Niedermaier on Arbitration and Arbitration Agreements Between Parties of Unequal Bargaining Power

Tilman Niedermaier, LL.M. (University of Chicago) has authored a book on "Arbitration Agreements and Agreements on Arbitral Procedure Between Parties of Unequal Bargaining Power. A Comparison of German and U.S. Law With Consideration of Further Legal Systems." (Originial German title: "Schieds- und Schiedsverfahrensvereinbarungen in strukturellen Ungleichgewichtslagen. Ein deutsch-U.S.-amerikanischer Rechtsvergleich mit Schlaglichtern auf weitere Rechtsordnungen").

The book is in German. The official English abstract reads as follows:

> *The German Arbitration Law of 1998 is particularly intended to meet the requirements of international commerce. One characteristic of international commercial disputes is a balance of power between the parties. However, structural imbalances between parties do occur not only in domestic and non-commercial disputes. In the recent years, issues raised by such imbalances in arbitration have received increasing attention in case law and legal scholarship in the United States.*
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> *Tilman Niedermaier compares the law in Germany and the United States. Taking into account recent developments in EU law, he assesses to what extent the interests of parties with unequal bargaining power in arbitration can be safeguarded under German law.*

More information is available on the publishers website.

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

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

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

In her article *Nerina Boschiero*, Professor of International Law at the University of Milan, addresses the issue of "Corporate Responsibility in Transnational Human Rights Cases. The U.S. Supreme Court Decision in *Kiobel v. Royal Dutch Petroleum*" (in English).

> *With a decision based upon the consideration that all the significant conduct occurred outside the territory of the United States, in Kiobel the U.S. Supreme Court unanimously ruled that the presumption against extraterritoriality applies to claims under the Alien Tort Statute, and that nothing in the statute refutes that presumption. However, in its decision the Supreme Court did not directly address the issue whether a corporation can be a proper defendant in a lawsuit under the ATS. In this article, the Author begins by providing a substantial "pre-Kiobel" analysis of the business-human rights relationship. Furthermore, in addressing – with reference to the Kiobel case – the issues of corporate liability and extraterritorial jurisdiction over abuses committed abroad, the Author provides a detailed description of the governments' positions on universal civil jurisdiction, also providing a critical evaluation of the arguments put forth by the EU Member States on the extraterritorial application of ATS. As the Author illustrates, this decision is far more complex and problematic than it may appear: it in fact leaves a number of questions open on what exactly remains of the ATS, as well as various uncertainties due to the substantive differences between the majority opinion and the different concurring opinions, difficult to be reconciled and harmonized, especially from an European standpoint.*

In his article *Andrea Bonomi*, Professor of Comparative Law and Private international Law at the University of Lausanne, provides an assessment of the new EU Regulation on succession matters in "Il regolamento europeo sulle successioni" (The EU Regulation in Matters of Successions; in Italian).

> *The European Regulation on Succession Matters, adopted on 4 July 2012, will be applicable from 17 August 2015 to the succession of persons who die on or after this date. The final text reflects in its main features the Commission proposal of 2010, albeit with several amendments. Among the most important novelties, we will mention the restructuring of the jurisdictional scheme, the introduction of an exception clause and of some specific provisions concerning wills and the formal validity of mortis causa provisions, as well as the admission of renvoi. Several useful clarifications have also been included, sometimes in the text of the Regulation and sometimes in the preamble, inter alia with respect to the definition of "court", the determination of the last habitual residence of the deceased, the "acceptance" of evidentiary effects of authentic instruments, and the purpose and effects of the European Certificate of Succession. Overall, the Regulation is a very detailed and well-balanced instrument. In the majority of cases, the adoption of the habitual residence as the main criteria for the allocation of jurisdiction and the determination of the applicable law will allow national courts in the Member States to regulate the succession according to their domestic law. Derogations from this approach result in particular from the admission of party autonomy, and are mainly provided for estate planning purposes. The unification of the conflict of law rules in the Member States as well as the extension of the principle of mutual recognition to decisions and authentic instruments to succession law matters will also significantly contribute to legal certainty, and further estate planning. Last but not least, the European Certificate of Succession will greatly facilitate the transnational administration of estates by heirs and representatives. On the other hand, the main weaknesses of the new instruments concern the relationships with non-Member States, and with those Member States who are not subject to the Regulation (Denmark, Ireland, and the United Kingdom); potential conflicts with the courts of those States, due to the wide reach of the Regulation's jurisdictional rules, cannot be avoided through lis pendens and recognition mechanisms. It is therefore to be hoped that the efforts of harmonization in the area of international succession will continue under the auspices of the Hague Convention at a global level.*

In her article *Francesca C. Villata*, Professor of International Law at the University of Milan, addresses the reorganisation of the Greek sovereign debt in "Remarks on the 2012 Greek Sovereign Debt Restructuring: Between Choice-Of-Law Agreements and New EU Rules on Derivative Instruments" (in English).

> *The paper analyses – from a choice-of-law perspective – the restructuring mechanism implemented for the Greek sovereign debt bonds in 2012. In this respect, on one hand, the role played by parties' autonomy in determining the law applicable both to contractual and to non-contractual matters is emphasised; on the other hand, an analysis of the relevant EU Regulations on CDSs and derivative instruments, as wells as of the Mi-FID II and MiFIR proposals is conducted mainly through the lens of unilateral mandatory rules following the lex mercatus approach. The paper concludes with an auspice for the adoption of uniform rules on the insolvency or pre-insolvency of states, providing for agreed-upon restructuring processes.*

In addition to the foregoing, the following comments are also featured:

Olivia Lopes Pegna, Researcher of International Law at the University of Florence, "L'interesse superiore del minore nel regolamento n. 2201/2003" (The Superior Interest of the Child in Regulation No 2201/2003; in Italian).

> *The European Union is increasingly concerned with private international law instruments regarding, directly or indirectly, children. The UN Convention on the rights of the child (Art. 3) and the European Charter of Fundamental Rights (Art. 24) require that in all actions relating to children, whether taken by public authorities or private institutions, the child's best interests be a primary consideration. It is therefore mandatory for EU Institutions, and for national judges, to construe and apply EU legislative instruments in compliance with this principle. The present work concerns rules on jurisdiction and enforcement of foreign judgments that expressly refer to the best interests of the child in order to operate, and in particular the rules set in Regulation No 2201/2003 (Brussels II-bis) concerning decisions on parental responsibility. It tries to show how, and to what extent, "the best interests of the child" principle introduce flexibility, or even derogate, to the traditional private international law methods. The case-law of the European Court of Justice on the Brussels II-bis Regulation is examined, together with the main decisions of the Italian courts,*

in order to evaluate to what extent effectiveness to the aforementioned principle is guaranteed in the application of the Regulation's provisions. It is also suggested that the Regulation shall be construed in a way that permits, in some circumstances, the participation of the child to the proceedings for recognition and enforcement of foreign decisions.

Nicolò Nisi (PhD candidate at the Bocconi University), "La giurisdizione in materia di responsabilità delle agenzie di rating alla luce del regolamento Bruxelles I" (Jurisdiction over the Liability of Rating Agencies under the Brussels I Regulation; in Italian).

A recent judgment delivered by the Italian Supreme Court decided upon the jurisdiction over damage claims brought by investors against rating agencies based in the U.S., allegedly liable for issuing inaccurate ratings capable of having a significant impact on their investment decisions. In this regard, the new Regulation (EU) No 462/2013 amending Regulation (EC) No 1060/2009 on credit rating agencies has introduced a new Article 35-bis specifically addressing the liability of rating agencies but it failed to provide some guidance with respect to private international law issues. The Italian Supreme Court declined its jurisdiction on the grounds of Article 5(3) of Regulation (EC) No 44/2001 ("Brussels I") and ruled that the "place where the harmful event occurred" is localized at the place of the initial damage, i.e. where the shares were first purchased at an excessive price, without any reference to the seat of the depositary bank, nor to the place where the rating is issued. This judgment turned out to be very interesting since it was the first Italian judgment to deal with jurisdiction issues relating to liability of rating agencies under the Brussels I Regulation and it provided for the opportunity to make a contribution to the discussion on the interpretation of Article 5(3) in case of financial torts and purely financial losses.

Indexes and archives of the RDIPP since its establishment (1965) are available on the website of the Department of Italian and Supranational Public Law of the University of Milan.

ECJ Rules on Irreconcilable Judgments Given in the Same State of Origin

On 26 September 2013, the Court of Justice of the European Union ruled in Salzgitter Mannesmann Handel GmbH v. SC Laminorul SA (C-157/12) that Article 34(4) of the Brussels I Regulation does not apply to two irreconcilable judgments given by courts of the same of Member state of origin.

Laminorul, which is established in Romania, brought an action seeking payment for a delivery of steel products against Salzgitter, established in Germany, before the Tribunalul Braila (Braila Court of First Instance) (Romania). Salzgitter claimed that that action should have been brought against the actual party to the contract with Laminorul, Salzgitter Mannesmann Stahlhandel GmbH , rather than against Salzgitter. On that ground, the Tribunalul Braila dismissed the action brought by Laminorul by judgment of 31 January 2008 ('the first judgment'). That judgment became final.

Shortly thereafter, Laminorul initiated new proceedings against Salzgitter before the same court for the same cause of action. That application was, however, served on Salzgitter's former legal representative, whose authority to act for the company had been limited, according to Salzgitter, to the first proceedings. No one appeared on Salzgitter's behalf at the hearing on 6 March 2008 before the Tribunalul Braila which delivered a judgment by default against Salzgitter, requiring Salzgitter to pay EUR 188 330 to Laminorul ('the second judgment'). Salzgitter later on made a number of applications in Romania to review or set aside the second judgment. They were all dismissed.

In the mean time, Maminorul was seeking enforcement of the second judgment in Germany.

The ECJ ruled:

36 The interpretation of Article 34(4) of Regulation No 44/2001 according to which it also covers conflicts between two judgments given in one Member State is inconsistent with the principle of mutual trust referred to in paragraph 31 above. Such an interpretation would allow the court in the Member State in which recognition is sought to substitute its own assessment of that of the court in the Member Sate of origin.

37 Once the judgment has become final at the end of the proceedings in the Member State of origin, the non-enforcement of that judgment on the ground that it is irreconcilable with a judgment given in the same Member State amounts to reviewing the judgment sought to be enforced as to its substance which is, however, expressly excluded by Article 45(2) of Regulation No 44/2001.

38 Such a possibility of review as to the substance would de facto constitute an additional means of redress against a judgment which has become final in the Member Sate of origin. In that regard, it is not disputed that, as the Advocate General has noted in point 31 of his Opinion, the grounds for non-enforcement provided for in Regulation No 44/2001 do not create additional remedies against national judgments which have become final.

39 Lastly, since the list of grounds for non-enforcement is exhaustive, as is apparent from the case-law referred to in paragraph 28 above, those grounds must be interpreted strictly and may not therefore be given, contrary to what Salzgitter and the German Government claim, an interpretation by analogy pursuant to which judgments given in the same Member State would also be covered.

Ruling:

Article 34(4) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as not covering irreconcilable judgments given by courts of the same Member State.

Sciences Po PILAGG Series, 2013-2014

The seminars on Private International Law as Global Governance (PILAGG) at the Law School of the Paris Institute of Political Science (*Sciences Po*) will be conducted this year according to a slightly different format, as they will be run in part with the LSE.

This year' series will be beginning with an informal round-table in Paris on methodological shifts in the conflict of laws. This discussion is designed to link up with last year's reflections on the changing paradigms in (private international) legal thought.

Speakers will discuss proportionality, the impact of collective redress in individualist schemes of intelligibility, the renewal of characterization, the articulation of the conflict of laws and public policies on immigration, the access to justice paradigm, and how conceptualizing networks might be helpful in transnational settings. They were asked to focus specifically on the ways in which their area of expertise may (or not) bring methodological renewal. Participants will be Catherine Kessedjian, Samuel Lemaire, Toni Marzal, Hélène van Lith, Sabine Corneloup, Karine Parrot, Ferderico Lenzi, Diego P. Fernández Arroyo and Horatia Muir Watt.

When: 17 October from 13:00 to 16:45.

Where: 13 rue de l'Université, 75007 Paris, salle de réunion Ecole de droit 4th floor.
The language for presentation and debate will be either French or English.

Next will be the first London session (November 19) on PIL and legal theory and then events on the political economy of the law of investment arbitration and on the interface of PIL and civil procedure.

Gay Marriage: France Blacklists 11 Nationalities (Updated)

In May 2013, France adopted a law allowing gay marriage.

The statute confirmed France' traditional choice of law rule according to which the law of the nationality of each spouse applies to the substantive validity of marriage (Civil Code, Art. 202-1, para. 1). However, in order to avoid confining the new legislation to couples of nationals originating from the 14 jurisdictions or so which allow gay mariage, the statute also adopted a new rule providing that same sex marriage would still be allowed when the national law or the law of the residence of one of the spouses only allowed it (Civil Code, Art. 202-1, para. 2). I have already reported how the French Constitutional Council miraculously found this provision to be constitutional.

So, is everybody welcome to come to Paris to marry a French national? Not quite. The French ministry of justice has issued guidelines instructing French mayors not to marry couples including a national coming from a list of 11 jurisdictions. The reason why is that France concluded a bilateral treaty with each of these jurisdictions providing for the application of the law of the nationality of each spouse. As treaties are superior to statutes in France, the administration has concluded that these treaties prevail over Art. 202-1, para. 2 of the Civil Code.

> *La règle introduite par l'article 202-1 alinéa 2 ne peut toutefois s'appliquer pour les ressortissants de pays avec lesquels la France est liée par des conventions bilatérales qui prévoient que la loi applicable aux conditions de fond du mariage est la loi personnelle.*
>
> *Dans ce cas, en raison de la hiérarchie des normes, les conventions ayant une valeur supérieure à la loi, elles devront être appliquées dans le cas d'un mariage impliquant un ou deux ressortissant(s) des pays avec lesquels ces conventions ont été conclues. En l'état du droit et de la jurisprudence, la loi personnelle ne pourra être écartée pour les ressortissants de ces pays.*

Most of these treaties, however, were concluded in the 1950s and 1960s. None of them contains any express provision on same sex marriage.

The blacklisted nationalities are:

– Algeria, Tunisia and Morroco,

– the five countries which formerly constituted Yugoslavia

– Laos, Cambodia

– Poland

A French prosecutor enforced the guidelines at the beginning of September and denied the right to marry to a Franco-Morrocan couple.

UPDATE:

The decision of the prosecutor was set aside today by a first instance court of Chambery.

I could not see the judgment, but the French press has reported that the Court would have ruled that the recent French statute has modified French international public policy, and that the applicable bilateral convention should thus be avoided as it discriminates against gay people.

This would be an innovative use of the public policy exception, to avoid the law of the forum, as discussed in comments by Mr Margonski and Mr Davis.

Conflict of Laws Across the Ditch

The Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement, signed on 24 July 2008, enters into force today. The provisions of the Agreement have been implemented by legislation in both jurisdictions (Trans-Tasman Proceedings Act 2010 (Cth), (NZ)), which also has effect from today.

Among other matters, this legislation lays down newly harmonised rules governing service of process as a basis of jurisdiction, stays of proceedings on appropriate forum grounds, a partial ban on anti-suit injunctions, proof of laws and the recognition and enforcement of judgments, ensuring that the civil justice systems in the two countries will, henceforth, be more closely integrated and aligned.

The Agreement and implementing legislation have already begun to influence the ways in which the courts of the party States approach litigation with a connection to the other party State. In *Robinson v Studorp Ltd* [2013] QSC 238, Jackson J of the Queensland Supreme Court examined the provisions of the Agreement and the Australian Act concerning court procedural co-operation and treated these as significant in deciding that the Queensland Court was not a "clearly inappropriate forum" for litigation between a New South Wales' (former New Zealand') resident and a New Zealand incorporated corporation relating to exposure to asbestos by the claimant while working with his New Zealand resident father in New Zealand. The asbestos products were manufactured by the defendant in New Zealand. True, the claimant had lived for a time in Queensland and had been diagnosed and treated for his disease within that state, but these connections seem comparatively unimportant.

This outcome is not wholly surprising given the way in which the Australian courts have applied their version of the common law *forum (non) conveniens* test in personal injury claims. If, however, the application had been determined under the new legislation, a different test (more favourable to the defendant) would have applied, requiring the court to ask whether a New Zealand court having jurisdiction is the "more appropriate court" to determine the matters in issue (s. 17(1); see also s. 19). In light of the spirit underlying the Agreement, the result seems topsy-turvy. It remains to be seen whether the entry into force of its provisions will effect a sea change in judicial attitudes on both sides of the Tasman Sea.

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?

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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?

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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.