Riles on Regulatory Arbitrage

Annelise Riles (Cornell Law School) has posted Managing Regulatory Arbitrage: A Conflict of Laws Approach on SSRN.

> *Many of the core challenges facing national financial regulators stem from a classical puzzle of international law: how to manage conduct that is beyond national jurisdiction, or conduct that is potentially subject to multiple regulatory authorities, in a context in which markets are transnational and market participants arbitrage the differences between regulatory regimes to their own advantage. The dominant approach of the G20 to this challenge has been a model borrowed from public international law and institutions. After reviewing some of the limitations of this approach, the paper considers how tools in the private international lawyer's toolkit that might offer a very different, yet potentially more effective approach.*

Coyle on Judgments Reciprocity

John Coyle (University of North Carolina School of Law) has posted Rethinking Judgments Reciprocity on SSRN.

> *Scholars have long debated the criteria that U.S. courts should use when deciding whether to recognize and enforce money judgments rendered by foreign courts. One of the proposed criteria — reciprocity — would require proof that the rendering court would enforce a U.S. judgment if the situation were reversed. Advocates of reciprocity claim that it is necessary to create incentives for foreign states to recognize and enforce U.S. judgments. Critics argue that a policy of judgments reciprocity is both costly to administer and highly unlikely to bring about any change in foreign state practice.*
>
> *This Article makes two original contributions to this debate. First, it draws on historical examples of successful reciprocal legislation to construct an*

analytical framework for determining the conditions under which such legislation is most likely to change foreign state behavior. These examples show that that a particular state's response to such legislation will in many cases be shaped by the reaction of interest groups within that state. Second, the Article seeks to evaluate how interest groups within specific foreign states — those that currently refuse to enforce U.S. judgments — would be likely to react to a new U.S. policy of judgments reciprocity. Drawing upon a hand-collected dataset of reported cases and federal complaints, it argues that judgment creditors in many of these states are likely to suffer few, if any, economic losses as a result of such a policy. In the absence of such losses, the Article concludes that a new U.S. policy of judgments reciprocity is unlikely to prompt foreign states to change their laws and, consequently, is unlikely to achieve its goal of making it easier to enforce U.S. judgments overseas.

Gascon on Povse: a Presumption of ECHR Compliance when Applying the European Civil Procedure Rules?

Fernando Gascón Inchausti is Professor of Law at Universidad Complutense de Madrid

On the basis of the provisions of Articles 11(8) and 42(2) of the Brussels IIa Regulation, the Austrian courts, after a long and tortuous process, ended up ordering the Povse child's return to Italy, considering that the enforcement system without exequatur introduced by the Regulation at this point didn't allow them to do anything different. This «blind compliance» of the Austrian courts was, in fact, the subject of the complaint against Austria before the European Court of Human Rights (EctHR): both applicants (daughter and mother) complained that the Austrian courts had violated their right to respect for their family life, since

they disregarded that the daughter's return to Italy would constitute a serious danger to her well-being and lead to a permanent separation of mother and child.

The basic argument of the Austrian Government against the complaint was to argue that its authorities had merely complied with their obligations under Brussels IIa Regulation and, in accordance with its provisions, they were not entitled to refuse to enforce the return decision nor to rule on its possible negative effects on the child. The Court's decision by majority accepts this argument and declares the application inadmissible. In the opinion of the Court a presumption exists that when a State is limited to meet its obligations as a member of an international organization (in this case, those arising from EU membership), it is also complying with the European Convention on Human Rights (ECHR) if the international organization provides fundamental rights a protection degree equivalent to that derived from the European Convention itself (as with the European Union).

The ECtHR applies to this case the doctrine of "presumption of compliance", which it had previously used in *Bosphorus v. Ireland* (30 June 2005, in a case involving the implementation of Council Regulation No 990/93 concerning trade with the Federal Republic of Yugoslavia), *M.S.S. v. Belgium and Greece* (21 January 2011, in a case regarding the Dublin II Regulation on asylum) and *Michaud v. France* (6 December 2012, final 6 March 2013, concerning the implementation of EU legislation on money laundering and the obligation of lawyers to report suspicious transactions of their clients). In *Povse v. Austria* the focus turns to European Civil Procedure and, more specifically, to Brussels IIa Regulation and the abolition of exequatur in international child abduction matters.

Through this doctrine, the ECtHR seeks to establish an appropriate balance between control and respect for the activities of other international organizations; the Court has stated, in fact, that "the Court may, in the interests of international cooperation, reduces the intensity of its supervisory role" (*Michaud* decision, § 104). In order to decide whether this "presumption of compliance" is applicable, the ECtHR can check three different sets of questions:

a) Check that the international organization, as such, is respectful of fundamental rights in an equivalent way as these are defined in the ECHR. In the case of the EU, this first requirement is recognized without difficulty by the ECtHR, for

reasons that need no further explanation here.

b) Check if the specific rule approved by the international organization and that States have the obligation to fulfill is also respectful of the fundamental rights standard set by the ECHR.

In *Povse v. Austria* the ECtHR (§ 80) performs this control when it ascertains that the Brussels IIa Regulation has sufficient mechanisms to control that potential risk to the child has been taken into account at the time of ordering his or her return. The ECtHR does not verify the legitimacy of the return system established by the Regulation from a substantive perspective: in other words, it doesn't check compliance with the right to family life of the rule according to which, if the child's removal is held to be wrongful, he or she must return to the State where he was habitually resident immediately before. But the ECtHR controls indeed that the Brussels IIa Regulation ensures that the decision ordering the return of the child is to be taken after verifying its impact on family and private life of the child, i.e. on his or her fundamental rights. There is, hence, a control on the existence of internal mechanisms to ensure respect for fundamental rights, even if that control is made in the State of origin and can not be made in the requested State. The legislative decision –taken by the European Union when approving the Brussels IIa Regulation– to place those controls exclusively with the court of origin could not in any way be regarded as infringing the right to private and family life, as it is justified by the need to effectively combat international child abduction in the EU context.

c) Check, although in a limited manner, how State authorities have applied the specific rule approved by the international organization. In particular, the ECtHR feels empowered to check whether the rule grants discretion to the national authority, for then the use of such discretion itself may be detrimental to fundamental rights and could be criticized by the EctHR.

In *Povse v. Austria* the ECtHR concluded that Articles 11(8) and 42(2) of the Brussels IIa Regulation granted no margin for discretion to the Austrian courts required to enforce the Venetian court decision, since the system of the Regulation at this point only allows the law and the courts of the requested State to determine the best way to comply with the order, but does not entitle them to take any decision that may prevent or suspend it, although allegedly it could had the aim of safeguarding fundamental rights.

With or without the *Povse* decision, it is obvious that the implementation of the European civil procedural rules can determine the filing of applications to the EctHR. After the *Povse* decision, it seems clear that these complaints will be resolved by the ECtHR applying the presumption of compliance doctrine. The *Povse* decision may thus serve as a basis for thinking about the control the ECtHR can exercise on the rules integrating the *corpus* of European Civil Procedure Law and on their implementation by national courts.

a) The ECtHR could control, of course, if European civil procedural rules provide for the affected fundamental rights a level of substantive and procedural protection that can be assumed by the ECHR system. As a rule the European legislator is always very careful with these issues, making it difficult to estimate *a priori* the detrimental nature to the fundamental rights of the rules that comprise European civil procedural law. However, casuistry always overflows legislator's forecasts…

For instance, we can think now of the rules establishing minimum standards on service to the defendant of the writ commencing the proceedings, which can be found in Article 14 of the European Enforcement Order Regulation, as well as in the European Order for Payment Procedure Regulation and in the European Small Claims Procedure Regulation. Approving these rules, the European procedural legislator has considered as tolerable certain mechanisms of service without proof of receipt by the debtor, although it is not always easy –at least from my perspective– to assume that the recipient actually received the documents (let's think of deposit of the document in the debtor's mailbox or of postal service without proof). Let's imagine that a default judgment is rendered against a defendant in the State of origin, because the writ commencing the proceedings had been served on him by one of these means and he didn't receive it for reasons that are not attributable to him. The judgment can be certified as European Enforcement Order and the creditor will be able to use it to seek enforcement in another Member State: in that case, the defendant will try unsuccessfully to prevent enforcement arguing that the judgment had been rendered in violation of his right to a fair trial. If the requested State is sued for that reason in the ECtHR (as happened in *Povse*), it could argue the presumption of compliance doctrine. However, when applying it to the case, could the ECtHR retain that Article 14 (c) of the European Enforcement Order Regulation, by endorsing a "too unsafe" service method, may violate the right to a fair trial arising from Article 6(1)

ECHR?

b) The ECtHR should also direct control over the way the court acted in a single case, determining whether or not it had any kind of discretion. For example, if we focus on EU regulations that involve cross-border enforcement, it will be necessary to analyze the terms in which they have implemented the principle of mutual recognition and, in particular, if there is a possibility that the requested court refuses the enforcement of the decision from the court of origin.

In *Povse v. Austria* controversy arose on the occasion of the implementation of one of the pieces of the Brussels IIa Regulation ¬the return of wrongfully removed children– in which the rule granted no discretion to the addressed court: this lack of discretionary leeway drifts from the absence of an opposition to enforcement in which a public policy clause could be activated. Indeed, opposition to enforcement of a foreign decision based on the infringement of public policy is the gateway to the protection of fundamental rights in international judicial cooperation systems. The choice to suppress it or to keep it will have important implications if the issue is examined from the perspective of a potential review by the ECtHR.

(i) In regulations establishing enforcement without exequatur and without public policy clause (Brussels IIa on child abduction and visits, European Enforcement Order, European Payment Order Procedure, European Small Claims Procedure and Brussels III) no critics can be made to the executing State which has not taken into account the possible violation of fundamental rights occurred in the original proceedings and which has not denied or suspended enforcement for this reason (precisely what happened in *Povse v. Austria*). There is, therefore, no control in the State of enforcement, and no further control can either be expected to be made by the ECtHR over the requested State, since the latter could benefit from the presumption of compliance doctrine.

It is perhaps ironic that a lower internal control also determines a lower external control by the ECtHR. This appearance, however, vanishes if attention is drawn to the following issues:

— Controls exist in the State of origin and they are sufficient to consider the right to a fair trial preserved (which is an issue that could also be scrutinized by the ECtHR, as in *Povse*).

— Eventually the courts' activity in the State of origin may also be subject to the scrutiny of the ECtHR. This, indeed, should be the most logical reaction, as it is more reasonable to blame the court of origin for a fundamental right violation than to blame the enforcement court for failing to offset the effectiveness of a foreign decision adversely affecting a fundamental right (although this sort of control is certainly possible and sometimes necessary). This is, without doubt, the clearest conclusion to be drawn from the *Povse* decision (endorsed by the critics that the ECtHR itself formulates against the applicants for failure to exhaust their means of defense before the Italian courts).

(ii) There are still regulations that maintain the public policy clause as a control tool in the State of enforcement (Brussels I, Brussels Ia –even if exequatur proceedings have been abolished–, Brussels IIa –for any matters apart from child abduction and visits–, and Regulation on Successions and Wills). If the application of one of those regulations in a particular case was under the control of the ECtHR, the question arises to what extent the existence of public policy clause would be relevant to analyze the existence of the elements of the "presumption of compliance". Can we understand that the existence of a "public policy exception" grants the court of enforcement a sufficient degree of discretion, whose exercise could be controlled by the ECtHR?

It is clear that the public policy clause can be used to refuse the enforcement of decisions that have been obtained violating fundamental rights or whose content itself violates a fundamental right. From this point of view, the ECtHR could criticize a national court for not using it in a particular case: like it or not, the existence of a public policy clause places the enforcement court in a position to guarantee the violated fundamental right, precisely a position it would not have if cross-border enforcement would be articulated through a system which did not include the public policy exception. This conclusion, however, should be made subject to a condition: the invocation of the public policy exception by the person against whom enforcement has been sought, since in the European procedural system in civil matters the breach of public policy can't be ascertained by the court on its own motion. Hence, the absence of an active defense by the debtor places the enforcement court in the same position of "no discretion" that exists in regulations with no public policy exception.

This review and this definition of public policy will certainly be carried out by the ECtHR with the aim to control the way in which the courts exercise discretion;

and this control on discretion, in itself, does not constitute direct control or attack against European civil procedure rules. However, if we take into account the fundamentals of this control and the context in which it operates, it is clear that the door is open to revision and, with it, to definition by the ECtHR about what should be understood for "public order" in the context of the implementation of European civil procedure rules.

Povse v. Austria: Taking Direct Effect Seriously?

Dr. Rafael Arenas García is Professor of Private International Law at Universitat Autònoma de Barcelona

Perhaps one of the most difficult questions in International Law is the relationship between international conventions. States must comply with the obligations established in the treaties they are bound by. All the parties to the treaty are entitled to require the application of the treaty, which is compulsory for them. A problem arises when a State is bound by more than one treaty, and compliance with of one of them implies the violation of another one. Art. 30 of the Vienna Convention on the Law of the Treaties sets rules to avoid the problems linked to the coexistence of treaties, but these rules do not suffice to solve all the difficulties which may arise. Let's take the case of two conventions to which only a few States are simultaneously parties. According to the Vienna Convention, when the parties to the later treaty do not include all the parties to the earlier one, "as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations". In other words, if State "A" is bound by treaty "1" with State "B", and by treaty "2" with State "C", "A" must apply treaty "1" in its relations with State "B" and treaty "2" in its relations with State "C". However, sometimes this is simply not possible; both treaties apply simultaneously, and compliance with one of them implies the immediate breach of the other.

At first sight, this was the situation in *Povse*. The enforcement in Austria of the Venice Youth Court's return orders allegedly violated art. 8 of the ECHR; at the same time, it had to be granted according the EU Regulation 2201/2003. The conflict between the international obligations arising from EU law and from the European Convention seemed unavoidable; Austria had to decide between two international obligations. It was not possible to correctly apply both the European Convention and the European Union Regulation.

Of course, as the ECtHR decision in *Povse* shows, this is not completely true. The ECtHR has interpreted the Convention on Human Rights in a way that resolves the contradiction between the Convention and EU Law; according to the Court, a Contracting State fulfils its obligations as a member of the Convention when it simply complies with its obligation as member of an international organisation to which it has transferred a part of its sovereignty, provided that the international organisation "protects fundamental rights (…) in a manner which can be considered at least equivalent (…) to that for which the Convention provides". However, I am still interested in showing how the contradiction between the Convention on Human Rights and EU law works, in order to fully understand the meaning of the case law of the ECtHR.

There are cases in which compliance with European Union law implies a breach of the European Convention. From a pure Public International Law perspective, the breaching State incurs in international responsibility. There is also an internal perspective. International treaties are part of the internal law of the State, and judges, authorities, and the public in general must observe, respect and apply them. How do they deal with the contradiction between different treaties? How do judges, authorities, etc., comply with EU law and with the ECHR in case of a conflict? This is not an easy question. If we only take into consideration the internal law of the States and international law, the answer is that each State decides in which way international law is implemented by its authorities and courts; national courts are bound by the domestic provisions on the internal effect of international law. However, the answer is not exactly the same when it comes to EU Law: at least, if we take the direct effect of EU Law seriously. As the ECJ has already held, EU law confers rights to individuals which the courts of Member States of the European Union must directly recognise and enforce. This means that the courts of the Member States are directly bound by EU law. State law is not needed for the direct application of EU law to be achieved. That is the reason

why some academics have held that the courts of the Member States should be seen as Courts *of the European Union* when they apply EU law (see A. Barav, "La plenitude de competénce du juge national en sa qualité de juge communautaire", *L'Europe et le Droit. Mélanges en homage à Jean Boulouis*, Paris, Dalloz, 1991, pp. 93-103, pp. 97-98 and 103; D. Ruiz-Jarabo Colomer, *El juez nacional como juez comunitario*, Madrid, Civitas, 1993).

If Member State courts are to be considered not as national courts, but as EU courts, when they apply Union law, a breach of the ECHR arising out of the application of EU law by a national court should not be attributed to the State, but to the EU itself. It would not be coherent to admit the direct effect of EU Law and, at the same time, to hold that Member States are liable for a breach of the ECHR arising out of the application of EU Law by their national courts.

Of course, the point of view I have just explained is far from being the common understanding of the relationship between EU Law and the ECHR. Nevertheless, maybe the way in which the European Court of Human Rights has dealt with the contradiction between EU law and the European Convention on Human Rights in *Povse* is nothing but a consequence of the impossibility to put the blame on the State for the "mistakes" of EU law. Perhaps when the EU becomes a member of the European Convention on Human Rights this will be more evident – maybe then we will realise that, in cases like *Povse*, the complaint ought to be addressed to the EU and not to the Member States.

Muir Watt on Abolition of Exequatur and Human Rights

Horatia Muir Watt is Professor of Law at Sciences Po Law School

I. **Framing the child-return issue**. Several recent cases handed down by the two European Courts appear to be opening new vistas for conflicts of laws, in which human rights play a large part. The cases are well-known (ECJ/CJUE *Aguirre v Pelz* 2010; ECtHR *Sneersone & Sneersone & Kampanella v. Italy* 2011,

Povse v. Austria 2013). They concern cross-border child abduction, and, more specifically, "fast-track" orders for the return of the abducted child, made by the (national) court of the child's pre-abduction residence under article 11 (8) of Regulation Brussels II bis. This provision was designed to avoid the effect of delaying tactics by the abducting parent, which were progressively becoming systematic by virtue of article 13(b) of the 1980 Hague Convention (allowing the authorities of the country to which the child has been abducted, to refuse exceptionally to order the return if to do so would be to expose that child to a serious risk of harm). To this end, the fast-track return order is immediately enforceable, notwithstanding the resistance of that local court (hereafter, the court of the "country of refuge"). The difficulty, addressed partially by each of the cases above, concerns potential collision between the "notwithstanding" provision of article 11 (8) and with both procedural (6-1 ECHR, including the right of the child to be heard; article 24 EU Charter) and substantive (article 8 ECHR) human rights requirements.

This situation is particularly complex because it involves the articulation, in an identical dispute arising out of the same set of facts, of the two European legal orders. While both guarantee fundamental rights on the basis of constitutional provisions (EU Charter and ECHR), among which the rights of the child are accorded the utmost supremacy, they may not share a methodology in the assessment of the existence of a violation, nor give exactly the same weight to the various factors which weigh into the process. This is the context in which the "*Bosphorus* presumption" (ECtHR *Bosphorus v. Ireland* 2005), which allows an overlapping consensus between the two universes, is now brought into the equation (*Povse*). Meanwhile, back down among the national courts, local judges – sometimes "siding" with the parent who is the national or domiciliary of their jurisdiction and who prefers to litigate to the bitter end rather than let the other win on the (theoretically) preliminary issue of where the merits of the custody dispute is to be decided – have to decide this mega-conflict between two supra-national regimes which both purport to promote the interests of the child! The child is often the prime victim of all this. To my mind, the real problem may well lie with the whole design of the cross-border child-return system, which focuses on the restitution of the abducted child before the custody dispute can be decided on the merits. While a highly creative idea at the outset, its undoubted potential to absorb tension when the parents are cooperative is as great as the risk of amplification of conflict it carries with it when they are not. See the sheer length

and number of procedural incidents in the *Povse* case (which led to a first preliminary ruling under Brussels II bis by the ECJ before the case was lodged with the ECtHR).

However, although Gilles Cuniberti mentions the *Povse* case in his opening lines to this symposium, the question for debate is framed in more general terms as concerning the abolition of exequatur (within the EU) and human rights. Therefore, beyond child return issues, it can be understood to be about the primacy either of the new, highly efficient, nuclear missile which has emerged progressively in recent EU secondary legislation (direct cross-border enforceability of a court order without intermediary enforcement proceedings), or of the ultimate joker of fundamental rights (which will be invoked in the very forum that has been by-passed by direct cross-border enforcement). So I'll start with the larger picture, which, in addition to Brussels II bis, extends to Brussels I recast, and various other instruments that have abolished the formality of *exequatur* or enforcement proceedings (alimentary obligations, TEE, small claims…). Thoughts on the circulation of debt may be helpful for reflecting upon the more sensitive issues relating to children.

II. The wider picture. Much of the literature on the abolition of exequatur within the European Union under, or in anticipation of, Brussels I recast, turns on whether or not it implies a significant reduction in the protection due to the fundamental rights (particularly procedural rights, which will therefore be the focus of the remarks below), of defendants. In other words, in re-establishing the balance in favor of the creditors of the internal market, who have traditionally suffered from the partitioning of national spheres of enforcement (including the costs of bringing even informal enforcement proceedings), have the tables turned too far in the opposite direction, in diminishing the guarantees due to henceforth vulnerable defendants? According to many accounts, abolishing the intermediate procedural filter of *exequatur* creates a significant risk of free-wheeling misfit-judgments, of which, when the floodgates are opened in 2015, the defects will be amplified by their cross-border effects.

A first observation is that in assessing this risk, the strength of assertions on either side contrast with the scarcity of empirical findings, as to its extent. We have, for instance, the Commission's own statistics for the (small) number of effective appeals against enforcement orders (under the existing provisions of Brussels I), according to which it made sense to abolish the remaining procedural

formalities (article 38 s. Brussels I). On the other hand, we also have an idea of the very large number of cases in which Member States have been called for account for procedural faults, either in Strasbourg, in Luxembourg, or in the shadow of either in domestic cases in national courts. In the specifically transnational sphere, many of the usual suspects are various forms of transnational injunctive relief, which have met with the disapproval of the ECJ itself (*Krombach* 2000*, Gambazzi* 2007…). But such cases can be used to demonstrate either the escalation of vitiated judgments with transnational effects, or the inevitable cultural determination of core standards of fairness. That is not to say that there will not always be (more or less) occasional duds among the number of judicial decisions produced by any legal system; that is precisely indeed why fair process requires allowing an appeal. However, the question here is specifically whether the risk of being subject to misjudgments from another country is greater with or without exequatur.

The political terms of the debate are also complex. For instance, while France has produced its highly predictable strain of critique against any European Union initiative, which though probably accurate in some instances would be more credible if it were not so frequently histrionic or indeed couched in the language of fantasized or quaint accounts of parliamentary democracy, the detractors of Brussels I are now calling for *more human rights protection*, which of course leads them from Scylla to Charybdis, to the extent that the latter are usually denounced, in private international law and beyond, as a worse methodological sin than the former. Interestingly, the focus of the new ire is no longer a defense of the idiosyncratic play of national public policy, but the safeguard of the due process requirements of the ECHR. *Allez savoir!*

Moreover, many of the historical and contextual arguments voiced in this context can be unhelpful. The main theoretical support for exequatur appears to be that free movement of judgments assumes their interchangeability, as does a market for non-judicial products; in a world composed of legal systems of very variable quality or content, producing equally heterogeneous judgments, exequatur thus fulfills the leveling function of a lock. However, such a function was constructed at a time when there was no supervisory device ensuring procedural (and indeed substantive) guarantees “from above” (that is, based on the ECHR or, where applicable, the EU Charter), nor indeed any common standard as to their content; a horizontal filter of incoming decisions supplied by exequatur or enforcement

proceedings was therefore, naturally, put into place in each national forum, on the basis of highly variable conceptions of procedural and substantive fairness. The origins of the whole Brussels jurisdiction and judgment system are to be found in the supposed costs that this variation created for those supplying credit in the internal market (at a time when Member States also used purely jurisdictional criteria as part of the filter). In retaining *exequatur*, if only as a formality, the existing Brussels I Regulation still adheres to a similar logic.

The shift wrought by the new regime in Brussels I recast is therefore a form of trade-off, made possible by the fact that each domestic court is deemed accountable *within its own legal system* in respect of the content of fair trial resulting from article 6-1° ECHR. Every court of origin, in handing down a judgment, is committed to respect *ex ante* the very same guarantees that can at present (under the existing Brussels I) be invoked additionally *ex post* in *exequatur* proceedings (or more accurately in appeal therefrom). Thus, the question is: does the reshuffling of the places of control, which under the new regime means that any challenge to the procedural fairness of a judgment or public act is to take place *ex ante* in the country of origin, and not *ex post* in the courts of the place of enforcement, potentially reduce fundamental procedural rights protection?

At this stage it is also worth pointing out that the emergence of a common core of procedural standards under article 6-1° ECHR put an end to the traditionally "attenuated" form of public policy control which had hitherto been associated (as such, or as an expression of *Inlandbeziehung*) with the recognition and enforcement of foreign judgments, at least as far as procedural guarantees are concerned. In other words, the enforcing state is bound by exactly the same standards (of which, however, the open-endedness subtly precludes absolute identity of procedural rules) as the state of origin. These are indeed applicable in full to judgments from third states (see ECJ *Pellegrini* 2001). Within the European Union, the question is once again how far maintaining only one set of controls, *ex ante* in the state of judgment (rather than two sets, of which one in the enforcing state under identical standards), implies a reduction of the level of protection for potential debtor-defendants. In other words, how far is the second control *ex post* actually useful as a human rights safeguard, and to what extent is it parasitical in terms of costs to (both) parties?

The statistics upon which the Commission acted seem to indicate that it is not

indeed indispensable, since exequatur orders give rise to appeals infrequently. But the debate continues. Thus, even if the statistics hold true across the board (are they really significant beyond small or uncontested claims?), there may be additional advantages attached to the existence of an intermediary procedure. One of these might be an important element of inter-systemic judicial dialogue which works to boost human rights protection ("outsiders' insights", to use the phrase of Basil Markesinis): look, after all, what it took in *Krombach* to challenge the civil effects of *contumace* in French (criminal) procedure. It may be, on the other hand, that given the large corpus of common standards which have developed since 2000 in the case-law of the ECtHR on the basis of article 6-1° ECHR, such an argument is becoming increasingly irrelevant; after all, lawyers are far more accustomed now to invoking such case-law within domestic settings, so that the time may have come to dispense with an external source of challenge and concentrate on efficiency.

But what if (exceptionally?), nevertheless, a vitiated judgment slips though the net? Part of the answer lies with the power of the court at the place of enforcement to refuse to give it effect. In the case of Brussels I recast, articles 46 et seq allow both preventive and remedial opposition to mis-judged foreign judgments, thereby transferring to the enforcing judge the control exercised until now in the course of (on appeal from) *exequatur* proceedings. The grounds for opposition (article 45) are indeed the same and allow for refusal of enforcement for both (exceptional) substantive (a) and procedural (b) reasons. What was the point of so much ado over the "recast", then, one might ask? Certainly, in the end, the burden of initiating the unforceability proceedings shifts to the defendant. Nevertheless, under the existing system, it is also the defendant who shoulders the (lesser?) weight and cost of the appeal against the *exequatur*. The result is probably similar, therefore, no better no worse, than within the previous framework.

However, *whether or not in the latter context*, there is always a possibility (arguably – though not necessarily convincingly – amplified by this shift), that the requirements of article 6-1° may not be satisfied nevertheless, following an unsuccessful attempt to oppose such enforcement before the local court. At first glance this might give rise to a risk of the type encountered in the child abduction case *Sneersone & Kampanella* cited above, where insufficient regard to the fundamental rights of the abducting parent or child by the original pre-abduction

home court, ordering an immediately enforceable return, created not only a cause of refusal but also a jurisdictional-procedural incident unprovided-for by Brussels II bis' fast-track procedure. However, the analogy may not be as clear-cut as it might seem at first glance since, in the latter context, the *whole point* of the fast-track is that it is intended to eliminate all obstacles to the enforcement of the initial cross-border return order along the way, in the name of the superior interests of the child. Whereas, in the context of Brussels I recast (as far I can see), the local enforcement procedure would appear to make all the difference, by providing an opportunity to resist a foreign judgment on fundamental rights grounds (at least those covered by article 45), as a last resort. Much, therefore, turns on this local enforcement procedure; the cases in which no such procedure exists (alimentary obligations, TEE..) may be more dicey. Be that as it may, in the context of Brussels I recast, I'm not convinced that in terms of loss of protection of defendants' fundamental rights, the change is as big a deal as is sometimes made out (although of course – no sooner said than done – practice will probably come up with a morally inacceptable cross-border small claims case…).

III. Now for the real difficulty. By contrast, article 11 (8) Brussels II bis provides for a return order by the pre-abduction home court, *notwithstanding* a judgment of non-return by the court at the place of enforcement; in other words, the fast-track is designed to by-pass resistance in the country of refuge, where the abducting parent seeks to keep the child (by virtue of article 13b 1980 Hague Convention). This provision takes the speediness of return to be of the essence, in the name of the best interests of the child, whatever the risk invoked under article 13b. The stakes are (merely) jurisdictional here: ultimately, it is for the court of the child's pre-abduction home to decide, where appropriate, on the substantive custody issue. However, the need for speed, and the (merely) restitutionary nature of the return, are no apology for sloppy process. Because the nuclear weapon inscribed in article 11(8) suffers no further procedural delay before the child is effectively returned home, it is counterbalanced by the particular duty of the home court under article 42 Brussels IIbis to ensure, before ordering the child's return notwithstanding the refusal of the court of the country of refuge, that the reasons for such refusal have been properly considered (at stake in *Sneersone & Kampanella*) and the child heard, unless inappropriate (at stake in *Aguirre*). If the home court does not do so, or does so unsatisfactorily, it is open to the applicant to challenge the order – including through an individual application to the ECtHR (as indicated in *Povse*).

But can the human rights joker still be played, as a last resort, *at the place of enforcement* (in the country of refuge)? Or is such a possibility, which has obvious implications for the allocation of jurisdiction, excluded by the very architecture of the fast-track, in the name of the child's own best interests? The answer, taking account of the positions of both European courts, is a bit of both, in a subtle dosage of which national courts will now have to take account. What is particularly complex is that the human rights complaint (typically for violation of article 8 ECHR) may involve an issue of access to relief *in the country of refuge*, that is, a question of international jurisdiction, which is one and the same as that of the procedural (or indeed substantive) guarantees due to the child and/or the abducting parent.

In *Aguirre (*as indeed in its own preliminary ruling in *Povse)*, the ECJ/CJUE allows no exception to the concentration of jurisdiction at the child's pre-abduction home – including for the purposes of human rights protection, deemed explicitly to be effective here (§69) by reason of locally available remedies despite the fact that the child and abducting parent are precisely elsewhere. On the other hand, in *Sneersone & Kampanella*, the ECtHR allows the human rights joker (article 8 ECHR) to be raised at the place of enforcement (country of refuge). Then, however, in *Povse*, the *Bosphorus* presumption of "equivalent protection" weighs into the equation. This presumption is conceded by the ECtHR in the name of inter-judicial comity "so as to reduce the intensity of its supervisory role" and avoid putting national courts in the distressful situation of having to choose between competing international obligations. In *Povse*, it was held that nothing justified a rebuttal of the presumption in the case of the applicants' claim (article 8 ECHR) within the framework of Brussels II bis. How does all this fit together? It is probably clearer if one distinguishes two different, successive, issues.

(1) The first is whether the lack of recourse *per se* (abolition of exequatur), as a structural feature of the fast-track procedure, deprives the child of adequate protection (as claimed for instance by the applicant in *Povse*).

– In *Aguirre (*as in the *Povse* preliminary ruling), the ECJ judges that the fact that challenges to the return order are all to be raised exclusively in the country of origin does not run counter to article 24 of the Charter, in the light of which article 42 Brussels II bis has to be read.

– While the ECtHR endorses this result (in *Povse*), it is by virtue of a line of

reasoning in two steps.

(i) Firstly, the "*Bosphorus* presumption" is applicable because under article 11(8) Brussels IIbis, the court of the country of refuge, having no choice but to order the return of the child, exercises no discretion (see ECtHR *MSS* 2011). Moreover, the ECJ/CJEU had already considered (as would have to be the case under ECtHR *Michaud v France* 2012, §114 et s.) the *specific* issue of the compatibility between article 11 (8) Brussels II bis and the article 8 Convention right to a family relationship (it having judged in its own preliminary ruling in the *Povse* case that the availability of an appeal on the basis of article 8 before the courts of the pre-abduction home country was sufficient protection: see on the CJUE's position, ECtHR *Povse,* §85). Given these two factors (no discretion and prior decision of the CJUE), the protection accorded to the right claimed under the ECHR is deemed by the ECtHR to be equivalent, under the *Bosphorus* presumption, to the protection afforded by Brussels II bis; the jurisdiction of the home court remains exclusive.

(ii) Secondly, there is no showing here, in the specific context of the *Povse* case, that the presumption should be rebutted. The decisive reason seems to be that the applicants did not even attempt to avail themselves here of the opportunity of challenging the order in the court of origin (ultimately, if necessary, by lodging an application with the ECtHR if such an attempt were to fail). This circumstance is clearly salient precisely because the availability of an appeal on the basis of article 8 ECHR in the home country is taken to be the reason for which the *Michaud* requirement (relating to the CJEU's own confirmation of adequate protection in respect of the right invoked) is fulfilled here (see above). Implicitly, according to the *Bosphorus* line of reasoning, there is an exhaustion-of-local-remedies condition, that does not – of course – preclude a challenge to the return order at the place of enforcement, *if all else fails*.

(2) Considering, then, that the presumption is rebuttable (even if not rebutted in *Povse*), would it still be possible to raise a human rights joker before the courts of the country of refuge (as in *Sneersone & Kampanella,* decided before *Bosphorus* was brought into the equation) if, in a particular case, the (pre-abduction home) court ordering the return did not deal, or dealt inadequately, with the human rights challenge? Under *Bosphorus*, the rebuttal of the presumption of equivalent protection would have to meet a particularly rigorous standard of proof of the violation (§156 *:* a "manifest deficiency" of protection) in a particular case in

order to justify that the constitutional values of the ECHR prevail over the interests of international cooperation. In principle, however, if it could be shown that despite exhaustion of all available remedies in the pre-abduction home country, the protection of child's (or a parent's) right has nevertheless been severely hampered, this would then still seem to imply, as in *Sneersone & Kampanella*, that there would be a right of access to the court of the place of refuge, and grounds for a refusal of enforcement of the notwithstanding order by such court. However, since the exhaustion of remedies in the home country would include (again, as indicated in *Povse*) an application to the ECtHR itself, it would only be if for some reason the access to such remedy proved to be impossible that the access argument could be made effectively in the courts of the country of refuge. Of course, it also appears from *Sneersone & Kampanella* and *Povse* combined, that in most (all?) cases, had the return order been effectively challenged locally and had the courts of the pre-abduction home country (on appeal) carried out their obligations under article 42 Brussels II bis (and the Charter), there would be no need – and indeed, by the same token, no right – to call for help from the courts of the country of refuge under the ECHR.

In the meantime, the policy problem is whether the current child-return system, designed to ensure against (assumedly) opportunistic forum shopping by the abducting parent, really works to further the best interests of the child. It may be that the current litigation inflation is transitional and that, once stabilized, the system will work more satisfactorily, with less collateral damage. Arguably, however, the multi-level jurisdictional scheme may have become too unwieldy, and whether or not it now weighs too heavily in favor of the non-abducting or stay-at-home parent (see *Kampanella*), such violent and probably costly legal battles can only be detrimental to the child. While on the one hand Brussels II bis supports speedy return in the name of the child's interest *in abstracto*, on the other, the circumstances of particular children in individual cases, to which the ECtHR directs its attention, often point in a different direction. These two opposite viewpoints, which also correspond to two competing epistemological schemes in the two European courts' patterns of reasoning, may indeed be at the very heart of the new mega-conflict-of-laws.

Requejo on Povse

Introduction

The accession of the European Union (EU) to the European Convention on Human Rights is proving difficult. PIL has not been spared.

In the field of recognition the biggest concern was not long ago represented by the conflict between the ECtHR decision in *Pellegrini*, and the European will to eliminate the intermediate procedure to declare the enforceability of foreign judgments – replacing the conditions usually required at the State where enforcement is sought by some controls operated in the Member State of origin. If *Pellegrin*i was to be followed, the unconditional system of recognition set in Art. 42 of the Brussels II bis Regulation would be incompatible with the ECHR. That the ECtHR decision in *Pellegrini* has been put forward as an argument against the abolition of the exequatur in the Commission proposal to recast Council Regulation (EC) no 44/2001 does therefore not come as a surprise; nor do the efforts by Member States designed to limit the effects of *Pellegrini* case (for instance by way of considering the decision of the ECtHR limited to cases where the State of origin is not a contracting State of the ECHR).

At first sight, the ECtHR decision to the application nº 3890/11, *Povse v. Austria*, based on the *Bosphorus test*, is the bridge to reconcile the positions.

Bosphorus test as applied to Povse

The so called *Bosphorus* test is based on the following premise: contracting States transferring sovereign powers to an international organization retain responsibility for the acts of their organs, "regardless whether the act or omission was a consequence of domestic law or of the necessity to comply with international obligations". However, in as far as the international organization "is considered to protect fundamental rights (…) in a manner which can be considered at least equivalent to that for which the Convention provides", a presumption that the contracting State has complied with the ECHR enters into play, if he lacked discretion in relation to the obligations derived from his membership to the international organization. Therefore, a three-step exam in needed in order to determine whether there is equivalence between the protection offered by the Convention and the international organization at stake

(step 1), and the degree of freedom of the concerned State (step 2); finally, the arguments against the presumption of equivalence in the specific case must be discarded (step 3).

Step1 in Povse: *Whether the relevant organization is considered to protect fundamental rights*. In the *Povse* decision this point is dealt with exclusively in par. 77, in such a manner that it is not only superficial, but inexistent (see the *Bosphorus* decision, num. 159-165, remitting to 73-81). This is not only striking, but disappointing. First, because as of today, i.e. at the relevant time of the analysis, the existence of truly "substantive guarantees" offered by the EU as a unit (instead of as a bunch of diverse systems striving for coherence), is not self-evident. Second, because the real issue at stake is precisely that of the compatibility between the ECHR and the guarantee's system provided by the EU in Regulation Brussels II bis: a system where the protection of the fundamental rights rests exclusively on the Member State of origin. By considering the ECJ as single key element of the control mechanism, the ECtHR avoids the issue; at the same time, it narrows the reach of its pronouncement. The ECtHR's approach may be explained in different ways, starting with the actual submission of the applicants: they contested the "equivalent protection" only by reference to the role of the ECJ in the present case. It should be added that the *Bosphorus* test has been used by the ECtHR on several occasions, in a way that may be considered consistent but not necessarily uniform, precisely because the different degrees of depth of the ECtHR's exam in order to affirm or to deny the equivalence of the protection offered by the international organization under review.

Step2 in Povse: Discretion. There was no discussion as regards Austria's lack of discretion under Art. 42 of the Brussles II bis Regulation.

Step3: Whether the presumption has been rebutted in the present case. In contrasts to step 1, the analysis here was performed extensively. Two elements seem to be essential: the role of the ECJ defining the applicability and interpretation of the relevant legal provisions (par. 85); and the *status quo* before the court of origin (the opportunity open to the applicants to still rely on their Conventions rights there: par. 86). The importance given to those issues legitimates further questions. To start with, what would happen in the absence of consultation of the ECJ? On the one hand, the stress put by the ECtHR in the ECJ's role suggests that the answer would have been different in the absence of a preliminary ruling (or at least, of a referral by the national court, even if rejected

by the ECJ).On the other hand, the ECJ's ruling in the aff. C-211/10, stating that any change in the situation of the abducted child with consequences on the return order must be pleaded before the competent court in the Member State of origin, creates a legal precedent for all member States, therefore exempting them from referring new queries on the same subject.

As for the second element retained by the ECtHR (the *status quo* in Italy), would its decision have been the same had the applicants exhausted their resources before the Italian courts without success? In the light of par. 86, the likely answer is yes. Presumably, this would also be the answer in the case of a complaint addressed, either simultaneously or consecutively, against two respondent States –the State of origin, and the Stated where enforcement is sought-, even if the ECtHR declares the first one in breach of the Convention when applying Art. 11 (8) the Brussels II bis Regulation (which is not a hypothetical situation: see *Sneersone and Kampanella v. Italy*).

Consequences

An interpretation of *Povse* in the sense that it sanctifies the Regulation mechanism of fundamental rights protection would result in the immunity of the State where enforcement is sought. In return, it places the ECtHR applicants in an uncomfortable situation when formulating their complaints: they must be very be cautious and select the correct respondent State. Special care and legal knowledge, improbable in the average individual applicant (representation before the ECtHR is not compulsory), will be required.

Bosphorus+Povse applied to Regulation 44/01 (and Regulation 1215/2012)

What would be the likely outcome of the *Bosphorus* test if applied to other UE PIL instruments, such as the Regulation 44/01 or the Brussels I recast Regulation? According to both instruments (albeit following different ways) the requested State is allowed to refuse the declaration of enforceability if specific, restricted grounds provided by the Regulations themselves are present; in particular, if such declaration is manifestly contrary to public policy. Thus at first glance, the answer is that these cases are not eligible for the *Bosphorus* presumption (However, it is so to the extent that the States have discretion when implementing the legal obligations steaming from their membership; whether this is the case as regards

public policy may be discussed in the light of *Krombach* and *Gambazzi*).

UE accession to ECHR

EU accession to the ECHR means the end of the *Bosphorus* test. Admittedly, the equivalence presumption in favor of the EU itself is no longer justified. However, it is worth considering whether it should not survive in the context of the analysis of a Member State compliance with the Convention, if he had to blindly obey a mandate of the EU; indeed, the presumption of equivalence makes more sense because the UE accession to the ECHR. In this context, provided that no ECtHR's decision has yet been pronounced against the EU, maintaining a rebuttable presumption of equivalence would simplify the applicant's choice of the correct respondent (see 3).

Latest Issue of "Praxis des Internationalen Privat- und Verfahrensrechts" (5/2013)

Recently, the September/October issue of the German law journal "Praxis des Internationalen Privat- und Verfahrensrechts" (**IPRax)** was published.

- ***Robert Magnus*:** "Choice of court agreements in succession law"

> *The EU Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession (Succession Regulation), most recently adopted by the European Parliament and the Council of the European Union introduces the possibility for parties of a probate dispute to conclude a jurisdiction agreement. This article compares the new rules on jurisdiction agreements with the current legal situation in Germany, where such agreements in succession matters have not been much in use. As the Succession Regulation is for several reasons rather unsatisfactory the article*

further discusses more convincing alternatives (e.g. prorogation by the deceased in testamentary dispositions, arbitration agreements).

- ***Maximilian Eßer***: "The adoption of more far-reaching formal requirements by the EU Member States under the Hague Protocol on the Law applicable to Maintenance Obligations"

Art. 15 of Regulation (EC) No 4/2009 refers to the Hague Protocol of 2007 for the determination of the law applicable to maintenance obligations. The Protocol was ratified by the EU as a "Regional Economic Integration Organisation". The formal requirements in Art. 7 (2) and Art. 8 (2) of the Protocol have to be considered as minimum standards. In order to protect the weaker party from a hasty and heedless choice of applicable law on maintenance obligations, the choice-of-law agreement should from this perspective be recorded in an authentic instrument. In his essay, Eßer illustrates that neither public international law nor European Union law prevent the EU Member States from adopting more farreaching formal requirements.

- ***Herbert Roth:*** "Der Einwand der Nichtzustellung des verfahrenseinleitenden Schriftstücks (Art. 34 Nr. 2, 54 EuGVVO) und die Anforderungen an Versäumnisurteile im Lichte des Art. 34 Nr. 1 EuGVVO" – the English abstract reads as follows:

The European Court of Justice has correctly decided, that the Court of the Member State in which enforcement is sought may lawfully review the effective delivery of the initial trial document even if the exact date of service is specified in the certificate referred in Article 54 of the COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters. The Court also held convincingly, that the recognition and therefore enforcement of a default judgement is normally not manifestly contrary to public policy in the sense of Article 34 No 1 of the Council Regulation 44/2001 despite the fact that the default judgement itself does not provide any legal reasoning. Exceptions are necessary if the defendant had no effective remedy against the decision in the Member State of origin.

- ***Jörg Pirrung:*** "Procedural conditions for compulsory placement of a child at risk of suicide in a secure care institution in another EU Member State"

Judgment and View in case S.C. clarify important questions of judicial cooperation within the EU in child protection matters. According to the ECJ, a judgment ordering compulsory placement of a 17 year old child in a secure care institution in another Member State according to Article 56 of the Brussels IIa regulation N 2201/2003 must, before its enforcement there against the will of the child, be declared to be enforceable/registered in that State. Appeals brought against such a registration do not have suspensive effect. Further activity of the EU and/or national legislators should ensure, by developing concrete rules, that the decision of the court of the requested State on the application for such a declaration of enforceability shall be made with particular expedition. Though there may be differences of opinion as to certain aspects regarding the answer given by the ECJ in point 3 of the operative part of its decision, – one might have preferred the way via enforcement of a provisional protective measure taken, on the basis of the recognition of the decision of the State of origin, by the State requested, such as the English decision of 24 February 2012 – the outcome of the procedure confirms the general impression that the ECJ has developed an effective way of interpretation and application of the regulation. After the entry into force for 25 EU States of the Hague Convention of 19 October 1996 on the Protection of Children, courts in EU States should, as far as possible, try to apply the EU regulation in conformity with the principles of this international treaty.

- ***Urs Peter Gruber:*** "Die perpetuatio fori im Spannungsfeld von EuEheVO und den Haager Kinderschutzabkommen" – the English abstract reads as follows:

In a case on the visiting rights of one parent to see the children in the custody of the other parent, the OLG Stuttgart was confronted with an intricate question of jurisdiction. Right after the commencement of the trial in Germany, the child had moved from Germany to Turkey and had acquired a new habitual residence there. The court had to decide whether this change of habitual residence was of relevance for its jurisdiction.

Pursuant to the Brussels IIa Regulation, which adheres to the principle of "perpetuatio fori", such a change does not affect jurisdiction of the court seised. However pursuant to the Convention of 5 October 1961 Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants, in such a case, jurisdiction shifts automatically to the state in which the new habitual residence of the child is located.

Therefore, the OLG Stuttgart had to decide whether jurisdiction was governed by the Brussels IIa Regulation or rather by the above mentioned convention on the protection of minors which both Germany and Turkey are parties of. The OLG Stuttgart held that when defining the exact scope of application of the Brussels IIa Regulation, one should consider the rights and obligations of member states arising from agreements with non-member states. Therefore, in the case at hand, the court held that the jurisdictional issue was not governed by the Brussels IIa Regulation; in order to ensure that Germany complied with its contractual duties in relation to Turkey, it applied the convention on the protection of minors. Consequently, it declined jurisdiction in favour of the competent Turkish courts.

- ***Fritz Sturm***: "Handschuhehe und Selbstbestimmung" – the English abstract reads as follows:

For centuries, the aristocracy used proxy marriages to anticipate the ceremony before the bride and the groom had met. Today proxy marriages are utilized for immigration purposes.

In many countries, such as Germany, Austria, Switzerland and the UK, this form of marriage is not permitted. Nevertheless, those countries recognize proxy marriages performed in a state where such marriages are permitted, if the representative has been given precise instructions. The US also apply the lex loci celebrationis, whereas French conflict of laws always requires the physical presence of the French spouse (Art. 146-1 C.civ.).

It is interesting to note that in cases where the representative did not receive precise instructions, certain German judges refer to the ordre public. Indeed, the prevailing German doctrine refuses to view the question of the validity of a marriage solemnised by a representative with such unlimited power as a question of form, but sees it as a problem of substantive validity, and infers

from the lack of the spouses' consent that such a marriage is null and void according to Art. 13 EGBGB.

However, as this paper shows, the prevailing doctrine has to be rejected in this respect. It goes astray as it does not reflect the fact that a marriage concluded through a representative authorized to independently choose the bride or groom himself may in fact later be approved by the spouse represented by him. This power of approval has to be qualified as a question of form and is therefore subject to the lex loci celebrationis.

An additional argument against this doctrine is that, if the representative has the aforementioned freedom of choice, Art. 13 EGBGB does not lead to a void marriage, but to a relationship which can only be dissolved by divorce.

- ***Carl Friedrich Nordmeier***: "Estates without a Claimant in Private International Law – Hidden Renvoi, § 29 Austrian PILC and Art. 33 EU Succession Regulation"

According to § 1936 German Civil Code, estates without a claimant are inherited by the State, whereas § 760 Austrian Civil Code provides a right to escheat for assets located in Austria. In addition, § 29 Austrian Code of Private International Law (PILC) determines the lex rei sitae as applicable, including the question if there are heirs. The same is true for laws that do not have a rule corresponding to § 29 PILC but contain hidden renvois. Art. 33 of the new European Succession Regulation (ESR) solves the problem of how to treat estates without a claimant in transborder cases only partially. It is recommended to apply the lex rei sitae in conflict cases not covered by the rule. Art. 33 ESR is applicable if only a part of the estate remains without claimant or if assets are located in third countries. Sufficient protection for creditors of the estate is granted as long as they are entitled to seek satisfaction of the assets which a State appropriates. Overall, § 29 PILC provides a better solution for dealing with estates without a claimant than Art. 33 ESR.

- ***Dieter Henrich:*** "Familienrechtliche Vorfragen für die Nebenklageberechtigung in einem Strafverfahren"
- ***Mathias Reimann***: "The End of Human Rights Litigation in US Courts?

The Impact of Kiobel v. Royal Dutch Petroleum Co., 569 U.S. — (2013)”

For three decades, the Alien Tort Claims Act provided non-US citizens with a jurisdictional basis to bring (private) tort actions in US federal courts for violations of international human rights norms against alleged perpetrators, both foreign and domestic. Especially suits against multinational corporations for aiding and abetting human rights violations committed by governments in developing countries against the local population had become numerous and turned into a major irritant in boardrooms and government offices.

In a landmark decision announced in April of 2013, the US Supreme Court decided that the Alien Tort Claims Act does not apply extraterritorially. Since virtually all cases brought by aliens arose and arise from acts committed outside of the United States, at first glance it seems that the Court has rendered the lower courts' extensive 30-year jurisprudence under the statute all but moot. This is a major victory in particular for multinational corporate defendants as well as a major defeat for human rights protection in US courts.

Yet, it is far from clear whether the decision really amounts to a death sentence for tort-based human rights litigation in US courts. The split decision may leave room for some claims under the statute, e.g., if the acts were planned or knowingly tolerated by an American defendant on US soil. It also does not affect claims under the (more narrowly drafted) Torture Victim Protection Act of 1991, nor does it bar actions brought in the state courts under domestic (instead of international) law. Last, but not least, the decision cannot destroy the lasting legacy of the case law under the Alien Tort Claims Act which not only generated important decisions in international law but also increased the awareness of the human rights implications of foreign investment.

- ***Wolfgang Winter:*** “Einschränkung des extraterritorialen Anwendungsbereichs des Alien Tort Statute” – the English abstract reads as follows:

On April 17, 2013 the U.S. Supreme Court issued its decision in Kiobel et al. v. Royal Dutch Petroleum et al. regarding the extraterritorial scope of the Alien Tort Statute, a provision dated 1789. The Court unanimously dismissed the complaint, filed by Nigerian citizens residing in the United States, alleging that the defendant non-U.S. companies aided and abetted the Nigerian Government

in committing violations of the law of nations in Nigeria. The Court's majority applied the rule of presumption against extraterritoriality to claims under the Alien Tort Statute and found that this presumption was not rebutted by the text, history, or purpose of the Alien Tort Statute. The minority vote required a nexus to the United States which did not exist in the present case.

The decision has to be applauded. It continues a recent development of U.S. Supreme Court decisions, avoids friction with the sovereignty of other nations, provides legal certainty and is in line with the historical context of the Alien Tort Statute.

- ***Ulrich Spellenberg***: "Consequences of incapacity to the validity of contract and set-off"

The judgment of the Austrian Supreme Court could have been an opportunity for the Court to rule on two major questions of private international and procedural law which are much discussed in Germany and much less in Austria, namely what law to apply on the consequences of incapacity to contract and whether international jurisdiction is necessary to plead a set-off. Unfortunately the Court left the first one open, as it could, and did not even mention the second. Nevertheless, the judgment suggests remarks on these problems as well in Austrian as in German law.

- ***Leonid Shmatenko***: "Die Auslegung des anerkennungsrechtlichen ordre public in der Ukraine" – the English abstract reads as follows:

The rather undefined legal term of „public policy" leads to a great legal uncertainty in the Ukrainian jurisprudence and jeopardizes the recognition and enforcement of arbitral awards. By taking a clear position upon what falls under the public order and what not, the newest decision of the Ukrainian High Specialized Court on Civil and Criminal Cases is somewhat revolutionary. Even though it does still not provide a clear definition of the former, it provides a first glimpse of hope that someday Ukrainian courts may find one and thus, guarantee legal certainty for the recognition and enforcement of foreign arbitral awards and lead to an arbitration friendly environment.

- ***Sebastian Krebber***: "The application of the posting-directive: Conflict of

Laws, Fundamental Freedoms and Assignment of the Tasks among the Competent Courts”

The decision of the OGH deals with the application of the posting-directive in the country of reception and reveals how uncertain the handling of the directive still is, because it duplicates employment conditions: on the one hand, the employment conditions of the law applicable to the employment contract and, on the other hand, the employment conditions of the law of the country of reception. The article attempts to show that the relationship between the general legal theory of the law of fundamental freedoms and the posting directive developed in Laval, Rüffert and above all in Commission/Luxembourg makes it possible to view the posting directive as a legal instrument whose only task is to secure the application of the employment conditions of the country of reception as set out in Art. 3 of the directive. Thus, the subject of the proceedings of the court in the country of reception with jurisdiction under Art. 6 of the posting-directive is limited to the enforcement of Art. 3 of the directive. The issues of the law of fundamental freedoms, conflict of laws and substantial law raised by the duplication of employment conditions are to be dealt with by the courts of general jurisdiction of Art. 18 et seq. Brussel I regulation.

- ***Reinhold Geimer***: “The Registrability of a Real Estate Purchase Agreement Established by a German Notary with the Spanish Land Register – A Comment on Tribunal Supremo, 19/06/2012 – 489/2007”

The Spanish Supreme Court confirmed that registrations of ownership with the Spanish land register may be based on authentic instruments drawn up by German civil law notaries. In spite of some (misleading) comments on European law, the judgment heavily relies on specific provisions of Spanish law on the access of foreign instruments to the Spanish land register. According to the Spanish Supreme Court, any authentic instrument of foreign origin producing the same evidentiary effects as a Spanish authentic instrument can be registered with the land register. This result reflects current Spanish practice and is due to the effects of registration: registration in the Spanish land register is not needed to establish ownership, but only entails bona-fide effects. This is why the Spanish Supreme Court decision has no effects on German practice where registration is needed to complete the transfer of ownership. As a result, German register law makes a distinction between evidentiary effects of

authentic instruments and substantive law requirements they have to meet. This distinction does not contravene European law as solely the Member States are competent to determine the rules according to which ownership is transferred.

- ***Burkhard Hess***: "Das Kiobel-Urteil des US Supreme Court und die Zukunft der Human Rights Litigation – Tagung am MPI Luxemburg"
- ***Erik Jayme/Carl Zimmer:*** "Die Kodifikation lusophoner Privatrechte – Zum 100. Geburtstag von António Ferrer Correia"
- ***Deniz Deren/Lena Krause/Tobias Lutzi:*** "Symposium anlässlich der 100. Wiederkehr des Geburtstags von Gerhard Kegel und der 80. Wiederkehr des Geburtstags von Alexander Lüderitz vom 1.12.2012 in Köln"
- ***Jens Heinig***: "Die Wahl ausländischen Rechts im Familien- und Erbrecht"

ECJ Rules on Jurisdiction for Copyright Infringement

Yesterday, the Court of Justice of the European Union delivered its judgment in Pinckney v. KDG Mediatech (Case C-170/12).

Mr Pinckney, who lives in Toulouse (France), claims to be the author, composer and performer of 12 songs recorded by the group Aubrey Small on a vinyl record. When he discovered that those songs had been reproduced without his authority on a compact disc pressed in Austria by Mediatech, then marketed by United Kingdom companies Crusoe or Elegy through various internet sites accessible from his residence in Toulouse, Mr Pinckney brought an action against Mediatech

before a French court seeking compensation for damage sustained on account of the infringement of his copyrights. Mediatech challenged the jurisdiction of the French courts.

The European Court understood the question formulated by the referring court to be whether Article 5(3) of the Brussels I Regulation must be interpreted as meaning that where is an alleged infringement of a copyright which is protected by the Member State of the court seised, that court has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State, which has in the latter State reproduced that work on a material support which is subsequently marketed by companies established in a third Member State through an internet site which is also accessible in the Member State of the court seised.

The Court reiterated its distinction between infringements of personality rights and of intellectual and industrial property rights, and insisted that the allegation of an infringement of an intellectual and industrial property right, in respect of which the protection granted by registration is limited to the territory of the Member State of registration, must be brought before the courts of that State. It is the courts of the Member State of registration which are the best placed to ascertain whether the right at issue has been infringed. It then applied it to copyrights.

> *39 First of all, it is true that copyright, like the rights attaching to a national trade mark, is subject to the principle of territoriality. However, copyrights must be automatically protected, in particular by virtue of Directive 2001/29, in all Member States, so that they may be infringed in each one in accordance with the applicable substantive law.*
>
> *40 In that connection, it must be stated from the outset that the issue as to whether the conditions under which a right protected in the Member State in which the court seised is situated may be regarded as having been infringed and whether that infringement may be attributed to the defendant falls within the scope of the examination of the substance of the action by the court having jurisdiction (see, to that effect, Wintersteiger, paragraph 26).*
>
> *41 At the stage of examining the jurisdiction of a court to adjudicate on damage caused, the identification of the place where the harmful event giving*

rise to that damage occurred for the purposes of Article 5(3) of the Regulation cannot depend on criteria which are specific to the examination of the substance and which do not appear in that provision. Article 5(3) lays down, as the sole condition, that a harmful event has occurred or may occur.

42 Thus, unlike Article 15(1)(c) of the Regulation, which was interpreted in Joined Cases C-585/08 and C-144/09 Pammer and Hotel Alpenhof [2010] ECR I-12527, Article 5(3) thereof does not require, in particular, that the activity concerned to be 'directed to' the Member State in which the court seised is situated.

43 It follows that, as regards the alleged infringement of a copyright, jurisdiction to hear an action in tort, delict or quasi-delict is already established in favour of the court seised if the Member State in which that court is situated protects the copyrights relied on by the plaintiff and that the harmful event alleged may occur within the jurisdiction of the court seised.

44 In circumstances such as those at issue in the main proceedings that likelihood arises, in particular, from the possibility of obtaining a reproduction of the work to which the rights relied on by the defendant pertain from an internet site accessible within the jurisdiction of the court seised

45 However, if the protection granted by the Member State of the place of the court seised is applicable only in that Member State, the court seised only has jurisdiction to determine the damage caused within the Member State in which it is situated.

46 If that court also had jurisdiction to adjudicate on the damage caused in other Member States, it would substitute itself for the courts of those States even though, in principle, in the light of Article 5(3) of the Regulation and the principle of territoriality, the latter have jurisdiction to determine, first, the damage caused in their respective Member States and are best placed to ascertain whether the copyrights protected by the Member State concerned have been infringed and, second, to determine the nature of the harm caused.

Final ruling:

Article 5(3) of Council Regulation (EC) No 44/2001 … must be interpreted as

meaning that, in the event of alleged infringement of copyrights protected by the Member State of the court seised, the latter has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State and which has, in the latter State, reproduced that work on a material support which is subsequently sold by companies established in a third Member State through an internet site also accessible with the jurisdiction of the court seised. That court has jurisdiction only to determine the damage caused in the Member State within which it is situated.

H/T: Bernd J. Jütte

Venice Conferences on Institutional Arbitration (12 and 19 October 2013)

The Venice Chamber of Arbitration and the Venice Chamber of Commerce, in collaboration with the University of Venice "Cà Foscari" and ARBIT (Italian Forum for Arbitration and ADR), will host two one-day conferences on institutional arbitration: "**Arbitrato interno e internazionale: aspetti procedurali dall'avvio all'esecuzione del lodo in Italia e nel mondo**" [Internal and International Arbitration: Procedural Aspects from the Commencement to the Execution of the Award in Italy and in the World].

The conferences, which will take place in Venice on **Saturday 12 October** and **Saturday 19 October**, will focus on institutional arbitration (both in international commercial and investment disputes), under the point of view of the procedural aspects ("L'arbitrato istituzionale. Aspetti procedurali", 12 October) and of the challenging and enforcement of the arbitral award ("L'arbitrato

istituzionale. Il lodo: annullamento, nullità, esecuzione", 19 October). Speakers include leading academics and practitioners and members of arbitration institutions (see the full programme here).

Participation is free, upon registration on the site of the Venice Chamber of Arbitration.

Commentary of the Succession Regulation

The first commentary of the European Regulation No 650/2012 of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession has been published by Bruylant.

The book is conceived as a commentary, article by article, of the Regulation. It is written in French and, in its 940 pages, it provides a comprehensive analysis of comparative law as well as extensive explanations and examples in order to allow practitioners to address the issues of future international successions and family business succession planning.

With the contributions of :

Andrea Bonomi (Introduction ; Préambule ; article 1er, paragraphe 1er, paragraphe 2,
points a à g, j ; article 3, paragraphe 1er, points a à d ; articles 4-12 ;
article 14-18 ; articles 20-22 ; article 23, paragraphe 1er, paragraphe 2,
points a à d, h, i ; articles 24-27 ; articles 34-38 ; articles 74-75 ;
articles 77-82);

Ilaria Pretelli (Articles 39-58);

Patrick Wautelet (Article 2 ; article 3, paragraphe 1er, points e à i, paragraphe 2 ;

article 13 ; article 19 ; article 23, points e à g, j ; articles 28-33 ; articles 59-73 ; article 76 ; articles 83-84).

More information available here.