contratos Internacionales (book)

Sixto Sánchez Lorenzo is Professor of Private International Law at the University of Granada (Spain) and member of the International Academy of Comparative Law.

English Law is the preferred legal system in international contracts. Uniform texts as those proposed by UNIDROIT or the European Union have not managed to supersede a leadership grounded on cosmopolitism and liberalism that characterize English Law. However, the rules and principles of English Law often remain distant and enigmatic for civil lawyers. This book is oriented to Spanish-speaking lawyers and intends to provide a synthesis of English Contract Law, emphasizing its particular rules with comparative references to civil law systems. At the same time, it deals with English case-law on international contracts. Even though English courts make use of the same tool that others European judges (the Rome I Regulation), the analysis of the influence of English Private International Law on European rules facilitates the interpretation of these rules in other European countries, but also reveals some idiosyncratic particularities in its application by English courts. Finally, substantive and conflict-of-law rules can be hardly separated. For English lawyers who are able to read Spanish, the book provides, paraphrasing H.L.A. Hart, an “external statement“ about both English Contract Law and Private International Law of Contracts.

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