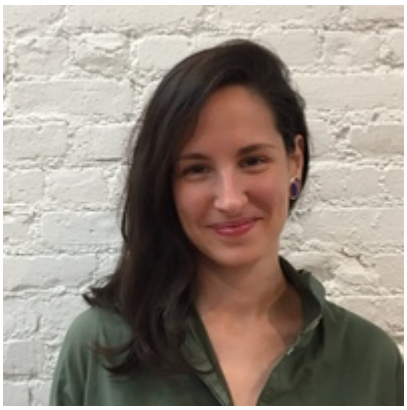
Conversations on transnational surrogacy and the ECtHR case Valdís Fjölnisdóttir and Others v. Iceland (2021)



Comments by Ivana Isailovic & Alice Margaria

The case of *Valdís Fjölnisdóttir and Others v. Iceland* brings to the attention of the European Court of Human Rights (ECtHR) the no longer new, yet persistently complex, question of the determination of legal parenthood following international surrogacy arrangements. Similar to previous cases, such as *Mennesson v France*, *Labassee v France*, and*Paradiso and Campanelli v Italy*, this complaint originated from the refusal of national authorities to recognise the parent-child relationship established in accordance with foreign law on the ground that surrogacy is prohibited under national law. *Valdís Fjölnisdóttir and Others* is the first case of this kind involving a married same-sex couple who subsequently divorced. Like the applicants in the case of *Paradiso and Campanelli v Italy*, Ms Valdís Glódís Fjölnisdóttir and Ms Eydís Rós Glódís Agnarsdóttir are not biologically linked to their child, who was born in California.

Ivana Isailovic & Alice Margaria's comments answer three questions:

1) What's new in this case?

2) What are the legal effects of this decision?

3) What are alternative legal framings and ideas?

1. Were you surprised by this ruling? Is there anything new in this case?

Alice: This judgment is emblematic of the ECtHR's generally cautious and minimalistic approach to assessing the proportionality of non-recognition *vis-à-vis* unconventional parent-child relationships. It is widely agreed (e.g., Liddy 1998; Stalford 2002; Choudhry and Herring 2010) that the Court has over time expanded the boundaries of what constitutes 'family life' and supported the adoption of more inclusive and diverse conceptions of 'family' through its dynamic interpretation of Article 8 ECHR. Yet, as I have argued elsewhere, this conceptual expansion has not translated into the same protection of the right to respect for family life for all unconventional families. *Valdís Fjölnisdóttir and Others* is a further manifestation of this trend. The Court has indeed no difficulty in qualifying the bonds existing between the two women and their child as 'family life'. As far as the applicability of the 'family life' limb of Article 8 is concerned, the quality and duration of the relationship at stake trump biological unrelatedness. Yet when it comes to assessing the proportionality of the interference of non-recognition with the applicants' right to respect for family life, the Court is satisfied with the *de facto* preservation of the family ties existing between the applicants, and diminishes the disadvantages created by lack of recognition of their parent-child relationship – just as it did in *Mennesson*. Icelandic authorities had taken steps to ensure that the applicants could continue to enjoy their family ties in spite of non-recognition by placing the child in the foster care of the two women and making these arrangements permanent. This had – from the Court's perspective – alleviated the distress and anguish experienced by the applicants. In addition, the child had been granted Icelandic citizenship by a direct act of Parliament, with the effect of making his stay and rights in the country regular and secure. As a result, according to the Court, non-recognition had caused the applicants only limited practical hindrances to the enjoyment of their family life. As in *Mennesson*, therefore, the Court finds that

there is family life among the three applicants, but no positive obligation on the part of the State to recognise the parent-child relationships in accordance with the California birth certificate. Whilst it is true that, in the case at hand, the family ties between the applicants had indeed been afforded some legal protection through foster care arrangements (unlike in previous cases), it seems that the unconventional nature of the family at stake – be it due to the lack of a biological link, the fact that it involves two mothers, or because they resorted to surrogacy – continues to hold back the Court from requiring the State to recognise the existing ties *ab initio* and through filiation. This is also line with the Advisory opinionof 10 April 2019 (request no. P16-2018-001), where the Grand Chamber clarified that States have the obligation to provide 'only' *some* form of legal recognition – e.g., adoption – to the relationship between a child born from surrogacy and their non-genetic mother.

Whilst not setting a new jurisprudential trajectory on how to deal with the determination of legal parenthood following international surrogacy, *Valdís Fjölnisdóttir and Others* brings two novel elements to bear. The first is encapsulated in para 64, where the Court determines the Supreme Court's interpretation of domestic provisions attributing legal motherhood to the woman who gives birth to be 'neither arbitrary nor unreasonable' and, accordingly, considers that the refusal to recognise the family ties between the applicants and the child has a 'sufficient basis in law'. In this passage, the Court takes a clear stance on the rule *mater semper certa est*, which, as this case shows, has the potential to limit the recognition of contemporary familial diversity (not only in the context of surrogacy but also in cases of trans male pregnancies, see e.g. *OH and GH v Germany*, Applications no. 53568/18 and 54941/18, communicated on 6 February 2019). Second, and in contrast, Judge Lemmens' concurring opinion takes one important step towards demystifying and problematising the relevance of biological relatedness in regulating legal parenthood following international surrogacy. He points out that the negative impact of non-recognition is equal for all children born from surrogacy abroad who find themselves in legal limbo, regardless of whether they are biologically connected to their parents or not. He further adds that, whilst adoption is an alternative means of recognition, it does not always provide a solution to all difficulties a child might be experiencing. In the case at hand, for instance, adoption would have benefited only one parent-child relationship: the couple had indeed divorced through the national proceedings and, therefore, a joint adoption was no longer a possibility for them.

This concurring opinion therefore moves towards questioning and potentially revising the terms of the debate between, on the one hand, preventing illegal conduct by intended parents and, on the other hand, tolerating legal limbo to the detriment of children.

Ivana: On the one hand, there is nothing new in this decision. Like in Mennesson (2014) and Paradiso & Campanelli (2017), the Court continues to "constitutionalize" domestic PIL rules. As many PIL scholars argued, this reflects the transformations of conflict of laws rules and methods, as the result of human rights field's influence. Following the ECHtR and the CJEU case law, conflicts of laws rules became subordinate to a proportionality test which implies weighing various interests at stake. In this case, it involves balancing applicants' rights to private and family life, and the interests of the state in banning commercial surrogacy.

Second, like in its previous decisions on surrogacy, by recognizing the importance of the *mater semper est* principle, the ECtHR continues to make the biological link preeminent when defining the scope of human rights protection

On the other, it seems that there is a major rupture with previous decisions. In Mennesson (para 81 & 99), and the advisory opinion requested by the French Cour de cassation (2019) (para 37-38), the ECtHR emphasized child's right to a recognition of their legal relationship with their intended parents (part of the child's right to private and family life). This has in turn influenced the Court's analysis of the scope of states' margin of appreciation.

In the case however, the Court pays lip service to child's interests in having their legal relationship with their intended parents recognized (besides pointing out that, under domestic law, adoption is open to one of the two women, par. 71, and that the State took steps to preserve the bond between the (intended) parents and their child).

Without the legal recognition of the parent-child relationship, however, the child—who is placed in foster care—is left in a vulnerable legal position that is hardly in line with the protection of children's rights. It is unclear what explains this shift in the Court's reasoning, and Judge Lemmens' concurring opinion that tries to make sense of it is unconvincing.

2. What are the effects of this decision in terms of the regulation of global surrogacy?

Ivana: There are at least two legal consequences for PIL. First, the decision legitimizes a flawed, biological and marginalizing understanding of legal parenthood/motherhood. Second, it legitimizes feminists' anti-surrogacy arguments that dovetail with conservative anti-LGBTQ transnational movements' positions.

According to the Court, *mater semper certa est*—the notion that the woman who gives birth to the child is the legal mother of that child— which justifies Iceland's refusal to recognize the foreign parent-child link, is neither "arbitrary nor manifestly unreasonable" (para 69)

But *mater semper certa est* has consistently been a bit more than an incantation.

In France, scholars showed that the Civil Code from 1804 originally allowed and promoted the constitution of families which didn't reflect biological bonds, as it was enough to prove marriage to infer kinship. In addition, the *mater semper certa est* principle has been continuously eroded by assisted reproductive technology, which today enables multiple individuals to be genetic parents.

Motherhood has always been stratified, and *mater semper est* has operated differently in relation to class, race and gender. Research shows how in the US during slavery, African American women were not considered to be the legal mothers of children they gave birth to, and how today, the state monitors and polices the lives of women of color and poor women (see for instance the work by Angela Davis and Dorothy Roberts). On this side of the Atlantic, between 1962-1984, the French state forcefully deported thousands of children from poor families from Réunion (a former French colony now an oversees territory) to metropolitan France. Finally, this principle penalizes those who do not identify with gender binaries, or with female identity, while being able to give birth, or those who identify as women/mothers, but are unable/unwilling to give birth.

Second, the decision in some respects illustrates the mainstreaming within law of feminists' anti-surrogacy arguments, which overlap with ant- feminist, conservative, anti-LGBTQ movements' discourses. Iceland' s argument that

surrogacy is exploitative of surrogates, mirrors affluent anti-surrogacy networks' positions that anti-surrogacy feminist groups adopted in the 1980s. These lobbies argue that surrogacy constitutes the exploitation of women, and that surrogacy severs the "natural maternal bonding" and the biological link between the mother and the child.

This understanding of surrogacy promoted by feminists came to overlap with the one adopted by transnational conservative, pro-life, anti-feminist, anti-LGBTQ groups, and it is interesting that some of the arguments adopted by the Court correspond to those submitted by the conservative institute *Ordo Iuris*, which intervened in the case. Another example of this overlap, is the EU lobby group *No Maternity Trafficking*, which includes right-wing groups, such as *La Manif pour tous,* that organized protests against the same-sex marriage reform in France in 2013.

Here is how the emphasis on the biological link in relation to the definition of legal parenthood may overlap with anti-LGBTQ discourses. As I argued elsewhere, in France, private lawyers, feminists, psychoanalysts, and conservative groups such as *La Manif pour tous* defended the biological understanding of legal filiation, to oppose the same-sex marriage reform which also opened adoption to same-sex couples, because, according to them, biological rules sustain a "symbolic order" which reflects the "natural order" and outside that order a child will become "psychotic." This understanding of legal filiation is however relatively recent in France and is in contradiction with the civil law approach to filiation based on individual will. In fact, different actors articulated these arguments in the 1990s, when queer families started demanding that their families be legally protected and recognized.

Alice: This decision confirms the wide, yet not unlimited, freedom States enjoy in regulating surrogacy and the legal consequences of international surrogacy in their territories and legal systems. In so doing, it legitimises the preservation and continuing operation of traditional filiation rules, in particular the *mater semper certa est* rule, which anchors legal motherhood to the biological processes of pregnancy and birth. It follows that the public order exception can still be raised. At the same time, however, authorities are required to ensure that *some* form of recognition be granted to *de facto*parent-child relationships created following

international surrogacy through alternative legal routes, such as foster care or adoption. In a nutshell, therefore, the regulatory approach to international surrogacy supported by this decision is one of *accommodation*, as opposed to *recognition*, of familial diversity. Parental ties created following surrogacy arrangements abroad have to be *granted* some form of legal recognition, to be given some standing in the national legal order, but do not necessarily have to be *recognised* in their original version, i.e., as legal parental ties *ab initio*.

3. If not this legal framing, which one should we (scholars, courts or activists) adopt to think about transnational surrogacy?

Alice: Conflicts of laws in this context can result in two opposing outcomes: openness to familial and other types of diversity, but also – as this case shows – attachment to conventional understandings of parenthood, motherhood and ways of creating and being a family. If we imagine a continuum with the abovementioned points as its extremes, the Court seems to take an intermediary position: that of *accommodating* diversity. The adoption of such an intermediary position in *Valdís Fjölnisdóttir and Others* was facilitated by the existence of foster care arrangements and the uninterrupted care provided by the first and second applicants to their child since his birth. In the Court's eyes, therefore, the child in this case was not left in 'complete' legal limbo to the same extent as the children in *Mennesson*, nor put up for adoption as in the case of *Paradiso and Campanelli*.

To address the question 'which framing shall we adopt?', the answer very much depends on who 'we' is. If 'we' is the ECtHR, then the margin for manoeuvring is clearly more circumscribed than for activists and scholars. The Court is bound to apply some doctrines of interpretation, *in primis* the margin of appreciation, through which it gains legitimacy as a regional human rights court. The application of these doctrines entails some degree of 'physiological' discretion on the part of the Court. Determining the width of the margin of appreciation is never a mechanical or mathematical operation, but often involves drawing a balance between a variety of influencing factors that might concur simultaneously within the same case and point to diametrically opposed directions. Engaging in this balancing exercise may create room for specific moral views on the issue at stake – i.e., motherhood/parenthood – to penetrate and influence the reasoning.

This is of course potentially problematic given the 'expressive powers' of the Court, and the role of standard setting that it is expected to play. That being said, if regard is given to the specific decision in *Valdís Fjölnisdóttir and Others*, despite the fact that the outcome is not diversity-friendly, the reasoning developed by the Court finds some solid ground not only in its previous case law on surrogacy, but more generally in the doctrinal architecture that defines the Court's role. So, whilst scholars advocating for legal recognition of contemporary familial diversity – including myself – might find this decision disappointing in many respects (e.g., its conventional understandings of motherhood and lack of a child-centred perspective), if we put *Valdís Fjölnisdóttir and Others* into (the Strasbourg) context, it would be quite unrealistic to expect a different approach from the ECtHR. What can certainly be hoped for is an effort to frame the reasoning in a manner which expresses greater sensitivity, especially towards the *emotional and psychological* consequences suffered by the applicants as a result of non-recognition, and thus gives more space to their voices and perceptions regarding what is helpful and sufficient 'to substantially alleviate the uncertainty and anguish' they experienced (para 71).

Ivana: In some respects, this decision mirrors dominant PIL arguments about surrogacy. For some PIL scholars, surrogacy challenges traditional ("natural") mother-child bond, when historically legal motherhood has always been a stratified concept. Other PIL scholars argue that surrogacy raises issues of *(over)exploitation* of surrogates and that women are *coerced* into surrogacy, but never really explain what these terms mean under patriarchy, and in a neoliberal context.

Like many economic practices in a neoliberal context, transnational surrogacy leads to abuses, which are well documented by scholars. But, understanding what law can, cannot or should do about it, requires, questioning the dominant descriptions of and normative assumptions about surrogacy that inform PIL discourses.

Instead of the focus on *coercion*, or on a narrow understanding of what womanhood is, like the one adopted by relational feminism, I find queer and Marxist-feminists' interventions empirically more accurate, and normatively more appealing.

These scholars problematize the distinctions between nature/ technology, and economy/ love which shape most of legal scholars' understanding of surrogacy (and gestation). As Sophie Lewis shows in her book Full Surrogacy Nowprocreation was never "natural" and has always been "technologically" assisted (by doctors, doulas, nurses, nannies..) and gestation is *work*. Seeing gestation as *work* seeks to upend the capitalist mode of production which relies on the unpaid work around social reproduction. Overall, these scholars challenge the narrow genetic understanding of kinship, argue for a more capacious definition of *care*, while also making space for the recognition of surrogates' reproductive work, their voices and their needs.

Legally recognizing the reproductive labor done by surrogates, may lead to rethinking how we (scholars, teachers, students, judges, activists…) understand the public policy exception/ recognition in PIL, and the recent proposals to establish binding transnational principles, and transnational monitoring systems for regulating transnational surrogacy in the neoliberal exploitative economy.

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China Enacts the Anti-Foreign Sanctions Law

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1. Background

On 10 June 2021, China's Standing Committee of the National People's Congress (hereinafter "NPC") issued "Anti-Foreign Sanctions Law of the People's Republic of China" (hereinafter "CAFSL"), which entered into force on the date of the promulgation. This is a reaction in response to the current tension between China and some western countries, in particular, the US and the EU that have imposed a series of sanctions on Chinese officials and entities. For example, in August 2020, the Trump administration imposed sanctions on 11 individuals for undermining Hong Kong's autonomy and restricting the freedom of expression or assembly of the citizens of Hong Kong. In June 2021, President Biden issued Executive Order 14032 to amend the ban on US persons purchasing securities of certain Chinese companies. In March 2021, the EU imposed unilateral sanctions on relevant Chinese individuals and entity, based on the human rights issues in Xinjiang. China has responded by imposing counter sanctions, which were issued by the Ministry of Foreign Affairs as administrative orders. The Anti-Foreign Sanctions Law provides the legal basis for China's further action and counter measures. This law was enacted after only two readings rather than the normal three demonstrating China's urgent need to defend itself against a growing risk of foreign hostile measures.

2. The main content

Competent Authority: All relevant departments under the State Council have been authorized to involve issuing the anti-sanction list and anti-sanction measures (Art. 4 and Art. 5). The "Ministry of Foreign Affairs" and "other relevant departments under the State Council" are authorized to issue orders of announcement (Art. 9). Reviewing from the current practice of China's response to foreign sanctions, the Ministry of Foreign Affairs has always issued sanctions lists against foreign individuals and organizations, so it is likely that the China's Ministry of Foreign Affairs will still lead the movement of announcing and

countering the foreign sanctions. However, other departments now also have the authority to sanction relevant individuals and entities. This provides flexibility if the foreign sanctions relate to a particular issue that is administrated by the particular department and when it is more efficient or appropriate for the particular department to handle it directly.

Targeted measures: Circumstances under which China shall have the right to take corresponding anti-sanction measures are as follows: (1) a foreign country violates international law and basic norms of international relations; (2) contains or suppresses China on various pretexts or in accordance with its own laws; (3) adopts discriminatory, restrictive measures against any Chinese citizen or organization; (4) meddles in China's internal affair (Art. 3).The CAFSL does not expressly specify whether the circumstances should be satisfied simultaneously or separately. From the perspective of legislative intent, it is obvious that the full text of the CAFSL is intended to broaden the legal authority for taking anti-sanctions measures in China, so it may not require the fulfillment of all four conditions.

It does not clarify the specific meanings of "violates international law and the basic norms of international relations", "contains or suppresses", and "meddles in China's internal affairs", which vary in different states and jurisdictions. But considering the sanctions issued by China and answers by the NPC spokesman, the key targeted circumstances are meddling China's internal affairs. It is reasonable to assume that these circumstances, mainly aimed at unilateral sanctions suppressing China under the pretexts of so-called sea-based, epidemic-based, democracy-based and human rights-based issues in Xinjiang, Tibet, Hong Kong and Taiwan. Therefore, other issues may not be included.

Art. 3 aims against the sanctions imposed by foreign states, for example the US and the EU. But from the text of the law, the concept of "sanctions" is not used, instead the concept of "discriminatory, restrictive measures" is adopted, which is very vague and broad. Discriminatory restrictive measures can be interpreted as foreign unilateral sanctions directly targeting Chinese individuals and organizations, which are the so-called "primary sanctions", different from the "secondary sanctions" restricting Chinese parties from engaging in normal economic, trade and related activities with directly sanctions third state's parties. In a press conference, the NPC spokesman stated that "the main purpose of the CAFSL is to fight back, counter and oppose the unilateral sanctions against China

imposed by foreign states." It should only apply to tackle the primary sanctions against China.

Targeted entities: The targeted entities of the anti-sanction list and anti-sanction measures are vague and broad. The targeted entities of anti-sanctions list include individuals and organizations that are directly involved in the development, decision-making, and implementation of the discriminatory restrictive measures (Art. 4). What means involvement in the development or decision-making or implementation is ambiguous. And the indirect involvement is even vaguer, which may broaden the scope of the list. Besides, following entities may also be targeted: (1) spouses and immediate family members of targeted individuals; (2) senior executives or actual controllers of targeted organizations; (3) organizations where targeted individuals serve as senior executives; (4) organizations that are actually controlled by targeted entities or whose formation and operation are participated in by targeted entities (Art. 5).

Anti-sanction measures: The relevant departments may take four categories of anti-sanction measures: (1) travel ban, meaning that entry into China will not be allowed and deportation will be applied;(2) freezing order, namely, all types of property in China shall be seized, frozen or detained; (3) prohibited transaction, which means entities within the territory of China will not be allowed to carry out transactions or other business activities with the sanctioned entities; (4) the other necessary measures, which may include measures like "arms embargoes" or "targeted sanctions" (Art. 6). Former three anti-sanction measures have been taken by the Ministry of Foreign Affairs in practice. For example, on 26 March 2021, China decided to sanction relevant UK individuals and entities by prohibiting them from entering the mainland, Hong Kong and Macao of China, freezing their property in China, and prohibiting Chinese citizens and institutions from doing business with them.

Relevant procedure: The decisions made by the competent authorities shall be final and not subject to judicial review(Art. 7).The counterparty shall not file an administrative lawsuit against anti-sanction measures and other administrative decisions. The counterparty can change the circumstance causing anti-sanction measures, and request the relevant department for the modification and cancellation of anti-sanction measures. If any change in the circumstances based on which anti-sanction measures are taken happens, the competent authorities may suspend, change or cancel the relevant anti-sanction measures (Art. 8). The

transparency requirement stipulates the relevant orders shall be announced (Art. 9).

A coordination mechanism for the anti-foreign sanctions work shall be established by the state to coordinate the relevant work. Coordination and cooperation, and information sharing among various departments shall be strengthened. Determination and implementation of the relevant anti-sanction measures shall be based on their respective functions and division of tasks and responsibilities (Art. 10).

Legal consequences of violation: There are two types of legal consequences for violating the obligation of "implementation of the anti-sanction measures". Entities in the territory of China will be restricted or prohibited from carrying out relevant activities (Art. 11). Any entities, including foreign states' parties, will be held legally liable (Art. 14).

Besides, a party suffering from the discriminatory, restrictive measures may be entitled to bring a civil action against the entities that comply with the foreign discriminatory measures against China (Art. 12). The defendant, in theory, includes any entities in the world, even entities that are the nationals or residents of the country imposing sanctions against China. It is curious how this can be enforced in reality. In particular, if a foreign entity has no connections with China, it is hard for a Chinese court to claim jurisdiction, and even taking jurisdiction, enforcing judgments abroad can also be difficult, if not impossible. Because enforcement jurisdiction must be territorial, without assets and reputation in China, a foreign party may disregard the Chinese anti-sanction measure.

3. Impact of the CAFSL

The CAFSL is a higher-level legislation in the Chinese legal system than the relevant departmental rules, such as the Chinese Blocking Rules and "unreliable entity list". It is a much more powerful legal tool than former departmental rules as it directly retaliates against the primary sanction on China. It provides a legal basis and fills a legal gap. However, it may not be good news for international businesses that operate in both the US and China. Those companies may have to choose between complying with US sanctions or Chinese laws, which may probably force some enterprises to make strategic decisions to accept the risk of penalty from one country, or even to give up the Chinese or US market. The

CAFSL is vaguely drafted and likely to create unpredictable results to the commercial transaction and other interests. The application and enforcement of the CAFSL and Chinese subsequent rules and regulations may give detailed interpretations to clarify relevant issues to help parties comply with the CAFSL. However, to China, the CAFSL serves a political purpose, which is more important than the normal functioning of a law. It is a political declaration of China's determination to fight back. Therefore, the most important matter for Chinese law-makers is not to concern too much of the detailed rules and enforcement to provide predictability to international business, but to send the warning message to foreign countries. International businesses, at the same time, may find themselves in a no-win position and may frequently face the direct conflict of overriding mandatory regulations in China and the US. By placing international businesses in the dilemma may help to send the message and pressure back to the US that may urge the US policy-makers to reconsider their China policy. After all, the CAFSL is a counter-measure, which serves defensive purposes, and would not be triggered in the absence of sanctions against Chinese citizens and entities.

Cross-Border Families under Covid-19 – International Virtual Workshop on 22 June 22 13:00-18:30 (CET)

The Minerva Centre for Human Rights at Tel Aviv University is organising an international socio-legal workshop that will explore the impact of the Covid-19 crisis and its regulation on cross-border families. Topics include issues of belonging, travel restrictions, civil rights, birth across borders, international child abduction and transnational homes in pandemic times.

The workshop will take place on 22 June 2021. The full program and registration

form are available.

For additional information, contact eynatmey@tauex.tau.ac.il

New York Court Denies Enforcement of Chinese Judgment on Systemic Due Process Grounds

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In Shanghai Yongrun Investment Management Co. v. Kashi Galaxy Venture Capital Co., the Supreme Court of New York (New York's court of first instance) denied enforcement of a Chinese court judgment on the ground that the judgment "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." The decision disagrees with every other U.S. and foreign court to have considered the adequacy of the Chinese judicial system in the context of judgments recognition. In recent years, there has been a growing trend in favor of the recognition of Chinese judgments in the United States and U.S. judgments in China. See William S. Dodge & Wenliang Zhang, Reciprocity in China-U.S. Judgments Recognition, 53 Vand. J. Transnat'l L. 1541 (2020). Unless this recent decision is overturned on appeal, it threatens to reverse the trend, to the detriment of judgment creditors in both countries.

In 2016 Shanghai Yongrun purchased an interest in Kashi Galaxy. In 2017, Kashi Galaxy agreed to repurchase that interest for RMB 200 million, an agreement that Kashi Galaxy allegedly breached by paying only part of the repurchase price. The agreement was governed by Chinese law and provided that suits could be resolved by courts in Beijing. In 2018, Shanghai Yongrun sued Kashi Galaxy,

Maodong Xu, and Xu's wife in the Beijing No. 1 Intermediate People's Court. After a trial in which defendants were represented by counsel, the court granted judgment in favor of Shanghai Yongrun. The Beijing Higher People's Court affirmed the judgment on appeal, but it could not be enforced in China because no assets were available within the court's jurisdiction.

In 2020, Shanghai Yongrun brought an action against Kashi Galaxy and Xu in New York state court, seeking to have the Chinese judgment recognized and enforced. Article 53 of New York's Civil Practice Law and Rules (CPLR) has adopted the 1962 Uniform Foreign Money-Judgments Recognition Act (1962 Uniform Act), which provides that final money judgments rendered by foreign courts are enforceable in New York unless one of the grounds for non-recognition set forth in CPLR 5304 is established. These grounds include that the foreign court did not have personal jurisdiction, that the foreign court did not have subject matter jurisdiction, that the defendant did not receive notice of the foreign proceeding, that the judgment was obtained by fraud, that the judgment is repugnant to the public policy of the state, that the judgment conflicts with another final judgment, that the judgment is contrary to a forum selection clause, that personal jurisdiction was based only on service, and that the judgment is for defamation and provided less protection for speech than would be available in New York. The defendants raised none of these grounds for non-recognition. Instead, they raised the broadest and least frequently accepted ground: that "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." CPLR 5304(a)(1).

To find a systemic lack of due process in the Chinese judicial system, the New York court relied entirely on the State Department's Country Reports on Human Rights Practices for 2018 and 2019. In particular, the court quoted the observations that Chinese "[j]udges regularly received political guidance on pending cases, including instructions on how to rule, from both the government and the [Chinese Communist Party], particularly in politically sensitive cases" and that "[c]orruption often influenced court decisions." The court held that these country reports "conclusively establish as a matter of law that the PRC judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law in the United States."

The implications of this ruling are broad. If the Chinese judicial system suffers from a systemic lack of due process, then no Chinese court judgments may ever be recognized and enforced under New York law. What is more, ten other states have adopted the 1962 Uniform Act, and an additional twenty-six states have adopted the updated 2005 Uniform Foreign-Country Money Judgments Recognition Act (2005 Uniform Act), which contains the same systemic due process ground for non-recognition. If followed in other jurisdictions, the New York court's reasoning would make Chinese judgments unenforceable throughout much of the United States.

But it seems unlikely that other jurisdictions will follow suit or that the New York court's decision will be upheld on appeal. U.S. decisions denying recognition on systemic due process grounds are rare. The leading cases have involved extreme and unusual circumstances: a Liberian judgment rendered during that country's civil war when the judicial system had "collapsed," Bridgeway Corp. v. Citibank, 201 F.3d 134, 138 (2d Cir. 2000), and an Iranian judgment against the sister of the former Shah, Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995). Although other courts have considered State Department country reports to be relevant in considering claims of systemic due process, none has found them to be dispositive. For example, the Fifth Circuit rejected a claim that Moroccan courts suffered from systemic lack of due process notwithstanding a statement in the 2009 country report that "in practice the judiciary . . . was not fully independent and was subject to influence, particularly in sensitive cases." DeJoria v. Maghreb Petroleum Exploration, S.A., 804 F.3d 373, 381 (5th Cir. 2015). This language about Moroccan courts is quite similar to the country report statements about China that the New York court found conclusive.

With respect to China specifically, no U.S. court had previously denied recognition based on a systemic lack of due process. To the contrary, a prior New York state court decision held that "the Chinese legal system comports with the due process requirements," Huizhi Liu v. Guoqing Guan, Index No. 713741/2019 (N.Y. Sup. Ct., Jan. 7, 2020), and a federal court in California concluded that "the Chinese court was an impartial tribunal." Qinrong Qiu v. Hongying Zhang, 2017 WL 10574227, at *3 (C.D. Cal. 2017). Other U.S. decisions have specifically noted that the party resisting enforcement had not alleged systemic lack of due process as a ground for non-recognition. See Global Material Technologies, Inc. v. Dazheng Metal Fibre Co., 2015 WL 1977527, at *7 (N.D. Ill. 2015); Hubei

Gezhouba Sanlian Industrial Co. v. Robinson Helicopter Co., 2009 WL 2190187, at *6 (C.D. Cal. 2009).

China has been promoting the rule of law, and its legal system is modernizing to follow internationally accepted standards. The independence of China's judiciary is guaranteed by its Constitution and other laws. To promote international trade and investment, China has emphasized the independence and impartiality of its courts. Other countries have repeatedly recognized and enforced Chinese judgments, including Australia, Canada, Germany, Israel, the Netherlands, New Zealand, Singapore, South Korea, and the United Kingdom. When parties have questioned the integrity of the Chinese judicial system as a whole, courts have rejected those arguments. Recently, in Hebei Huaneng Industrial Development Co. v. Deming Shi, [2020] NZHC 2992, the High Court of New Zealand found that the Chinese court rendering the judgment "was part of the judicial branch of the government of the People's Republic China and was separate and distinct from legislative and administrative organs. It exercised a judicial function. Its procedures and decision were recognisably judicial." When claims of improper interference are raised in the context of judgments recognition, the New Zealand court suggested, "the better approach is to see whether justice was done in the particular case."

The New York court's decision in Shanghai Yongrun is not only contrary to past decisions involving the enforcement of Chinese judgments in the United States and other countries. It also threatens to undermine the enforceability of U.S. judgments in China. Under Article 282 of the Civil Procedure Law of the People's Republic of China, foreign judgments are recognized and enforced "in accordance with the principle of reciprocity." For U.S. judgments, Chinese courts in cases like Liu v. Tao (Reported on by Ron Brand) and Nalco Co. v. Chen have found China's reciprocity requirement to be satisfied by U.S. decisions that recognized and enforced Chinese judgments. If U.S. courts change course and begin to hold that China's judiciary can never produce enforceable judgments, Chinese courts will certainly change course too and deny recognition to U.S. judgments for lack of reciprocity.

Maintaining reciprocity with China does not require U.S. courts to enforce every Chinese judgment. U.S. courts have denied recognition and enforcement of Chinese judgments when the Chinese court lacked personal jurisdiction, Folex Golf Indus., Inc. v. O-Ta Precision Industries Co., 603 F. App'x 576 (9th Cir. 2015),

or when the Chinese judgment conflicted with another final judgment, UM Corp. v. Tsuburaya Prod. Co., 2016 WL 10644497 (C.D. Cal. 2016). But so far, U.S. courts have treated Chinese judgments the same as judgments from other countries, applying the case-specific grounds for non-recognition in an evenhanded way. The systemic due process ground on which the New York court relied in Shanghai Yongrun is fundamentally different because it holds Chinese judgments to be categorically incapable of recognition and enforcement.

New York may be on the verge of expanding the case-specific ground for non-recognition by adopting the 2005 Uniform Act to replace the 1962 version that is currently in place. A bill to adopt the 2005 Act has passed both the Assembly and the Senate in New York. The 2005 Act adds two grounds for non-recognition not found in the 1962 Act: (1) that "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment"; and (2) that "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law." These grounds, already found in the laws of twenty-six other states that have adopted the 2005 Uniform Act, would allow New York courts to review foreign judgments for corruption and for lack of due process in the specific case without having to condemn the entire foreign judiciary as incapable of producing recognizable judgments. It is worth noting that the defendants in Shanghai Yongrun did not claim that there was any defect in the Chinese proceedings that led to the judgment against them.

Many court systems around the world are imperfect. The case-specific grounds for non-recognition found in the 1962 and 2005 Uniform Acts allow U.S. courts to refuse enforcement to foreign judgments on a range of case-specific grounds from lack of jurisdiction or notice, to public policy, to corruption or lack of due process. These case-specific grounds largely eliminate the need for U.S. courts to declare that an entire judicial system is incapable of producing valid judgments.

Shell litigation in the Dutch courts – milestones for private international law and the fight against climate change

by Xandra Kramer (Erasmus University Rotterdam/Utrecht Univeristy) and Ekaterina Pannebakker (Leiden University), editors

1. Introduction

As was briefly announced earlier on this blog, on 29 January 2021, the Dutch Court of Appeal in The Hague gave a ruling in a long-standing litigation launched by four Nigerian farmers and the Dutch *Milieudefensie*. The Hague Court held Shell Nigeria liable for pollution caused by oil spills that took place in 2004-2007; the UK-Dutch parent company is ordered to install equipment to prevent damage in the future. Though decided almost four months ago, the case merits discussion of several private international law aspects that will perhaps become one of the milestones in the broader context of liability of parent companies for the actions of their foreign-based subsidiaries.

Climate change and related human rights litigation is undoubtedly of increasing importance in private international law. This is also on the radar of the European institutions as evidenced among others by the ongoing review of the Rome II Regulation (point 6). Today, 26 May 2021, another milestone was reached, both for for private international law but for the fight against global climate change, with the historical judgment (English version, Dutch version) by the Hague District Court ordering Shell to reduce Co2 emissions (point 7). This latter case is discussed more at length in today's blogpost by Matthias Weller.

2. Oil spill in Nigeria and litigation in The Hague courts

As is well-known Shell and other multinationals have been extracting oil in Nigeria since a number of decades. Leaking oil pipes have been causing environmental damage in the Niger Delta, and consequently causing health damage and social-economic damage to the local population and farmers. Litigation has been ongoing in the Netherlands and the United Kingdom for years (see Geert van Calster blog for comments on a recent ruling by the English Supreme Court). At stake in the present case are several oil spills that occurred between 2004-2007 at the underground pipelines and an oil well near the villages Oruma, Goi and Ikot Ada Udo. The spilled oil pollutes agricultural land and water used by the farmers for a living.

Shortly after the oil spills, four Nigerian farmers instituted proceedings in the Netherlands, at the District Court of The Hague. The farmers are supported by the Dutch foundation *Milieudefensie*, which is also a claimant in the procedure. The claimants submit that the land and water, which the Nigerian farmers explored for living, became infertile. They claim compensation for the damage caused by the Shell's wrongful acts and negligence while extracting oil and maintaining the pipelines and the well. Furthermore, they claim to order Shell to secure better cleaning of the polluted land and to take appropriate measures to prevent oil leaks in the future.

The farmers summon both the Shell's Nigerian subsidiary and the parent company at the Dutch court. To be precise, they institute proceedings against the Shell's Nigerian subsidiary – Shell Petroleum Development Company of Nigeria Ltd and against the British-Dutch Shell parent companies – Royal Dutch Shell Plc (UK), with office in The Hague; Shell Petroleum N.V. (a Dutch company) and the 'Shell' Transport and Trading Company Ltd (a British company). It is this corporate structure that brings the Nigerian farmers to the court in The Hague and paves the way for the jurisdiction of Dutch courts.

3. Jurisdiction of Dutch courts: anchor defendant in the Netherlands and sufficient connection

Both the first instance court (in 2009) and the court of appeal at The Hague (in appeal in 2015) hold that the Dutch courts have jurisdiction. The ruling of the

Court of Appeal is available in English and contains a detailed motivation of the grounds of jurisdiction of the Dutch courts. See in particular at [3.3] – [3.9].

Claim against Shell parent company/companies. Dutch courts have jurisdiction to hear the claim against Shell Petroleum based on art. 2(1) Brussels I Regulation, as the company has its registered office in the Netherlands. Furthermore, the jurisdiction of Dutch courts to hear the claims against Royal Dutch Shell is based on art. 2(1) in conjunction with art. 60(1) Brussels I Regulation and the jurisdiction over claims to Shell Transport and Trading Company – on art. 6(1) and art. 24 Brussels I Regulation.

Claim against Shell's Nigerian subsidiary. The jurisdiction of the Dutch courts to hear the claim against Shell's Nigerian subsidiary is based on art. 2(1) in conjunction with art. 60(1) Brussels I Regulation and on art. 7(1) of the Dutch Code of civil procedure (DCCP). Art. 7(1) deals with multiple defendants. By virtue of art. 7(1) DCCP, if the Dutch court with jurisdiction to hear the claim against one defendant (in this case this is the Royal Dutch Shell), has also the jurisdiction to hear the claims against co-defendant(s), 'provided the claims against the various defendants are connected to the extent that reasons of efficiency justify a joint hearing'. The jurisdiction on the claim against the so-called 'anchor defendant' (for instance, the parent company) can thus carry with itself the jurisdiction on the other, connected, claims against other defendants.

Both the first instance court and the court in appeal found that the claims were sufficiently connected, despite the contentions of Shell. The Shell's contentions were twofold. First, Shell stated that the claimants abused procedural law, because the claims against Royal Dutch Shall were 'obviously bound to fail and for that reason could not serve as a basis for jurisdiction as provided in art. 7(1) DCCP' (at [3.1] in the 2015 ruling). According to Shell, the claim was bound to fail, because the oil leaks were caused by sabotage, in which case Shell would be exempt from liability under the applicable Nigerian law. This contention was dismissed: the claim was not necessarily bound to fail, according to the first instance court. The appellate court added that it was too early to assume that the oil spill was caused by sabotage. Second, Shell contested the jurisdiction of the Dutch courts because the parent companies could not reasonably foresee that they would be summoned in the Netherlands for the claims as the ones in the case. Dismissing this contention the court of appeal at The Hague stated in the 2015 ruling that 'in the light of (i) the ongoing developments in the field of *foreign*

direct liability claims (cf. the cases instituted in the USA against Shell for the alleged involvement of the company in human rights violations; *Bowoto v. Chevron Texaco* (09-15641); *Kiobel v Royal Dutch Petroleum Co*., 133 S. Ct. 1659 (2013), as well as *Lubbe v. Cape Plc*. [2000] UKHL 41), added to (ii) the many oil spills that occurred annually during the extraction of oil in Nigeria, (iii) the legal actions that have been conducted for many years about this (for over 60 years according to Shell), (iv) the problems these oil spills present to humans and the environment and (v) the increased attention for such problems, it must have been reasonably foreseeable' for the parent companies taken to court with jurisdiction with regard to Royal Dutch Shell (see the 2015 ruling at [3.6].

4. Application of (substantive) Nigerian law

Substantive law. All claims addressed in the Court of Appeal ruling of 29 January 2021 are assessed according to Nigerian law. This is the law of the state where the spill occurred, the ensuing damage occurred and where the Shell's Nigerian subsidiary (managed and monitored by Shell) has its registered office. The events that are the subject of litigation occurred in 2004-2007 and fall outside the temporal scope of Rome II. Applicable law is defined based on the Dutch conflict of laws rules on torts, namely art. 3(1) and (2) *Wet Conflictenrecht Onrechtmatige Daad* (see the first instance ruling at [4.10]).

Procedural matters. Perhaps because the case of damage to environment as the one in the discussed case, the application of substantive law is strictly tied to the evidence, the court goes on to specify private international law with further finesse. It mentions explicitly that procedural matters are regulated by the Dutch code of civil procedure. In the meantime, the substantive law aspects of the procedure, including the question which sanctions can be imposed, are governed by the *lex causae* (Nigerian law). The same holds true for substantive law of evidence, including the specific rules on the burden of proof relating to a particular legal relationship. The other, general matters relating to the burden of proof and evidence are regulated by the *lex fori*, thus the Dutch law of civil procedure (at [3.1]).

5. The ruling of The Hague Court of Appeal

In its the ruling, the Dutch court holds Shell Nigeria liable for damage resulting from the leaks of pipelines in Oruma and Goi. Nigerian law provides for a high threshold of burden of proof that rests on the one who invokes sabotage of the pipelines (in this case, Shell). The fact of sabotage must be (evidenced to be) beyond reasonable doubt. Shell could not provide for such evidence for the pipelines in Oruma and Goi. Furthermore, Shell has not undertaken sufficient steps for the cleaning and limiting environmental damage. Shell Nigeria is therefore liable for the damage caused by the leaks in the pipelines. The amount of the damage to be compensated is still to be decided. The relevant procedure will follow up. The ruling is, however, not limited to this. Shell is also ordered to build at one of the pipelines (the Oruma-pipeline) a Leak Detection System (LDS), so that the future possible leaks could be swiftly noticed and future damage to the environment can be limited. This order is made to Shell Nigeria and to the parent companies.

Spills at Oruma and Goi are are two out of three oil spills. The procedure on the third claim – the procedure regarding the well at Ikot Ada Udo will continue: the reason for the oil spill is not yet clear and the next hearing has been scheduled.

6. Human rights litigation and Rome II

This Shell case at the Dutch court is one in a series of cases where human rights and corporate responsibility are central. Increasingly, it seems, victims of environmental damage and foundations fighting for environmental protection can celebrate victories. In the introduction we mentioned the English Supreme Court ruling in Okpaby v Shell [2021] UKSC 3 of February 2021. In this case the Supreme Court reversed judgments by the Court of Appeal and the High Court in which the claim by Nigerian farmers brought against Shell's parent company and its subsidiary in Nigeria had been struck out (see also Geert van Calster's blog, guest post by Robert McCorquodale). Also there is a growing body of doctrinal work on human right violations in other countries, corporate social responsibility, due diligence and the intricacies of private international law, as a quick search on the present blog also indicates.

From a European private international law perspective, as also the discussion above shows, the Brussels I*bis* Regulation and the Rome II Regulation are key. The latter Regulation has been subject of an evaluation study commissioned by

the European Commission over the past year, and the final report is expected in the next months. Apart from evaluating ten years of operation of this Regulation, one of the focal points is the issue of cross-border corporate violations of human rights. The question is whether the present rules provide an adequate framework for assessing the applicable law in these cases. As discussed in point 5 above, in the Dutch Shell case the court concluded that Nigerian law applied, which may not necessarily be in the best interest of environmental protection. This was based on Dutch conflict rules applicable before the Rome II Regulation became applicable, but Art. 4 Rome II would in essence lead to the same result. For environmental protection, however, Art. 7 Rome II may come to the rescue as it enables victims to make a choice for the law of the country in which the event giving rise to damage occurred instead of having the law of the country in which the damage occurs of Art. 4 applied. In a similar vein, the European Parliament in its draft report with recommendations to the Commission on corporate due diligence and corporate accountability, dated 11 September 2020, proposes to incorporate a general ubiquity rule in art. 6a, enabling a choice of law for victims of business-related human rights violations. In such cases a choice could be made for the law of the country in which the event giving rise to the damage occurred, or the law of the country in which the parent company has its domicile, or, where it does not have a domicile in a Member State, the law of the country where it operates. This draft report, which also addresses the jurisdiction rules under the Brussels I*bis* Regulation was briefly discussed on this blog in an earlier blogpost by Jan von Hein.

7. Shell and climate continued: The Hague court strikes again

Today, all eyes were on the next move of The Hague District Court in an environmental claim brought against Royal Dutch Shell Plc (RDS). It concerns a collective action under the (revised) Dutch collective action act (see earlier on this blog by Hoevenaars & Kramer, and extensively Tzankova & Kramer 2021), brought – once again by *Milieudefensie*, also on behalf of 17,379 individual claimants, and by six other foundations (among others *Greenpeace*). The claim boils down to requesting the court to order Shell to reduce emissions. First, the court extensively deals with the admissibility and representativeness of the claimants as part of the new collective action act (art. 3:305a Dutch Civil Code). Second, the court assesses the international environmental law, regulation and

policy framework, including the UN Climate Convention, the IPCC, UNEP, the Paris Agreement as well as European law and policy and Dutch law and policy.

Third, and perhaps most interesting for the readers of this blog, the court assesses the applicable law, as the claim concerns the global activities of Shell. As Weller has highlighted in his blogpost that discussion mostly evolves around Art. 7 Rome II. Milieudefensie pleaded that Art. 7 should, pursuant to its choice, lead to the applicability of Dutch law and, should this provision not lead to Dutch law, on the basis of Art. 4(1) Rome II. In establishing the place where the event giving rise to the damage occurs the court states that 'An important characteristic of the environmental damage and imminent environmental damage in the Netherlands and the Wadden region, as raised in this case, is that every emission of CO2 and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase.' Milieudefensie holds RDS liable in its capacity as policy-setting entity of the Shell group. RDS pleads for a restrictive interpretation and argues that corporate policy is a preparatory act that falls outside the scope of Art. 7 as 'the mere adoption of a policy does not cause damage'. However, The Hague Court finds this approach too narrow and agrees with the claimants that Dutch law applies on the basis of Art. 7 and that, in so far as the action seeks to protect the interests of Dutch residents, this also leads to the applicability of Dutch law on the basis of Art. 4.

The judgment of the court, and that's what has been all over the Dutch and international media, is that it orders 'RDS, both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts and with which it jointly forms the Shell group, to limit or cause to be limited the aggregate annual volume of all CO2 emissions into the atmosphere (Scope 1, 2 and 3) due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels'.

To be continued – undoubtedly.

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

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Some months ago I commented here about an interlocutory ruling of September 2019, issued by the First Instance Court of Palma de Mallorca (Spain). The ruling stayed proceedings commenced by Central Santa Lucía L.C., a US corporation, against Meliá Hotels International S.A., on grounds of sovereign immunity. The court ruled that although the defendant was a Spanish legal entity, the basis of the claim entirely depended on a declaration that the nationalization of the land formerly owned by the claimants' predecessors in Cuba had been contrary to international law.

In March 2020, the Court of Appeal of Mallorca overturned the abovementioned interlocutory ruling and established the jurisdiction and competence of Spanish courts. The Court of Appeal found that the Cuban state was not a defendant in the proceedings, and neither was Gaviota S.A., a Cuban corporation owned by the Cuban state and the current owner of the expropriated land. Although the Court of Appeal admitted that any right to compensation for the allegedly illicit or unjustified enrichment of Meliá Hotels depended upon the illegality of the nationalization program introduced by Cuban Law 890 of 13 October 1960, the fact remained that the only defendant in the proceedings was a non-sovereign legal entity incorporated in Spain. Meliá Hotels argued that under the UN Convention on Jurisdictional Immunities of States and Their Property of 2004 it was not necessary that the claim be addressed to a foreign state; it was enough that the proceedings were meant to harm the interests, rights or activities of the foreign state. The Court of Appeal was not convinced and insisted that under Spanish Organic Law 16/2015 it was necessary that the proceedings had commenced against a foreign state or that measures had been requested against the property of the foreign state, in enforcement proceedings.

The Court of Appeal discussed several past rulings where Spanish courts had had an opportunity to deal with the effects of the nationalizations which followed the Cuban revolution of 1959. From this series of cases arises the doctrine that even

where Spain and Cuba had entered into a lump sum agreement in 1986, whereby Cuba agreed to pay the Spanish Government a fixed amount as compensation for all Spanish nationals affected by the expropriation program, the rights of those Spanish nationals were not extinguished and might be raised again before the present or future Cuban Governments (Supreme Court Ruling of 10 December 2003). Moreover, although Spanish courts could not control the legality of the expropriations, they could indeed assess such legality in so far as it may be necessary to determine their private law effects in Spain (Supreme Court Ruling of 25 September 1992).

The Court of Appeal also disagreed with the Court of First Instance in another respect. The latter had found that, regardless of the issue of sovereign immunity, Spanish courts did not have jurisdiction to hear claims concerning property rights over immovable assets located outside Spain. The Court of Appeal found that EU Regulation (EU) No 1215/2012 (Brussels I) was applicable despite the fact that the asset was situated in Cuba, i.e. outside the territory of the European Union. However, the Court of Appeal found that these proceedings did not have as their object a right *in rem* in immovable property. Instead, the claimants were exercising a right *in personam* to obtain monetary compensation. In this regard, the court mentioned that under Article 2 of Regulation (EC) No 864/2007 (Rome II), the concept of damage includes unjust enrichment. Therefore, Spanish courts had jurisdiction as the defendant corporation was domiciled in Spain.

Months afterwards, Meliá Hotels applied for a new stay of the proceedings, alleging that Central Santa Lucía was not the real successor of the original owners of the land in Cuba but an entity exclusively created for the purposes of obtaining compensation for the Cuban expropriations and that the claim was an attempt to circumvent Council Regulation (EC) No 2271/96, a "blocking statute" protecting against the effects of the extra-territorial application of legislation adopted by a third country. That is, Central Santa Lucía was trying to hide what was actually a claim indirectly based upon the Helms–Burton Act and from which the blocking statute was trying to shield European companies. The First Instance Court found that Central Santa Lucía seemed to have commenced proceedings in the US under the abovementioned US statute but that the current litigation in Spain did not derive from those proceedings nor could have any incidence on them. Furthermore, in the Spanish proceedings the Helms-Burton Act would not be applied and would not be taken into account.

Next, Meliá Hotels applied for a mandatory joinder (*litisconsorcio pasivo necesario*), requesting that the Cuban State be joined to the proceedings. The Court of First Instance ordered the joinder drawing on its own arguments in the earlier ruling where it had established its lack of jurisdiction on the basis of the sovereign immunity of Cuba. The court indicated that Central Santa Lucía claimed that Meliá Hotels had unjustifiably or illegitimately enriched itself by exploiting the expropriated land and that the examination of the illegality of such expropriation necessarily called for the participation of Cuba in the proceedings because any right of the claimants depended upon a declaration of the Spanish courts that the land was being illegitimately held by Cuba or, rather, by Gaviota S.A. It was wrong, the court seemed to say, to analyse the legitimacy of the acquisition of property without listening to the party who had carried out that act of acquisition. It was also impossible to recognize the original property right of Central Santa Lucía, a right which was in opposition to the present property rights of Cuba, without allowing Cuba to be heard in that respect. For these reasons, not only the State of Cuba but Gaviota S.A. had to be brought in as co-defendants with Meliá Hotels.

Finally, the Court of First Instance issued a new interlocutory decision last 3 May, where it established that it had no jurisdiction to hear the claim because now one of the defendants is a foreign sovereign state. The Office of the Prosecutor was also of the same opinion. The Spanish Ministry of Foreign Affairs had also filed a report indicating that the act of nationalization was an act *iure imperii* and that the Cuban State enjoyed immunity for that reason. However, the ministry added that any contractual relationships between Meliá Hotels and Gaviota S.A. could be the subject matter of civil proceedings in Spain. The Court of First Instance relied much on its own ruling of September 2019 but it also drew on its own mandatory joinder of November 2020, insisting that any decision of the Spanish courts concerning the right of Central Santa Lucía to be compensated by Meliá Hotels would involve analysing the act of acquisition as well as the property rights of the Cuban State and Gaviota S.A. This was the reason why the latter had been joined and were now co-defendants, one of whom – Cuba – was a foreign sovereign which enjoyed immunity from jurisdiction. Since it was impossible to separate the analysis of the jurisdiction of the Spanish court from that of the claim against Meliá Hotels, the proceedings had to be stayed against all parties. Finally, the Court of First Instance mentioned that although Cuba had not made an appearance in the proceedings after being named as a defendant, that could not

be interpreted as tacit submission under Spanish law.

The Court of First Instance does not seem to be aware of the "Catch 22" type of decision it has made. On the one hand the claim could not be heard because Central Santa Lucía had not brought Cuba in as a co-defendant. On the other hand, now the Spanish court does not have jurisdiction precisely because Central Santa Lucía has brought a sovereign defendant into the proceedings, further to the mandate of the same court, at the request of the primary defendants.

The Court of First Instance also seems to have given a lot of weight to the fact that if it decided that the nationalization had been illegal, that would have affected the property rights of Cuba over the nationalized land. This is obviously not the case, precisely because Spain does not have any kind of enforcement jurisdiction over property located in Cuba. As the abovementioned Supreme Court ruling of 25 September 1992 indicated, even if Spanish courts cannot control the legality of the Cuban expropriations, they can indeed draw certain consequences from their illegality, provided that those consequences are of a private law nature and are limited to the Spanish territory.

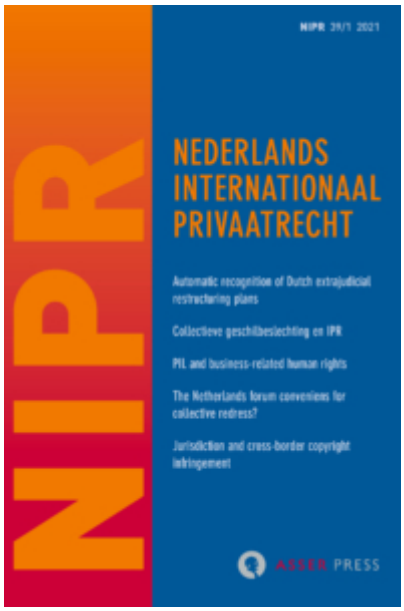
As it was mentioned in my first post, the Spanish Court also seems to have confused immunity from jurisdiction with the act of state doctrine – which has no place in the Spanish legal system –, mentioning once and again that the acts of nationalization of the Cuban State are protected when, in fact, the only one protected is Cuba itself, but this protection is restricted to certain types of acts.

Although this ruling of 3 May may be appealed, the exiled Cubans are running out of options, especially now that two years have elapsed since the Helms-Burton act was activated without much to show for. Title III lawsuits continue to face legal obstacles and conflicting rulings by US courts. The growing body of case law is, nevertheless, clarifying the conditions concerning the right of action of the claimants, which must be based on their standing and on the knowledge that defendants had about the confiscated nature of the property.

Maybe the best option for the Cuban community in the US is not to hope for a full implementation of the Helms-Burton act but to lobby for a lump-sum agreement between Cuba and the US, similar to the agreement between Cuba and Spain of 1986. The diplomatic opening that commenced with President Obama would have been a good start for that but there are doubts that President Biden wants to push

forward in the same direction, given the communist island's poor human rights record. Still, Venezuela, the oil rich and long standing ally of the Castro brothers is now in a state of such turmoil that Cuba may feel the need to make concessions.

Latest issue Dutch PIL journal (NIPR)



The latest issue (21/1) of the Dutch journal *Nederlands Internationaal Privaatrecht* has been published. It includes the following articles.

Vriesendorp, W. van Kesteren, E. Vilarin-Seivane & S. Hinse, Automatic recognition of the Dutch undisclosed WHOA procedure in the European Union / p. 3-17

On 1 January 2021, the Act on Court Confirmation of Extrajudicial Restructuring Plans ('WHOA') was introduced into the Dutch legal framework. It allows for extrajudicial debt restructuring outside of insolvency proceedings, a novelty in the Netherlands. If certain requirements – mostly relating to due process and voting – are met, court confirmation of the restructuring plan can be requested. A court-confirmed restructuring plan is binding on all creditors and shareholders whose claims are part of that plan, regardless of their approval of the plan. WHOA is available in two distinct versions: one public and the other undisclosed. This

article assesses on what basis a Dutch court may assume jurisdiction and if there is a basis for automatic recognition within the EU of a court order handed down in either a public or an undisclosed WHOA procedure.

Arons, Vaststelling van de internationale bevoegdheid en het toepasselijk recht in collectieve geschilbeslechting. In het bijzonder de ipr-aspecten van de Richtlijn representatieve vorderingen / p. 18-34

T*he application of international jurisdiction and applicable law rules in collective proceedings are topics of debate in legal literature and in case law. Collective proceedings distinguish in form between multiple individual claims brought in a single procedure and a collective claim instigated by a representative entity for the benefit of individual claimants. The 'normal' rules of private international law regarding jurisdiction (Brussel Ibis Regulation) and the applicable law (Rome I and Rome II Regulations) apply in collective proceedings. The recently adopted injunctions directive (2020/1828) does not affect this application.*

Nonetheless, the particularities of collective proceedings require an application that differs from its application in individual two-party adversarial proceedings. This article focuses on collective redress proceedings in which an entity seeks to enforce the rights to compensation of a group of individual claimants.

Collective proceedings have different models. In the assignment model the individual rights of the damaged parties are transferred to a single entity. Courts have to establish its jurisdiction and the applicable law in regard of each assigned right individually.

In the case of a collective claim brought by an entity (under Dutch law, claims based on Art. 3:305a BW) the courts cannot judge on the legal relationships of the individual parties whose rights are affected towards the defendant. The legal questions common to the group are central. This requires jurisdiction and the applicable law to be judged at an abstract level.

Bright, M.C. Marullo & F.J. Zamora Cabot, Private international law aspects of the Second Revised Draft of the legally binding instrument on business and human rights / p. 35-52

Claimants filing civil claims on the basis of alleged business-related human rights harms are often unable to access justice and remedy in a prompt, adequate and

effective way, in accordance with the rule of law. In their current form, private international law rules on jurisdiction and applicable law often constitute significant barriers which prevent access to effective remedy in concrete cases. Against this backdrop, the Second Revised Draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises has adopted a number of provisions on private international law issues which seek to take into account the specificities of such claims and the need to redress the frequent imbalances of power between the parties. This article analyses the provisions on jurisdiction and applicable law and evaluate their potential to ensure effective access to remedy for the claimants.

Conference report

Touw, The Netherlands: a *forum conveniens* for collective redress? / p. 53-67

On the 5th of February 2021, the seminar 'The Netherlands: a Forum Conveniens for Collective Redress?' took place. The starting point of the seminar is a trend in which mass claims are finding their way into the Dutch judicial system. To what extent is the (changing) Dutch legal framework, i.e. the applicable European instruments on private international law and the adoption of the new Dutch law on collective redress, sufficiently equipped to handle these cases? And also, to what extent will the Dutch position change in light of international and European developments, i.e. the adoption of the European directive on collective redress for consumer matters, and Brexit? In the discussions that took place during the seminar, a consensus became apparent that the Netherlands will most likely remain a 'soft power' in collective redress, but that the developments do raise some thorny issues. Conclusive answers as to how the current situation will evolve are hard to provide, but a common ground to which the discussions seemed to return does shed light on the relevant considerations. When legal and policy decisions need to be made, only in the case of a fair balance, and a structural assessment thereof, between the prevention of abuse and sufficient access to justice, can the Netherlands indeed be a forum conveniens for collective redress.

Latest PhDs

Van Houtert, Jurisdiction in cross-border copyright infringement cases. Rethinking the approach of the Court of Justice of the European Union (dissertation, Maastricht University, 2020): A summary / p. 68-72

The dissertation demonstrates the need to rethink the CJEU's approach to jurisdiction in cross-border copyright infringement cases. Considering the prevailing role of the EU courts as the 'law finders', chapter four argues that the CJEU's interpretation must remain within the limits of the law. Based on common methods of interpretation, the dissertation therefore examines the leeway that the CJEU has regarding the interpretation of Article 7(2) Brussels Ibis in cross-border copyright infringement cases.

European Parliament Resolution on corporate due diligence and corporate accountability

Our blog has reported earlier on the Proposal and Report by the Committee on Legal Affairs of the European Parliament for a Resolution on corporate due diligence and corporate accountability. That proposal contained recommendations to amend the EU Regulations Brussels Ia (1215/2015) and Rome II (864/2007). The proposals were discussed and commented on by Jan von Hein, Chris Tomale, Giesela Rühl, Eduardo Álvarez-Armas and Geert van Calster.

On 10 March 2021 the European Parliament adopted the Resolution with a large majority. However, the annexes proposing to amend the Brussels Ia and Rome II Regulations did not survive. The Resolution calls upon the European Commission to draw up a directive to ensure that undertakings active in the EU respect human rights and the environment and that they operate good governance. The European Commission has already indicated that it will work on this.

Even if the private international law instruments are not amended, the Resolution touches private international law in several ways.

* It specifies that the "Member States shall ensure that relevant provisions of this Directive are considered overriding mandatory provisions in line with Article 16 of Regulation (EC) No 864/2007" (Art. 20). It is a bit strange that this is left to national law and not made an overriding mandatory provision of EU law in line with the CJEU's Ingmar judgment (on the protection of commercial agents – also a Directive). Perhaps the legislator decides otherwise.

* It proposes a broad scope rule covering undertakings "operating in the internal market" and encompassing activities of these undertakings or "those directly linked to their operations, products or services by a business relationship or in their value chains" (Art 1(1)). It thus imposes duties on undertakings to have due diligence strategies and communicate these even if the undertakings do not have their seat in an EU Member State. In this way it moves away from traditional seat theories and place of activities tests.

CJEU on the EU-third State child abduction proceedings under article 10 of the Brussels IIA Regulation

This post was written by Vito Bumbaca, PhD candidate/ Assistant Lecturer, University of Geneva

The EAPIL blog has also published a post on this topic, click here.

Introduction:

The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIA Regulation) still applies to the United Kingdom in EU cross-border proceedings dealing with parental responsibility and/ or child civil abduction commenced prior to the 31 December 2020 (date when 'Brexit' entered into force). Moreover, the Court of Justice of the European Union (CJEU) is entitled to exercise its jurisdiction over such proceedings involving the UK.

The decision of the High Court of England and Wales (Family Division, 6 November 2020, EWHC 2971 (Fam)), received at the CJEU on 16 November 2020 for an urgent preliminary ruling (pursuant to article 19(3)(b) of the Treaty of the European Union, art. 267 of the Treaty of the Functioning of the European Union, and art. 107 of the Rules of Procedure of the Court of Justice), and the CJEU judgment (*SS v. MCP*, C-603/20, 24 march 2021) are taken as reference in this analysis.

Question for a CJEU urgent preliminary ruling:

'Does Article 10 of [Regulation No 2201/2003] retain jurisdiction, without limit of time, in a Member State if a child habitually resident in that Member State was wrongfully removed to (or retained in) a non-Member State where she, following such removal (or retention), in due course became habitually resident?'

Contents of the EWHC (Family Division) judgment:

This judgment involved an Indian unmarried couple with a British daughter, born in England (2017), aged more than three (almost four at the time of the CJEU proceedings). Both parents held parental responsibility over their daughter, the father being mentioned as such in the birth certificate. The mother and the child left England for India, where the child has lived continuously since 2019. The father applied before the courts of England and Wales seeking an order for the return of the child and a ruling on access rights. The mother contested the UK jurisdiction (EWHC 2971, § 19).

The father claimed that his consent towards the child's relocation to India was temporary for specific purposes, mainly to visit the maternal grandmother (§ 6).

The mother contended that the father was abusive towards her and the child and, on that basis, they moved to India (§ 8). Consequentially, she had requested an order (Form C100 'permission to change jurisdiction of the child', § 13). allowing the child's continuous stay in India. Accordingly, the mother wanted their daughter to remain in India with her maternal grandmother, but also to spend time in England after the end of the pandemics.

In the framework of article 8, Brussels IIA, the Family Division of the Court of England and Wales held that the habitual residence assessment should be fact-based. The parental intentions are not determinative and, in many circumstances, habitual residence is established against the wishes of the persons concerned by the proceedings. The Court further maintained, as general principles, that habitual residence should be stable in nature, not permanent, to be distinguished from mere temporary presence. It concluded that, apart from British citizenship, the child did not have factual connections with the UK. Therefore, according to the Court, the child was habitually resident in India at the time of the proceedings concerning access rights initiated in England (§ 16).

The Family Division extended its analysis towards article 12(3) of the Regulation concerning the prorogation of jurisdiction in respect of child arrangements, including contact rights. For the Court, there was no express parental agreement towards the UK jurisdiction, as a prerogative for the exercise of such jurisdiction, at the time of the father's application. It was stated that the mother's application before the UK courts seeking the child's habitual residence declaration in India could not be used as an element conducive to the settlement of a parental agreement (§ 32).

Lastly, the Court referred to article 10 of Brussels IIA in the context of child abduction while dealing with the return application filed by the father. In practice, the said provision applies to cross-border proceedings involving the EU26 (excluding Denmark and the United Kingdom (for proceedings initiated after 31 December 2020)). Accordingly, article 10 governs the 'competing jurisdiction' between two Member States. The courts of the Member State prior to wrongful removal/ retention should decline jurisdiction over parental responsibility issues when: the change of the child's habitual residence takes place in another Member State; there is proof of acquiescence or ultra-annual inaction of the left-behind parent, holding custody, since the awareness of the abduction. In these circumstances, the child's return would not be ordered in

principle as, otherwise provided, the original jurisdiction would be exercised indefinitely (§ 37).

In absence of jurisdiction under Brussels IIA, as well as under the Family Law Act 1986 for the purposes of inherent jurisdiction (§ 45), the High Court referred the above question to the CJEU.

CJEU reasoning:

The Luxembourg Court confirmed that article 10, Brussels IIA, governs intra-EU cross-border proceedings. The latter provision states that jurisdiction over parental responsibility issues should be transferred to the courts where the child has acquired a new habitual residence and one of the alternative conditions set out in the said provision is satisfied (*SS v. MCP*, C-603/20, § 39). In particular, the Court observed that article 10 provides a special ground of jurisdiction, which should operate in coordination with article 8 as a ground of general jurisdiction over parental responsibility (§ 43, 45).

According to the Court, when the child has established a new habitual residence in a third State, following abduction, by consequently abandoning his/ her former 'EU habitual residence', article 8 would not be applicable and article 10 should not be implemented (§ 46-50). This interpretation should also be considered in line with the coordinated activity sought between Brussels IIA and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (§ 56).

Ultimately, the Court maintained that article 10 should be read in accordance with recital 12 of the Regulation, which provides that, as one of its fundamental objectives, parental responsibility issues should be decided by the courts that better suit the principle of factual proximity in the child's best interests (§ 58). Accordingly, the courts that are closest to the child's situation should exercise general jurisdiction over parental responsibility. To such an extent, article 10 represents a balance between the return procedure, avoiding benefits in favour of the abductor parent, and the evoked proximity principle, freezing jurisdiction at the place of habitual residence.

The Court further held that if the courts of the EU Member State were to retain jurisdiction unconditionally, in case of acquiescence and without any condition

allowing for account to be taken concerning the child's welfare, such a situation would preclude child protection measures to be implemented in respect of the proximity principle founded on the child's best interests (§ 60). In addition, indefinite jurisdiction would also disregard the principle of prompt return advocated for in the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (§ 61).

The Court concluded that insofar as the child's habitual residence changes to a third State, which is thus competent over parental responsibility, and article 12 of the Regulation is not applicable, the EU courts seised of the matter should apply the rules provided in the bilateral/multilateral instruments in force between the States in question or, on a subsidiary basis, the national Private International Law rules as indicated under article 14, Brussels IIA (§ 64).

Comment:

Considering the findings of fact, the CJEU reasoning and, prior to it, the EWHC judgment, are supported in that the daughter's habitual residence at the time of the parental *de facto* separation (EWHC 2971, § 6-10) was in India; and remained there at the relevant date of the father's application for return and access rights. If we assume, as implicitly reported in the decisions, that the child was aged less than one at the time of the first relocation from England to India, and that she lived more than two years (18 months between 2017-2018 and almost fully 2019-2020, (EWHC 2971, § 25)) within the maternal family environment in India, including prior to the wrongful act, her place of personal integration should be located in India at the above relevant date. Such a conclusion would respect the factual proximity principle enshrined in recital 12 of Brussels IIA, according to which habitual residence is founded on the child's best interests. Recital 12 constitutes a fundamental objective applicable to parental responsibility, including access rights, and child abduction proceedings. As a result, the courts of the EU26 should be bound by it as a consequence of the Brussels IIA direct implementation.

The CJEU has not dealt with specific decisive elements that, in the case under analysis, would determine the establishing of the child's habitual residence in India at a relevant time (the seisin under art. 8 and the period before abduction under art. 10 of the Regulation). Considering the very young age (*cf.* CJEU, *SS v. MCP*, C-603/20, § 33: 'developmentally sensitive age') of the daughter at the time

of the relocation, the child's physical presence corresponding to the mother's and grandmother's one as the primary carers prior to the wrongful act (retention) and to the return application, as well as the Indian social and family environment at the time of the seisin, highlighted by the EWHC, should be considered determinative (*cf.* CJEU, *UD v. XB*, C-393/18, 17 October 2018, § 57) – the Family Division instead excluded the nationality of the child as a relevant factor. The regularity of the child's physical presence at an appreciable period should be taken into account, not as an element of *temporal* permanent character, but as an indicator of *factual* personal stability. In this regard, the child's presence in one Member State should not be artificially linked to a limited duration. That said, the appreciable assessment period is relevant in name of predictability and legal certainty. In particular, the child's physical presence after the wrongful act should not be used as a factor to constitute an unlawful habitual residence (Opinion of Advocate General Rantos, 23 February 2021, § 68-69).

Again, in relation to the child's habitual residence determination in India, the child's best interests would also play a fundamental role. The father's alleged abuse, prior to the relocation, and his late filing for return, following the wrongful retention, should be considered decisive elements in excluding the English family environment as suitable for the child's best interests. This conclusion would lead us to retain India as the child-based appropriate environment for her protection both prior to the wrongful retention, for the return application, as well as at the seisin, for access rights.

In sum, we generally agree with the guidance provided by the CJEU in that factual proximity should be considered a fulfilling principle for the child's habitual residence and best interests determination in the context of child civil abduction. In this way, the CJEU has confirmed the principle encapsulated under recital 12, Brussels IIA, overcoming the current debate, which is conversely present under the Hague Convention 1980 where the child's best interests should not be assessed [comprehensively] for the return application (HCCH, Guide to Good Practice Child Abduction Convention: Part VI – Article 13(1)(b); a *contrario*, European Court of Human Rights, *Michnea v. Romania*, no. 10395/19, 7 October 2020). However, it is argued (partly disagreeing with the CJEU statement) that primary focus should be addressed to the mutable personal integration in a better suited social and family environment acquired within the period between the child's birth and the return application (*cf.* CJEU, *HR*, C-512/17, 28 June 2018, §

66; *L v. M*, 2019, EWHC 219 (Fam), § 46). The indefinite retention of jurisdiction, following abduction, should only be a secondary element for the transfer of jurisdiction in favour of the child's new place of settlement after the wrongful removal/ retention to a third State. In practice, it is submitted that if the child had moved to India due to forced removal/ retention by her mother, with no further personal integration established in India, or with it being maintained in England, founded on the child's best interests, the coordinated jurisdictional framework of articles 8 and 10 (and possibly article 12.4) of the Brussels IIA Regulation might have still been retained as applicable (*cf.* Opinion of Advocate General Rantos, § 58-59; as a comparative practice, see also *L v. M*, and to some extent Cour de cassation, civile, Chambre civile 1, 17 janvier 2019, 18-23.849, 5°). That said, from now on the CJEU reasoning should be binding for the EU26 national courts. Therefore, article 10 shall only apply to intra-EU26 cross-border proceedings, unlike articles 8 and 12 governing EU26-third State scenarios.

European Commission: Experts' Group on the Recognition of Parenthood between EU Member States

The European Commission (EC) has issued a call for experts to join an Experts' Group on the Recognition of Parenthood between the Member States of the European Union (EU).

Families are increasingly mobile as they move and travel between the Member States of the EU. Yet, given the differences in Member States' substantive and conflict of laws rules on parenthood, families may face obstacles in having the parenthood of their children recognised when crossing borders within the Union.

The EC is preparing a legislative initiative on the recognition of parenthood between the Member States of the European Union. The goal of this initiative is to

ensure that children will maintain their rights in cross-border situations, in particular where families travel or move within the Union.

In this context, the EC seeks **experts to advise it in the preparation of this legislative initiative**. Experts must have proven and relevant competence and experience at EU and / or international level in areas relevant to the recognition of parenthood between EU Member States. In particular, the members of the Expert Group must be experts in one or more of the following areas:

- private international law on family matters;
- Member States' law, and comparative law, on the establishment and recognition of parenthood;
- Union case law on free movement, name and nationality;
- fundamental rights and related case law, in particular under the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR) on or affecting parenthood and nationality; and / or
- the rights of the child and related case law.

The members of the Expert Group will be appointed in their personal capacity to represent the public interest. The call is not limited to experts with the nationality of one of the EU Member States.

The call for experts will run **until 23 April 2021.** Details about the call can be found at the following here.

this information was provided by Ms Lenka Vysoka, EC.