The Artist, the Actor and the EEO Regulation; or, how the English Courts and the Spanish Constitutional Court prevented a cross-border injustice threatened via the EEO Regulation in the litigation concerning Gerardo Moreno de la Hija and Christopher Frank Carandini Lee

Written by Jonathan Fitchen, University of Aberdeen

Introduction

The EEO Regulation (805/2004) was mooted in the mid-1990's to combat perceived failings of the Brussels Convention that were feared to obstruct or prevent 'good' judgment creditors from enforcing 'uncontested' (i.e. undisputable) debts as cross-border debt judgments within what is now the EU. The characterisations 'good' and 'bad' are not employed facetiously; the unreasonable obstruction of a creditor who was assumed to pursue a meritorious debt claim was and remains a central plank of the EEO project: hence the Regulation offers an alternative *exequatur* and public policy free procedure for the cross-border enforcement of such uncontested monetary civil and commercial claims that, until 2002, fell under the quite different enforcement procedures of the Brussels Convention. The 2004 EEO Regulation covers money enforcement titles (judgments, settlements and authentic instruments) that are already enforceable in the Member State of origin and hence are offered an alternative route to cross-border enforcement in the Member State addressed via the successors to the Brussels Convention, first the Brussels I Regulation and now the

Brussels Ia Regulation, on an expedited basis due to omitting both an *exequatur* stage and the ability of the Member State addressed to refuse enforcement because of public policy infringements.

As the EEO Regulation was introduced some years *after* the cross-border enforcement provisions of the Brussels Convention had been replaced by those of the Brussels I Regulation, many of the EEO's 'innovations' to remedy 'unnecessary' or abusive delays, caused by either a 'bad' debtor or by an overly cautious enforcement venue, had already been mitigated three years before it came into force in 2005. This fact and other issues (e.g. a preference among lawyers for the familiar and now streamlined Brussels I Regulation enforcement procedure, the issue of ignorance of the EEO procedures, and a greater than expected willingness for creditors to litigate debt claims directly in foreign venues) contributed to a lower than expected take up of the EEO Regulation in the context of contentious legal proceedings.

Anecdotal evidence of low use of the EEO in contentious matters has led to a view that the EEO Regulation is somewhat redundant. The coming into force of the *exequatur*-free Brussels Ia Regulation and the surveys connected with the IC²BE project have re-enforced this view of its redundancy. An expected recasting for the 2004 Regulation did not however occur in 2012 as the Commission withdrew it. The same year the Commission had received a less than complimentary report from RAND Europe concerning the Regulation (with which it disagreed and continues to disagree). It may be speculated that having lost the argument on restricting or deleting public policy in the course of the re-casting of the Brussels I Regulation, the Commission may have feared that the re-casting of the EEO might tend towards its *de facto*deletion if the Member States were permitted to consider its reliance on control in the Member State of origin and the lack of a public policy exception given examples of national case law that were already suggestive of structural difficulties with the Regulation and its underlying drafting assumptions (e.g. see G Cuniberti's comment on French Cour de cassation chambre civile 2, 6 janvier 2012 N° de pourvoi: 10-23518).

As matters stand, the EEO Regulation continues to apply and continues to cause particular difficulties for debtors (and also creditors, enforcement authorities and the CJEU), whether in the Member State of origin or in the Member State addressed. This assertion is supported by two litigation notes, of which this is the first (and most extraordinary): indeed, it is suggested that the difficulties that arose in the litigation discussed below are at least as significant for European private international law as the infamous case C-7/98 *Krombach v Bamberski*; *Krombach* and *Lee* each indicate the need for the inclusion of an overt public policy exception for those cases in which domestic civil procedure and the norms of European and international civil procedure have malfunctioned to such an extent that EU PIL is in danger of being 'understood' to force the Member State of enforcement to grant cross-border legal effect to a judgment granted improperly in flagrant breach of European and domestic human rights standards.

Facts

In January 2014 the civil judgment enforcement officials of the English High Court received a European Enforcement Order (EEO) application from a Spanish gentleman's lawyers requesting the actual enforcement of the Spanish judgment and costs recorded by the EEO certificate for €923,000. The enforcement target – who had been contacted officially by a letter from the applicant's lawyers *for the first time in the proceedings* shortly before this application and given 14 days to pay – was the well-known actor Christopher Lee, who was domiciled in the UK and resident in London where he had lived for many years.

Thus began the enforcement stage of a cross-border saga in which the judgment creditor and judgment debtor sought respectively to enforce or resist the enforcement of an EEO certificate that was incomplete (hence defective on its face) and unquestionably should never have been granted because it related to a Spanish judgment that should never have been delivered (or declared enforceable) concerning a debt, that had not been properly established according to Spanish procedural law, and relating to an at best contestable (and at worst fanciful) legal liability alleged to somehow fall upon an actor in a film concerning a subsequent unauthorised use by the DVD distributor of that film of the claimant artist's copyrighted artwork from that film in connection with the European DVD release of that film. The claim under Spanish copyright law was based on proceedings dating from June 2007 commenced before the Burgos Commercial court that unquestionably were never at any time (whether as a process, a summons or a judgment) in the following seven years served properly on the famous and foreign-domiciled defendant in accordance with the service provisions of the EU Service Regulation.

The original claim named three parties: 1) a production company (The Quaid

Project Ltd); 2) Mr. Juan Aneiros (who was alleged to have signed a contract pertaining to the artwork for the film with the claimant artist in 2004 and who was the son-in-law of Christopher Lee and who seemingly ran Mr Lee's website) and 3) Christopher Lee himself. The proceedings attempted in Spain however encountered an initial problem of how to serve these 'persons' in or from Spain. The solution selected as far as Lee was concerned did not use the Service Regulation nor did it anticipate the later reasoning of the CJEU in *Case C 292/10 G v de Visser ECLI:EU:C:2012:142*. After not finding Lee resident in Spain, the hopeless fiction of service by pinning the originating process to the noticeboard of the Burgos Commercial Court for a period of time was employed: it was then claimed that this properly effected service in circumstances where it was claimed to be impossible to find or serve a world renowned and famous English actor (or the actor's agent) in Spain (where he did not live).

Such modes of service where the defendant is likely to be domiciled in another state have been condemned as insufficient by the ECJ in cases such as: *Case 166/80 Peter Klomps v Karl Michel [1981] ECR 1593; Case C-300/14 Imtech Marine Belgium NV v Radio Hellenic SA ECLI:EU:C:2015:825; Case C-289/17 Collect Inkasso OU v Aint 2018 EU:C:2018*. These defects in serving Lee as intended defendant, and then as an enforcement target, proved fatal in February 2020 when, after roughly six years of challenges by Lee (and from mid 2015 by his Widow), the Spanish Constitutional Court decided that the consequences flowing from the service violations were sufficiently serious to remit the Spanish proceedings back to square one for noncompliance with Article 24 of the Spanish Constitution by the Spanish civil courts.

Significant aspects of the claim are unclear, in particular, why Lee was regarded as potentially liable for the claim. The various law reports make clear that the claim concerned compensation sought under Spanish copyright law by an artist whose contracted artwork for a film called 'Jinnah' (in which Christopher Lee had starred) had later been used without his permission for the subsequent European DVD release of that film. Though Spanish law permits such a contractual claim by the artist against the relevant party who uses his artwork, it is unclear from the various English and Spanish law reports how, in connection with the DVD release, this party was Christopher Lee. It is stated at para 11 of [2017] EWHC 634 (Ch) that Lee's lawyers told the English court that their client (who was not a producer or seemingly a funder of the original film) did not sign *any* contract with the claimant. It is hence not clear that Lee made (or could make) any decisions concerning the artwork for the film and still less concerning its later use for the European DVD release to breach the claimant's copyright. Such decisions appear to have been made by other natural and legal persons, without any link to Lee capable of making him liable for the compensation claimed.

Though it is doubtful that the issue will ever be resolved, a few statements in the Spanish press (*El Pais,* 22 March 2010) suggest both that the claimant regarded Lee as having been amongst those who had 'authorised' his original appointment to the film as its artist/illustrator but also, and confusingly, that the artist had not been able to speak to Lee about the issue and did not, subject to what the court might hold, consider him responsible for the misuse. Though it is speculation, it may be that a connection was supposed by the claimant (or his lawyers) analogous to a form of partnership liability between Lee and some of the other defendants who might have been presumed to have been involved in the original decision to employ the artist at the time of the film and hence might possibly have later been involved in the decision to re-use the same artwork (this time without the artist's consent) for the European DVD release. Neither the matter nor the nature of Lee's potential liability is though clear.

Further uncertainty arises from the issue of quantum. Spanish law allows an aggrieved artist to bring a claim for contractual compensation to seek sums representing those revenues that would have accrued to him had there been a reasonable contractual agreement to use his artwork in this manner. One function of the Spanish court in such a claim is to determine the correct quantum of this sum by considering representations from *each* party to the claim: this process could not occur properly in the present case as the service defects meant that only the views of the claimant were ever presented. Why was €710,000 the correct sum? Why not €720,000, €700,000 or €10,000? Trusting the artist's own estimation seems optimistic given that the sum claimed was large and the matter concerned the European DVD release of a film that was many orders of magnitude less well-budgeted or commercially successful than other films in which Christopher Lee had starred (e.g. Star Wars and the Lord of the Rings). Equally, did the artist really have all the data in his possession to allow him to demonstrate unilaterally the proper quantum in a forensic manner?

Despite these uncertainties the suggested liability and quantum were asserted for the purposes of formulating the Spanish claim that led to the *in absentia* judgment granted in March 2009 which, by May 2009, (in default of any appeal by the officially uncontacted Lee) was declared final. In October 2009 the judgment was declared enforceable by yet another notice from the same Burgos court that was again pointlessly fixed to the notice board of the court in default of employing any effective mode of service that should have been used in this context.

The matter was reported (inaccurately) in the UK press and media in 2010, possibly based on not quite understood Spanish newspaper reports, without however securing any comment from Lee. It is unclear if Lee ever did know unofficially of the Spanish proceedings, but it seems likely that he did as his son-in-law was involved in these. Such unofficial knowledge does not, of course, excuse successive service failures. One point that the UK media did record accurately in 2010 was that no defendant had appeared in the earlier Spanish proceedings.

In 2011, at the request of the claimant, the Burgos court issued him with an EEO certificate. It was seriously incomplete, omitting ticks for the boxes found at: 11.1 (that service had been as per the Service Regulation); 12.1 (ditto the summons); 13.1 (that service of the judgment had been as per the Regulation); 13.3 (that the defendant had a chance to challenge the judgment); and, 13.4 (that the defendant had not so challenged). The judgment on which the EEO certificate was based was claimed in the certificate to be one dated 26 April 2010 (seemingly never produced in the later London enforcement proceedings) while the certificate wrongly gave as Lee's London address as the address of his son-in-law and misspelled Lee's middle name.

In October 2013 the claimant applied to the Spanish courts for the rectification of the 2011 EEO certificate: such rectification was however confined only to correct the misspelled name and to add over €200,000 to the original 'debt' as costs due in part, it may be supposed from the comments of the Constitutional Court, to unsuccessful attempts to pursue the Spanish property of Lee's Spanish son-in-law. Seemingly no rectification was sought for the other serious omissions. The October 2013 EEO certificate was presented in January 2014 in London to Lee and to the English court. Lee's correct address had now been ascertained by the claimant's lawyers instructed to seek the cross-border enforcement of the EEO certificate concerning the 'uncontested' sums apparently due in Spain via its expedited and public policy free procedures.

On finally learning officially of the existence of the earlier Spanish *in absentia* proceedings when met with a lawyer's letter to his address demanding payment of the entire alleged debt within 14 days, Lee instructed his English lawyers and appointed Spanish lawyers to commence challenges to the earlier Spanish proceedings and to secure stays of enforcement in Spain and in the UK (the latter being via Art 23(c) EEO). By reason of a good-faith error, Lee's English lawyers 'jumped-the-gun' and represented to the English court that the Spanish challenge proceedings had already commenced – in fact at that point the Spanish lawyers had only been *instructed* to bring a challenge – and secured the English Art.23(c) stay some 17 days ahead of the actual commencement of the Spanish challenge proceedings. The creditor, via his lawyers, objected (correctly) to the premature grant and also to the continuation of the stay under Art.23(c) which first required the commencement of the Spanish challenges: this objection led to a Pyric victory when the English court dispensed with the erroneous stay but replaced it, seamlessly, with another stay granted as part of its inherent jurisdiction (rather than via any provision of the EEO Regulation) which it justified as appropriate given the presentation of a manifestly defective and incomplete EEO certificate. The stay was to endure for the duration of the Spanish appeals and all Spanish challenges to enforcement. Lee's death in mid 2015 saw the stay endure for the benefit of his widow.

While the stay proceedings were ongoing in England, the attempts by Lee's lawyers to challenge the earlier Spanish proceedings before the Spanish civil courts and appeal courts went from bad to worse. The said courts all took the astonishing view (summarised in paras 23 – 30 of [2017] EWHC 634 (Ch) (03 April 2017)) that there had been sufficient service and that Lee was now out-of-time to raise objections by civil appeal. All Spanish stay applications were rejected; even the Constitutional Court rejected such a stay application (on an earlier appeal prior to the 2020 case), finding the earlier conclusions of the civil courts that there was no demonstrable irreparable harm for Lee without the stay to be in accordance with the Constitution. Appeal attempts before the civil courts to object to the frankly ridiculous triple failure of service of process, summons and judgment, or to the existence of a viable claim, or to the lack of the quantification stage required by Spanish procedural law, all fell on deaf ears in these courts.

In this sense, because the Spanish civil courts all demonstrated their unwillingness to remedy the successive misapplication of EU laws, the private international law and procedural law of the EU all failed in this case in the Member State of origin. That this failure did not result in immediate actual enforcement against Lee's estate in the Member State addressed was due only to the extemporisation by an English court of an inherent jurisdiction stay in response to an incomplete certificate supporting the application. Without this extemporised stay the enforcement would have proceeded in the UK without any possibility of Lee requesting corrective intervention by English authorities to invoke a missing public policy exception. The English court was clear that had the empty boxes been ticked, there would have been no basis for the stay and enforcement would have been compelled. So much for the Recital 11 assurances of the EEO Regulation:

"This Regulation seeks to promote the fundamental rights and takes into account the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter."

These events left Lee's lawyers with only one remaining challenge possibility in Spain, viz. arguing that the Spanish civil courts had violated the Spanish Constitution. These challenges were brought to the Spanish Constitutional Court by lawyers acting first for Lee and then, after his death, acting for his widow. The decision of the Constitutional Court was delivered on 20 February 2020 (see comment by M Requejo Isidro) and found that there had indeed been a significant domestic breach of the Spanish Constitution, specifically, Section 24 para 1 which (in English) reads

"All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense."

The Constitutional Court – which necessarily is restricted to a consideration of the matters that go directly to the operation of the Spanish Constitution and hence has no further general appellate competence over the actions of the civil courts – concluded that the initial failure to serve a non-domiciled person, whose address was claimed to be unknown, but would have been very simple to discover, in accordance with the provisions of the relevant EU Service Regulation meant that Christopher Lee, and later his widow, were not adequately protected by the Spanish courts as required by Section 24 of the Spanish Constitution and hence had been deprived impermissibly of the defence that had to be provided. The order of the Constitutional Court annulled the earlier Spanish proceedings and sent the contingency-fee-funded claimant back to square one to recommence any subsequent proceedings properly and with due service concerning his alleged claim against whatever parts of the estate of the late Christopher Lee might now still be located within the UK or the EU.

Reflections on some of the wider issues

Though this litigation was compared above with the cause-celebre that was *Krombach*, it can be argued to represent a greater Member State of origin catastrophe than the earlier case: at least Herr Krombach was officially notified, served, summoned to the proceedings and then notified of the judgment. *Krombach* and *Lee* do both however illustrate why a public policy exception in the Member State addressed is essential. Unfortunately, in *Lee* this illustration is set against the absence of that exception. Thus, *Lee* demonstrates the grim prospects facing the 'debtor of an uncontested sum' (who only has this status due to blatant and successive breaches of service and private international law procedures) in cross-border enforcement procedures if the 'emergency brake' of public policy has been removed by drafters keen to prevent its unnecessary application to facilitate faster 'forward-travel' in circumstances in which the application of the said brake would not be necessary.

Had not the presented EEO certificate been so deficient, the English courts would not have been willing to extemporise a stay and the whole sum would have been enforced against Lee in London long before the civil and constitutional proceedings – all of which *Lee* also had to fund – concluded in Spain. Few ordinary people could have effectively defended the enforcement across two venues for six years when facing a claimant pursuing a speculative claim via a conditional fee arrangement (with its clear significance for the likely recovery of defence costs and a resulting impact upon the need to fund your own lawyers in each jurisdiction). It must be presumed that, despite manifest breaches of EU law and human rights standards, most ordinary persons would simply have had to pay-up. Whether this has already occurred, or occurs regularly, are each difficult to ascertain; what can though be said is that the design and rationale of the EEO Regulation facilitate each possibility.

Lee was fortunate indeed to face an incomplete EEO certificate and to find

English judges who, successively, were favourably disposed towards his applications despite a Regulation drafted to dismiss them. Though some may be disposed to regard the judiciary of *that* ex-Member State as 'constitutionally' predisposed to effect such interpretative developments, this would be a mistake, particularly in the present context of applications to the Masters in question (members of the judiciary who deal with incoming foreign enforcement applications). In any case, judicial willingness to extemporise a solution when faced with a defective EEO certificate to avert an immediate cross-border injustice seems a slender thread indeed from which to hang the conformity of the operation of the EEO Regulation with the basic human rights that should have been, but were not, associated with the treatment of Lee throughout these proceedings.

It is suggested that the circumstances of *Lee* demonstrate the failure of both the EEO Regulation, and of EU PIL in general, to protect the rights of an unserved and officially unnotified defendant to object to a cross-border enforcement despite the grossest of failings in the Member State of origin that, given the existence of Article 24 of the Spanish Constitution, proved astonishingly unsusceptible to Spanish appeal procedures. Had the judgment creditor been compelled to proceed to enforcement under the Brussels I Regulation (or later under the Recast of that Regulation) the service defects would probably have been more evident whether in the assumption of jurisdiction and / or at the point of enforcement outside Spain: the judgment debtor would also have had the option to raise the public policy exception to defend the enforcement proceedings plus better stay options in the enforcement venue.

Further it is suggested that *Lee* indicates that the EEO Regulation is no longer fit for purpose and should be recast or repealed. *Lee,* like *Krombach*, illustrates the danger of relying on the Member State of origin when drafting cross-border procedures of a non-neutral nature, i.e. reflecting assumptions that certified claims sent abroad by the 'creditor' will be 'good'. It is not always correct that all will remain 'fixable' in the Member State of origin such that objections to enforcement in the Member State addressed and a public policy exception are unnecessary. *Krombach* and *Lee* may be exceptional cases, but it is for such cases that we require the equally exceptional use of a public policy exception in the enforcement venue.

Call for Papers: Third German-Speaking Conference for Young Scholars in PIL

Following successful events in Bonn and Würzburg, the third iteration of the conference for young German-speaking scholars in private international law will take place – hopefully as one of the first events post-Corona – on 18 and 19 March 2021 at the Max Planck Institute for Comparative and International Private Law in Hamburg. The conference will focus on the theme of *PIL for a better world: Vision – Reality – Aberration?*; it will include a keynote by Angelika Nußberger, former judge at the European Court of Human Rights, and a panel discussion between Roxana Banu, Hans van Loon, and Ralf Michaels.

The organisers are inviting contributions that explore any aspect of the conference theme, which can be submitted until 20 September 2020. The call for papers and further information can be found on the conference website.

Now reviewed: new book (in Spanish) on surrogacy

written by Michael Wells-Greco

(Note: publication of this book was announced earlier.)

La gestación por sustitución en el derecho internacional privado y comparado

Instituto de Investigaciones Jurídicas UNAM – Centro de Investigación y Docencia Económicas (CIDE)

México, 2020

This highly informative and timely book edited by María Mercedes Albornoz addresses the pressing challenges presented by surrogacy arrangements. With contributions from Nuria González Martín, Verónica Esparza, Ximena Medellín Urquiaga, Isabel Fulda, Rebeca Ramos, Regina Tamés, Mónica Velarde, Federico Notrica, Cristina González Beilfuss, Rosa Elvira Vargas, María Virginia Aguilar, Francisco López González, María Mercedes Albornoz and Nieve Rubaja, and a thought provoking preface by Eleonora Lamm, this collection contains a remarkable wealth of comparative Ibero-America legal materials on surrogacy. While comparisons are made with the diverse national surrogacy approaches in other parts of the world, much of the comparative discussion centres on the experience of surrogacy in the Americas (in Mexico and Argentina, in particular). The careful analysis demonstrates the challenges for many states arising from surrogacy arrangements.

The book contains a number of contributions that provide international perspectives on surrogacy. These include, for example, a careful consideration of the impact and relevance of the case law of the European Court of Human Rights (the discussion begs the question whether the Inter-American Court of Human Rights will be seised to consider surrogacy in ways similar to its European cousin) and two reflective discussions on the work and aims of international surrogacy projects. The current situation in the Americas highlights ever more starkly the need for the international community to come together to consider whether a multilateral framework might be agreed upon which enable states to work together to uphold the human rights of all concerned. Only a holistic analysis by the global community can begin to determine whether international frameworks can achieve these aims.

Yet there are limitations with possible international approaches. There are also limits to what is considered to be morally acceptable. It is rightly posited that it is for each state to consider its national approach to surrogacy (which may include prohibition) but public policy is not an empty vessel and it cannot be deployed as a blanket defence when legal parent-child relationships are established abroad. There is an acceptance that surrogacy is not going to go away, so consideration ought to be given to the more complex and important human rights considerations it raises, which means focusing on the interests of children, as well as those of the surrogate (who in the volume is intentionally not referred to as the surrogate mother) herself.

The book returns, as it were, to Mexico and concludes with a proposed model of regulation in Mexico of cross-border surrogacy arrangements through a private international law lens.

The book is a fascinating read – it would interest anyone from lay readers with an interest in surrogacy to academics, lawyers and other professionals.

Dr. Michael Wells-Greco

The end of fostering outdated injustice to children born outside marriage through reparation of Nazi-expatriation acts: Ruling of the German Constitutional Court of 20 May 2020 (2 BvR 2628/18)

Marie-Luisa Loheide is a doctoral candidate at the University of Freiburg who writes her dissertation about the relationship between the status of natural persons in public and private international law. She has kindly provided us with her thoughts on a recent ruling by the German Constitutional Court.

According to Article 116 para. 2 of the German Basic Law *(Grundgesetz – GG)*, every descendant of former German citizens of Jewish faith who have been forcibly displaced and expatriated in a discriminatory manner by the Nazi-regime is entitled to attain German citizenship upon request. This rule has been incorporated in the Basic Law since 1949 as part of its confrontation with the systematic violations of human rights by the Nazi-regime and is therefore meant to provide reparation by restoring the *status quo ante*.

Descendants *("Abkömmlinge")* as referred to in Article 116 para. 2 are children, grandchildren and all future generations without any temporal constraint. Regardless of their parents' choice of citizenship, they have a personal right to naturalisation which is exercised upon request by reactivation of the acquisition of citizenship *iure sanguinis*. This very wide scope is legitimated by the striking injustice done by the Nazi-regime. Yet, according to the settled case law of the Federal Administrative Court, it had been limited by a strict "but-for" test: in order to solely encompass those people affected by this specific injustice. This meant that the descendant must hypothetically have possessed German citizenship according to the applicable citizenship law at the time of its acquisition which is usually the person's birth. To put it more clearly, one had to ask the following hypothetical question: Would the descendant be a German citizen if his or her ancestor had not been expatriated by the Nazis?

Exactly this limiting prerequisite was the crucial point of the matter decided upon by the German Constitutional Court on 20 May 2020. In the underlying case, the hypothetical question described above would have had to be answered in the negative: Until its revocation in 1993, German citizenship law stated that children of an unmarried German father and a mother of other citizenship did not acquire the German citizenship of their father but only that of their mother, contrary to today's principle of *ius sanguinis*-acquisition. As *in casu* the daughter of a forcibly displaced and expatriated former German emigrant of Jewish faith and a US-American mother was born outside marriage in 1967, she was denied the acquisition of the German citizenship. Whereas this was not criticised by the administrative courts seised, the German Constitutional Court in its ruling classified the denial as an obvious violation of the principle of equal treatment of children born within and outside marriage underlying Article 6 para. 5 GG as well as the principle of equal treatment of women and men according to Article 3 para. 2 GG, as alleged by the plaintiff. In its reasoning, the Court emphasised that an exception from the principle of equal treatment of children born outside marriage could only be made if absolutely necessary. This corresponds to the case-law of the European Court of Human Rights on Article 14 of the ECHR that a difference in treatment requires "very weighty reasons". The former non-recognition of the family relationship between an unmarried father and his child, however, did obviously contradict the stated constitutional notion without being justified by opposing constitutional law. Out of two possible interpretations of "descendant" as referred to in Article 116 para. 2 GG the court must have chosen the one that consorts best with the constitution. According to the Constitutional Court, the more generous interpretation of descendant also prevents a perpetuation of the outdated notion of inferiority of children born outside marriage through Article 116 para 2 GG and corresponds to its purpose of reparation.

As the notion of inferiority of children born outside marriage has fortunately vanished, a clarifying judgment was highly overdue and is therefore most welcome. It is not acceptable that outdated notions are carried to the present through a provision of the Basic Law that is meant to provide reparation of Nazi crimes. Especially in post-Brexit times, the question dealt with has become more and more urgent with respect to people reclaiming their German citizenship in order to maintain their Union citizenship and the rights pertaining to it (see here).

In regard to conflicts law, this clarification of a key question of citizenship law is relevant to the determination as a preliminary issue (incidental question or *Vorfrage)* when nationality is used as a connecting factor. The judgment is likely to lead to more cases of dual citizenship that are subject to the ambiguous conflicts rule of Art. 5 para. 1 sentence 2 EGBGB.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)

4/2020: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" features the following articles:

E. Schollmeyer: **The effect of the entry in the domestic register is governed by foreign law: Will the new rules on cross-border divisions work?**

One of the most inventive conflict-of-law rules that secondary law of the European Union has come up with, can be discovered at a hidden place in the new Mobility Directive. Article 160q of the Directive assigns the determination of the effective date of a cross-border division to the law of the departure Member State. The provision appears as an attempted clearance of the complicated brushwood of the registration steps of a cross-border division of a company. This article explores whether the clearance has been successful.

F. Fuchs: **Revolution of the International Exchange of Public Documents: the Electronic Apostille**

The Apostille is of utmost importance for the exchange of public documents among different nations. The 118 states currently having acceded to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents issue, altogether, several millions of Apostilles per year in order to certify the authenticity of public documents emanating from their territory. Some years ago, the electronic Apostille was implemented, which allows states to issue their Apostilles as an electronic document. Interested parties may verify the authenticity of such an electronic document via electronic registers which are accessible on the internet. Whereas Germany has not yet acceded to that new system, 38 other jurisdictions already have done so.

G. Mäsch: **Third Time Lucky? The ECJ decides (again) on the place of jurisdiction for cartel damages claims**

In three decisions now the ECJ has dealt with the question of where the "place of the causal event" and the "place where the damage occurred" are to be located in order to determine, based on the ubiquity principle enshrined in Article 7(2) of the Brussels Ibis Regulation, the place of jurisdiction for antitrust damages (tort) claims. In this paper the overall picture resulting from the ECJ decisions in CDC

Hydrogen Peroxides, flyLAL-Lithuanian Airlines and now Tibor-Trans is analysed. The place of the “conclusion” of a cartel favoured by the ECJ to determine the place of the causal event is not only unsuitable in the case of infringements of Art. 102 TFEU (abuse of a dominant market position), but also in cases of infringement of Art. 101 TFEU (prohibition of cartels). The same criticism applies to the ECJ’s localisation of the place where the damage occurred at the place where the competition is impaired and the victim of the cartel or the abuse of the dominant market position (claimant) sustained the financial loss. In this paper it is suggested to dock the place of the causal event to the actual seat(s) of the cartel offender(s) and the place where the damage occurred exclusively to the affected market.

J. Kleinschmidt: **Jurisdiction of a German court to issue a national certificate of succession (‘Erbschein’) is subject to the European Succession Regulation**

The European Succession Regulation provides little guidance as to the relationship between the novel European Certificate of Succession and existing national certificates. In a case concerning a German “Erbschein”, the CJEU has now clarified an important aspect of this relationship by holding that jurisdiction of a Member State court to issue a national certificate is subject to the harmonised rules contained in Art. 4 et seq. ESR. This decision deserves approval because it serves to avoid, as far as possible, the difficult problems ensuing from the existence of conflicting certificates from different Member States. It remains, however, an open question whether the decision can be extended to national certificates issued by notaries.

K. Thorn/K. Varón Romero: **The Qualification of the Lump-Sum Compensation for Gains in the Event of Death Pursuant to Section 1371 (1) of the German Civil Code (BGB) in Accordance with the Regulation (EU) No. 650/2012**

In “Mahnkopf” the CJEU had to decide whether the material scope of application of the Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4/7/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession also covers national provisions which, like Section 1371 (1) of the German Civil Code

(BGB), grant the surviving spouse a lump-sum compensation for gains after the death of the other spouse by increasing his or her inheritance. Hence, this was a question of the qualification of Section 1371 (1) BGB, which had been discussed controversially in Germany for a long time and had only been clarified on a national level in 2015. The CJEU decided in favour of a qualification under inheritance law at the level of Union law, and thus took a view which contradicts that of the Federal Court of Justice (BGH) for national conflict of laws. The authors agree with the result of the CJEU but criticise the methodical approach to the implementation of the functional qualification. The article identifies the new questions and problems that will now have to be clarified by the German courts as a result of the CJEU decision and in this context analyses two recent decisions of Higher Regional Courts. The authors note that in the context of Section 1371 (1) BGB, the question of the (temporal) scope of application of the Regulation is likely to become more important in the future, asotherwise, in their opinion, the BGH case law will still have to be considered. Accordingly, in the opinion of the authors, for future German jurisdiction much will depend on whether the BGH adapts its previous case law to that of the CJEU.

P. Mankowski: **Recognition and free circulation of names 'unlawfully' acquired in other Member States of the EU**

The PIL of names is one of the strongholds of the recognition principle. The touchstone is whether names "unlawfully" acquired in other Member States of the EU must also be recognised. A true recognition principle implies that any kind of révision au fond is interdicted. Yet any check on the "lawfulness" or "unlawfulness" of acquiring a certain name abroad amounts to nothing else than a révision au fond.

M. Gernert: **Termination of contracts of Iranian business relations due to US sanctions and a possible violation of the EU Blocking Regulation and § 7 AWV**

US secondary sanctions are intended to subject European economic operators to the further tightened US sanctions regime against Iran. In contrast, the socalled Blocking Regulation of the European Union is intended to protect European companies from such extraterritorial regulations and prohibits to comply with certain sanctions. In view of the great importance of the US market and the intended uncertainty in the enforcement of US sanctions, many European companies react by terminating contracts with Iranian business partners in order to rule out any risk of high penalties by US authorities. This article examines if and to what extent the Blocking Regulation and § 7 AWV influence the effectiveness of such terminations.

B. Rentsch: **Cross-border enforcement of provisional measures – lex fori as a default rule**

Titles from provisional measures are automatically recognised and enforced under the Brussels I-Regulations. In consequence, different laws will apply to a title's enforceability (country of the rendering of the provisional measure) and ist actual enforcement (country where the title is supposed to take effect). This sharp divide falls short of acknowledging that questions of enforceability and the actual conditions of enforcement are closely entangled in preliminary measure proceedings, especially the enforcement deadline under Sec. 929 para. 2 of the German Code of Civil Procedure (ZPO). The European Court of Justice, in its decision C-379/17 (Societ Immobiliare Al Bosco Srl) refrained from creating a specific Conflicts Rule for preliminary measures and ruled that the deadline falls within the scope of actual enforcement. This entails new practical problems, especially with regard to calculating the deadline when foreign titles are involved.

A. Spickhoff: **"Communication torts" and jurisdiction at the place of action**

Communication torts in more recent times are mostly discussed as "internet torts". Typically, such torts will be multi-state torts. In contrast, the current case of the Austrian Supreme Court concerns the localisation of individual communication torts. The locus delicti commissi in such cases has been concretised by the Austrian Supreme Court according to general principles of jurisdiction. The locus delicti commissi, which is characterised by a falling apart of the place of action and place of effect, is located at the place of action as well as at the place of effect. In the event of individual communication torts, the place of effect is located at the victim's place of stay during the phone call or the message arrival. The place of action has to be located at the sending location. On the other hand, in case of claims against individual third parties, the place of effect is located at the residence of the receiver. The Austrian Supreme Court remitted the case to the lower court for establishing the relevant facts for jurisdiction in respect of the denial of the plaintiff's claim. However, the court did not problematise the question of so-called "double-relevant facts". The European

Court of Justice, in line with the judicial practice in Austria and Germany, has accepted a judicial review of the facts on jurisdiction only with respect to their conclusiveness.

R. Rodriguez/P. Gubler: **Recognition of a UK Solvent Scheme of Arrangement in Switzerland and under the Lugano Conventions**

In recent years, various European companies have made use of the ability to restructure their debts using a UK solvent scheme of arrangement, even those not having their seat in the UK. The conditions and applicable jurisdictional framework under which the scheme of arrangement can be recognised in jurisdictions outside the UK are controversial. In Switzerland doctrine and jurisprudence on the issue are particularly scarce. This article aims to clarify the applicable rules of international civil procedural law as well as the requirements for recognition of a scheme of arrangement in Switzerland. It is held that recognition should be generally granted, either according to the 2007 Lugano Convention or, in a possible "no-deal Brexit" scenario, according to the national rules of private international law, or possibly even the 1988 Lugano Convention.

T. Helms: **Foreign surrogate motherhood and the limits of its recognition under Art. 8 ECHR**

On request of the French Court of Cassation the Grand Chamber of the European Court of Human Rights has given an advisory opinion on the recognition of the legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and its intended mother who is not genetically linked to the child. It held that Art. 8 ECHR requires that domestic law provides a possibility of recognition of a legal parent-child relationship with the intended mother. But it falls within states' margin of appreciation to choose the means by which to permit this recognition, the possibility to adopt the child may satisfy these requirements.

Private International Law and the outbreak of Covid-19: Some initial thoughts and lessons to face in daily life

Written by Inez Lopes (Universidade de Brasília) and Fabrício Polido (Universidade Federal de Minas Gerais)

Following the successful repercussion of the **Webinar PIL & Covid-19: Mobility of Persons, Commerce and Challenges in the Global Order,** which took place between 11 and 22nd May 2020, the Scientific Committee headed by Prof. Dr Inez Lopes (Universidade de Brasília), Prof. Dr Valesca R. Moschen (Universidade Federal do Espírito Santo), Prof. Dr Fabricio B. Pasquot Polido (Universidade Federal de Minas Gerais), Prof. Dr Thiago Paluma (Universidade Federal de Uberlandia) and Prof. Dr Renata Gaspar (Universidade Federal de Uberlandia) is pleased to announce that the Webinar´s videos are already available online (links below). The committee thanks all those professors, staff and students who enthusiastically joined the initiative. A special thank is also given to the University of Minas Gerais and the Brazilian Centre for Transnational and Comparative Studies for the online transmissions. The sessions were attainable to both participants and the audience.

On the occasion of the Webinar, scholars and specialists from Argentina, Brazil, Uruguay, Mexico, Portugal, Spain and the United Kingdom shared their preliminary views on Private International Law (PIL) related issues to the existing challenges posed by Covid-19 outbreak in Europe and the Americas. The main objective of the Webinar was to focus on the discussions on three main multidisciplinary clusters for PIL/Covid-19 research agenda: *(I) Private International Law, International Institutions and Global Governance in times of Covid-19*; (*II) Protection of persons in mobility and Covid-19: human rights, families, migrants, workers and consumers; (III) International Commerce and Covid-19: Global supply chains, investments, civil aviation, labour and new* *technologies*.

The initiative brought together the ongoing collaborative research partnerships among peers from the University of Brasília-UnB, Federal University of Minas Gerais-UFMG, Federal University of Uberlândia-UFU, Federal University of Espírito Santo-UFES, State University of Rio de Janeiro, Federal Rural University of Rio de Janeiro, FGV Law/São Paulo, Federal University of Paraná, Federal University of Rio Grande do Sul, Universidad Nacional del Litoral/Argentina, Universidad de la República/Uruguay, CIDE/Mexico, University of Coimbra/Portugal, University of Minho/Portugal, Universidad de València/Spain, University of Edinburgh/UK, and besides to members of the American Association of Private International Law – ASADIP, the Latin American Society of International Law, the Latin American Research Network of International Civil Procedure Law and the Brazilian Association of International Law.

The proposal for e-gathering specialists was made in line with the intense academic engagement to explore potential critical views related to current and future avenues for Private International Law during a pandemic crisis. One could remark the strong narratives about "global" and "domestic" health crises and their interactions with the practical operation of PIL lawmaking and decision-making processes. More generally, participants raised several issues on how PIL framework, norm-setting and dispute resolution mechanisms would be intertwined with global health emergencies, national public health interests, social isolation and distancing, inequalities, poverty, the demise of social protection on global scale and restrictions on the mobility of families, groups, individuals, companies and organizations during a pandemic crisis.

The Webinar participants also talked about an expedite PIL agenda on core issues related to state and non-state actors' practices during Covid-19 health crisis, challenges to international commerce, investment, labour and technologies and enforcement of human rights in cross-border cases. In view of the three clusters and specific topics, the Webinar sessions went into the analysis of the actual and potential impacts of Covid-19 outbreak on PIL related areas, its methodologies and policy issues. Participants highlighted that the PIL sectors on applicable law, jurisdiction, international legal (administrative and judicial) cooperation and recognition of foreign judgments will remain attached to the objective of resolving urgent cases, such as in the field of family and migration law (e.g. cases of international abduction, family reunion vs. family dispersion), consumer law, labour law, international business law and overall in cross-border litigation (e.g. reported cases involving state immunity, bankruptcy, disruption of global supply chains).

Likewise, there was a converging view amongst participants that PIL and its overarching principles of cooperation, recognition and systemic coordination will be of a genuine practical meaning for what is coming next in Covid-19 pandemic. Also, values on cosmopolitanism, tolerance and integration going back to the roots and veins of the Inter-American scholarship to PIL studies (since the end of 19th century!) may help to improve institutions dealing with local, regional and global. Likely those principles and values could provide PIL community with 'cautionary tales' in relation to existing trends of opportunistic nationalism, refusal of cooperation and threats with foreign law bans (for example, with regard to specific states, migrants and even businesses). As to policy level and to State practices (connected to international politics and public international law), participants have raised various concerns about the mobility of persons, sanitary barriers and national campaigns perniciously devoted to spreading xenophobia, marginalising groups, minorities and migrants. Some participants have also referred to the dangers of unilateral practices of those States advocating a sort of international isolation of countries and regions affected by Covid-19 without engaging in cooperation and dialogues. Even in those extreme cases, there will be harmful consequences to PIL development and its daily operation.

Inevitably, the tragedies and lost lives in times of Coronavirus have made participants reflect upon the transformative potentials for international scholarship and policy in a multidisciplinary fashion. For example, as remarked in some panels, in order to engage in a constructive and policy-oriented approach, PIL scholarship could refrain from any sort of 'black-letter' reading or absenteeism concerning Covid-19. At this stage, a sort of 'political awareness' should be encouraged for studies in public and private international law. Issues on economic reconstruction (rather than simply 'economic recovery'), access to public health, disruptive technologies, generational environmental concerns, labour markets, access to credit will be highlighted in global governance talks during Covid-19 pandemic and beyond. Some participants conceive the moment as "reality shock" rather than "mindset change" in facing good/bad sides of the pandemic.

As a preliminary matter of housekeeping method, participants shared some conceptual and normative questions in advance to the Webinar as a kick-off stage. A first teaser was initially to generate discussions about the interplay between state actors, international institutions, International Health Law and PIL. One of the departing points was the impact of the global sanitary emergency on individuals, families, organizations and companies and overlapping goals of state powers, public ordering and transnational private regulation. In addition, participants raised further concerns on the current international institutional design and PIL roles. Covid-19 accelerated and openly exposed the weakness of international institutions in guiding States and recalling their obligations concerning the protection of citizens during national emergencies or providing aid to most states affected by the outbreak of a pandemic disease. That scenario reveals existing gaps and bottlenecks between international, regional and national coordination during health emergencies (for example, the World Health Organization, Organization of American States and the European Union in relation to Member States). Participants also proposed further questions whether a global health emergence would change current views on jurisdiction (prescriptive, adjudicatory and executive), particularly in cases where cooperation and jurisdictional dialogues are refused by states in times of constraints and ambivalent behaviours in global politics.

Interdisciplinary PIL approaches also allowed participants to draw preliminary lines on the intersectionality between global health, national policies and jurisdictional issues, particularly because of the distinct regulatory frameworks on health safety and their interplay with cross-border civil, commercial and labour matters. The Coronavirus outbreak across the globe paves the way to rethink roles and new opportunities for international organizations, such as the United Nations, WHO, WTO, the Hague Conference of Private International Law, European Union, ASEAN, Mercosur and Organization of American States. One of the proposals would be a proper articulation between governance and policy matters in those international institutions for a constructive and reactive approach to the existing and future hardship affecting individuals, families and companies in their international affairs during pandemics and global crises. Since Private International Law has been functionally (also in historical and socio-legal dimensions) related to “the international life” of individuals, families, companies, organizations, cross-border dealings, a more engaged policy-oriented approach would be desirable for the PIL/global health crisis interplay. To what extent would it be possible to seek convergence between PIL revised goals, health emergencies, new technologies, governance and “neo-federalism” of organizations for advanced roles, new approaches, new cultures?

Some panels have directly referred to the opportunities and challenges posed ahead to PIL research agenda as well as to international, transnational and comparative studies. Both the Covid-19 outbreak and the global crisis require a study to continuously commit with inter- and multidisciplinary research and even strategically to recover some overarching values for a global order to be rebuilt. Reinforced and restorative cooperation, cosmopolitanism, ethics of care, solidarity and the entitlement of human rights (for instance, new proposed formulations for the right to development under the UN 2030 Agenda) are inevitably related to practical solutions for global health crises and emergencies. Humankind has been in a never-ending learning process no matter where in the globe we live. In a certain fashion, the despicable speech and behaviour of certain governments and global corporations’ representatives during the fight against the coronavirus generated endurable feelings in scholarly circles worldwide. Besides, political agents’ disdain regarding lost lives will never be forgotten.

How could PIL resist and respond to global challenges involving politics, international affairs and global health while at the same time it will be confronted with upcoming events and processes associated to extremist discourses and hatred, disinformation, historical revisionism, ‘junk science’ or everything else that disregards principles of global justice, international cooperation and protection of the rights of the person in mobility? Perhaps it is too early to reach consensus or a moral judgment on that. Nevertheless, the fight against Coronavirus/Covid-19 seems to extoll the powerful narratives of alterity, care, social protection, equalities, science, access to knowledge and education. Private International Law may play an important and critical role during forthcoming ‘austerity projects’ that may come during these dark sides and days of our History. As recalled by participants, the present requires our communities to engage in new proposals to support people, enterprises, consumers, workers and governments in their aspirations and endeavours for improving ‘social contracts’ or creating new ones. A pandemic crisis would not be the last stop or challenge.

For the sake of a peaceful and safe global community, PIL has ‘tools and minds’ to raise awareness about a balanced, fairly and universally oriented compromise to keep global, regional and national legal regimes operating in favour of the mobility of persons, the recognition of foreign situations, enforcement of human rights, allocation of distributive international trade, as well as engaging in environmental and human development goals. For example, recent academic writings on hardship or 'force majeure' theories could indeed focus on technical solutions for international contracts and liability rules, which are suitable for accommodating certain interests (the 'zero-sum' game?) among public and/or private parties during Covid-19 and after that. Yet those reflections could not isolate themselves from a broader discussion on major social and economic hurdles associated to business environments worldwide, such as unequal access to finance, trade imbalance, precarious work, digital dispossession by new technologies and multi-territorial and massive violation of human rights. From now on, global fairness and solidarity appear to be crucial for a common talk and shared feeling for countries during their socioeconomic reconstruction. Cooperation remains a cornerstone to pursue equilibrium strategies and surely PIL and its academic community will remain a great place for an authentic and constructive exchange between ideas beyond PIL itself. Stay with your beloved, stay safe!

Inez Lopes *(Universidade de Brasília)*
Fabrício Polido *(Universidade Federal de Minas Gerais)*

****

International Law, International Relations and Institutions: narratives on Covid-19 & challenges for Private International Law

05/11 – Monday – 10:30

Raphael Vasconcelos – State University of Rio de Janeiro; Fabrício B. Pasquot Polido – Federal University of Minas Gerais; Renata Gaspar – Federal University of Uberlândia

Video here

PIL, Global Governance, mobility of persons and Covid-19: enforcement of sanitary measures, international public policy and critical debates

05/12 – Tuesday – 16:30

Paula All – National University of Litoral/ Argentina; Rosa Zaia – Federal University of Uberlândia; Renata Gaspar – Federal University of Uberlândia

Video here

PIL, state immunity, international organizations and cross-border civil/commercial litigation in Covid-19

05/13 – Wednesday – 10:30

Valesca R. Borges Moschen – Federal University of Espírito Santo; Martha Olivar Jimenez – Federal University of Rio Grande do Sul; Fabrício B. Pasquot Polido – Federal University of Minas Gerais; Tatiana Cardoso Squeff – Federal University of Uberlândia

Video here

Emerging issues for international protection of consumer tourist and Covid-19

05/14 – Thursday – 10:30

Guillermo Palao Moreno – University of València/Spain; Tatiana Cardoso Squeff – Federal University of Uberlândia; Valesca R. Borges Moschen – Federal University of Espírito Santo

Video here

Covid-19, persons in mobility, social and sexual rights at transnational

level: violence, vulnerability, xenophobia and discrimination

05/15 – Friday – 10:30

Tatyana Friedrich – Federal University of Paraná; Mariah Brochado – Federal University of Minas Gerais; Francisco Gomez – University of València / Spain; Raphael Vasconcelos – State University of Rio de Janeiro

Video here

Global digital economy, data protection, online misinformation and cybersecurity in times of Covid-19: jurisdictional and international legal cooperation

05/18 – Monday – 10:30

Anabela Susana Gonçalves – University of Minho / Portugal; Alexandre Pacheco – Getúlio Vargas Foundation – FGV / Direito-SP; Fabrício B.P. Polido – Federal University of Minas Gerais; Inez Lopes – University of Brasília – UnB

Video here

Civil aviation and Covid-19: current landscape for transportation of passengers and international commercial transactions

05/19 – Tuesday – 10:30

Inez Lopes – GDIP-Aéreo-Espacial / University of Brasília; Fabrício B. Pasquot Polido – Federal University of Minas Gerais; Marcelo Queiroz – GDIP-Aéreo-Espacial / UnB and GETRA / UnB; Fernando Feitosa – GDIP-Aero-Espacial / UnB and GETRA / UnB

Video here

Covid-19, foreign investments, integrated markets and PIL goals: regulatory choices, critical infrastructure and litigation

05/20 – Wednesday – 10:30

Laura Capalbo – University of the Republic / Uruguay; Veronica Ruiz Abou-Nigm – University of Edinburgh / UK; Ely Caetano Xavier Junior- ICHS – Federal Rural University of Rio de Janeiro

Video here

Covid-19 & future of work in the global order: aspects of DIP, employment contracts, outsourcing and worker protection

05/21 – Thursday – 10:30

Marcia Leonora Orlandini – Federal University of Uberlândia; Marcel Zernikow – State University of Rio de Janeiro; Maurício Brito – GDIP-Transnational Justice / UnB

Full video here.

Covid-19, International commerce, global supply chains, WTO and beyond

05/22 – Friday – 16:30

María Mercedes Albornoz – CIDE / Mexico; Rui Dias – University of Coimbra / Portugal; Fabio Morosini – Federal University of Rio Grande do Sul; Renata Gaspar – Federal University of Uberlândia

Full video here

Covid-19, PIL and new technologies: research opportunities for Ph.D Students 05/19 – Tuesday – 19:00

Cecília Lopes – Master's Student / UFMG; Fernanda Amaral – Master's Student / UFMG

Full video here

Covid-19, PIL and protection of vulnerable communities: research opportunities for Ph.D Students

05/22, Friday – 10:30 – Márcia Trivellato – Doctoral candidate/ UFMG; Thaísa Franco de Moura – Doctoral candidate/ UFMG; Diogo Álvares – Master student/UFMG;

Full video here

Application of the Brussels I bis Regulation ratione materiae, interim relief measures and immunities: Opinion of AG Saugmandsgaard Øe in the case Supreme Site and Others, C-186/19

Written by María Barral Martínez, a former trainee at the European Court of Justice (Chambers of AG Campos Sánchez-Bordona) and an alumna of the University of Amsterdam and the University of Santiago de Compostela

The Hoge Raad Neederlanden (The Dutch Supreme Court), the referring court in the case Supreme Site Service and Others, C-186/19, harbours doubts regarding the international jurisdiction of Dutch courts under the Brussels I bis Regulation, in respect to a request to lift an interim garnishee order. An insight on the background of the case can be found here and here, while the implications of that background for admissibility of request for a preliminary ruling are addressed in section 1 of the present text.

In replying to a preliminary ruling request made by that court, AG Saugmandsgaard Øe issued his Opinion. Advocate General concluded that a flexible approach should be taken when interpreting the concept of “civil and commercial matters” within the meaning of Article 1(1) of the Brussels I bis Regulation. AG was of the view that an action for interim measures as the one brought by SHAPE, aimed at obtaining the lifting of a garnishee order, qualifies as civil and commercial matters, within the meaning of Article 1(1), provided that such garnishee order had the purpose of safeguarding a right originating in a contractual legal relationship which is not characterised by an expression of public powers, a matter that is left to the referring court to verify. For presentation of AG reasoning and its analysis in relation to interim measures, see section 2.

Moreover, according to AG, alleged claims of immunity enjoyed under international law by one of the parties to the proceedings had no significance, when it comes to the analysis of the material scope of the Brussels I bis Regulation. Against this background, the case provides a good opportunity to explore jurisdictional issues in the face of immunities, such as the debate regarding international jurisdiction preceding the assessment of immunities, and what can be inferred from the case-law of the Court of Justice and the European Court of Human Rights in that respect. Next, it requires us to determine whether the case-law developed in relation to State bodies and their engagement in *acta iure imperii* can be applied mutatis mutandis to the international organisations. Finally, it revives the concerns on whether the scope of the Brussels I bis Regulation should be determined in a manner allowing to establish international jurisdiction under that Regulation even though enforcement against public authorities stands little chances, be that international organisations as in the present case. These issues are discussed in section 3.

1. Admissibility of the preliminary reference

Advocate General Saugmandsgaard Øe made some remarks on the admissibility of the preliminary ruling and on whether a reply of the Court of Justice would be of any avail to the referring court.

It should be recalled that at national level, two sets of proceedings were initiated in parallel. In the first set, – the proceedings on the merits – Supreme, the private-law companies, sought a declaratory judgment that it was entitled to the payment of several amounts by SHAPE, an international organisation. These proceedings were under appeal before the Den Bosch Court of Appeal because SHAPE challenged the first instance court's jurisdiction. In the second set – the proceedings for interim measures where the preliminary ruling originated from – SHAPE brought an action seeking the lift of the interim garnishee order and requesting the prohibition of further attempts from Supreme to levy an interim garnishee order against the escrow account.

In the opinion of AG, the preliminary ruling was still admissible despite the fact that the Den Bosch Court of Appeal ruled on the proceedings on the merits granting immunity of jurisdiction to SHAPE in December 2019 – the judgment is under appeal before the Dutch Supreme Court. He opined that the main proceedings should not be regarded as having become devoid of purpose until the court renders a final judgment on the question whether SHAPE is entitled to invoke its immunity from jurisdiction, in the context of the proceedings on the merits and whether that immunity, in itself, precludes further garnishee orders targeting the escrow account (point 35).

2. Civil and commercial matters in respect of substantive proceedings or interim relief proceedings?

The Opinion addressed at the outset the question on whether the substantive proceedings should fall under the material scope of the Brussels I bis Regulation in order for the interim relief measures to fall as well within that scope. As a reminder, the object of the proceedings on the merits, is a contractual dispute over the payment of fuels supplied by Supreme to SHAPE, in the context of a military operation carried out by the latter.

As AG signalled, to answer the question several hypotheses have been put forward by the parties at the hearing held at the Court of Justice. The first hypothesis, supported by the Greek Government and Supreme, proposed that in order to determine if an action for interim measures falls within the scope of the Regulation, the proceedings on the merits should fall as well under the material scope of the Regulation. In particular, the characteristics of the proceedings on the merits should be taken into account. The second hypothesis, supported by SHAPE, considered that the analysis should be done solely in respect to the proceedings for interim measures. The European Commission and the Dutch and Belgian Governments opined that in order to determine if the action for interim measures can be characterised as civil and commercial matters, it is the nature of the right which the interim measure was intended to safeguard in the framework of the interim relief proceedings that matters.

Endorsing the latter hypothesis, AG indicated that an application for interim measures cannot be regarded as automatically falling within or outside the scope of the Brussels I bis Regulation, depending on whether or not the proceedings on the merits fall within that scope, simply because it is ancillary to the proceedings on the merits (point 51). To support his conclusion, AG followed the line of reasoning developed by the Court in the context of the instruments preceding the Brussels I bis Regulation. In that regard, the Court has held that to ascertain that provisional/protective measures come within the scope of the Regulation, it's not the nature of the measures that should be taken into account but the nature of the rights they serve to protect. To illustrate this: in Cavel I, the Court held that interim measures can serve to safeguard a variety of rights which may or may not fall within the scope of the now Brussels I bis Regulation (then the Brussels Convention) depending on the nature of the rights which they serve to protect. This has been confirmed in Cavel II: "ancillary claims accordingly come within the scope of the Convention according to the subject-matter with which they are concerned and not according to the subject-matter involved in the principal claim". Further, in Van Uden, the Court held that "provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights". This case-law has been also confirmed in recent judgments of the Court, namely in Bohez – where a penalty payment was imposed as a measure to comply with the main judgment – and Realchemie Nederland concerning an action brought for alleged patent infringement in the context of interim proceedings, where a prohibition in the form of payment of a fine was ordered.

In brief, what matters in this discussion on interim measures falling or not within the scope of the Brussels I bis Regulation, is not the relation between the main proceedings and the interim measures, the crucial factor being the **purpose –**

determined from a procedural law standpoint – of the interim relief measure vis-à-vis the proceedings on the merits: **an interim measure falling within the scope of the Regulation has to safeguard the substantive rights at stake in the main proceedings**. In the present case, the substantive right in question is a credit arising from a contractual obligation that Supreme holds against SHAPE.

3. Whether immunities play a role in determining if an action can qualify as "civil and commercial matters" within the meaning of Article 1(1) of the Regulation

One of the particularities of the case is that in the second set of proceedings where the preliminary ruling originated, SHAPE and JFCB (NATO) have introduced an action for interim relief measures, based on immunity from execution. SHAPE alleged that its immunity from execution flowing from the 1952 Paris Protocol trumps any jurisdiction derived from that Regulation.

It is against this background that the Dutch Supreme Court asked the Court of Justice if the fact that an International Organisation claims to enjoy immunity from execution under public international law, bars the application of the Brussels I bis Regulation or has an impact on its application *ratione materiae*. In his Opinion, Advocate General considered that the referring court is concerned by the actions relating to "acts or omissions in the exercise of state authority" linked to the concept of "*acta iure imperii*" – a concept which is also used in international law in relation to the principle of State immunity.

The Opinion tackled the question of immunities under public international law and concluded that a dispute where an International Organisation is a party, should not be automatically excluded from the material scope of the Brussels I bis Regulation. Interestingly, some aspects of the reasoning that allowed to reach that conclusion echo the doctrinal debates on the interplay between the jurisdictional rules of EU private international law, on the one hand, and the immunity derived from public international law, on the other hand.

- ### Does immunity precede the jurisdiction under EU

PIL?

At point 72, AG rejected the arguments advanced by the Austrian Government, who argued that the Brussels I bis Regulation should not apply to the case at hand. In the view of this government, if an international organisation takes part in a dispute, the immunity that this organisation enjoys on the basis of customary international law or treaty law, characterizes the nature of the legal relationship between the parties. In other words, a criterion based on the nature of a party (*scil*. the fact that it is an international organization that is a party to proceedings) should suffice to decline jurisdiction under the Brussels I regime.

In that respect, AG made some interesting remarks: first, by applying the Brussels I bis Regulation to a dispute where an International Organisation is a party, there is no breach of Article 3(5) TUE and of the obligation to respect public international law enshrined in that provision. Second, if, based on the Brussels I bis regime, a national court declares its international jurisdiction over a dispute, potential immunity claims advance by the parties will not be affected, as they are to be considered at a later stage of the proceedings. AG departed from the premise that the assessment on immunities should take place after the national judge seised with the case looks into the substance of the merits, including party allegations. This is therefore, at a second stage, after the national court has decided over its international jurisdiction within the first stage, that the immunity needs to be ascertained and its limits set (point 69).

This approach resonates with the idea that national courts are not supposed to engage in an in-depth analysis of the substance at that very first stage, when they are determining their own jurisdiction. They should not be undertaking a mini-trial, ascertaining jurisdiction requires only a first approximation to the facts of the case, solely for the purpose of determining jurisdiction. In FlyLaL II, a case concerning jurisdictional issues pursuant to the Brussels I Regulation, in respect of an action for damages brought for infringement of competition law, the Court observed that at the stage of determining jurisdiction "the referring court must confine itself to a prima facie examination of the case without examining its substance". The statement draws on AG Bobek's Opinion presented in the aforementioned case: "[d]etermination of jurisdiction should be as swift and easy as possible. Thus, a jurisdictional assessment is by definition a prima facie one. […] The jurisdictional assessment will, in practice, require a review of the basic factual and legal characteristics of the case at an abstract level.”

From the ECtHR case-law (see, most notably, Waite and Kennedy v. Germany) dealing with immunities of international organizations and the right to a remedy enshrined in Article 6 ECHR, a similar reading can be extracted. National courts deciding on granting of an immunity – be [it] immunity of jurisdiction or from execution – and performing the “reasonable alternative means” test, inevitably engage in a substantive analysis of the merits. **To ensure that the claimant’s right to access justice is not breached, requires more than an abstract examination of the facts**. This would seem to favour the idea **that determination of international jurisdiction precedes a substantive analysis of the circumstances of the case in respect to any alleged claim of immunities made by the parties**.

However, it is still not clear how this reasoning can be reconciled with judgments of the Court of Justice in the cases Universal Music International Holding and Kolassa. There, the Court of Justice held that according to the objective of the sound administration of justice which underlies the Brussels I Regulation, and respect for the independence of the national court in the exercise of its functions, a national court in the framework of ascertaining its international jurisdiction pursuant to the Brussels I regime, must look at all the information available to it. Although such an assertion seems to be construed in very general terms, one may well wonder what exactly a court assessing its international jurisdiction under the Brussels I bis Regulation is required to look at. Should it be a minimal review of the substance or a prima facie analysis strictly focused on the nature of the elements of the action – relevant in the context of the connecting factors used by the rules on jurisdiction –,including all the information available before the court?

If the answer would be the latter, that means that in the case at hand, the immunity from execution relied on by SHAPE in support of its action should be taken into account.

A reading of paragraphs 53 to 58 in the Court of Justice’s recent judgment in Rina, hints that in order to establish its own jurisdiction under the Brussels I bis Regulation, a national court has to take into consideration all available information. In the case at issue, party allegations where a party (Rina) invokes immunity of jurisdiction. While at first glance this instruction does not steer away from the judgments in Universal Music International Holding and Kolassa, what the Court proposes here is definitely more complex than a first approximation to the facts of the case. At paragraph 55 the Court notes "a national court implementing EU law in applying [the Brussels I Regulation] must comply with the requirements flowing from Article 47 of the Charter. […] The **referring court must satisfy itself that, if it upheld the plea relating to immunity from jurisdiction, [the claimants] would not be deprived of their right of access to the courts**, which is one of the elements of the right to effective judicial protection in Article 47 of the Charter." If the national courts were to engage in such analysis – in a similar fashion as the ECtHR established in regards to Article 6 ECHR – it will certainly go beyond a mere examination *in abstracto*, implying rather a deep dive on the merits.

Moreover, the judgment in Rina seems to suggest that the analysis of international law cannot be avoided even when it comes only to the question whether the Brussels I regime applies or not. At paragraph 60, the Court of Justice explained "[t]he principle of customary international law concerning immunity from jurisdiction does not preclude the national court seised from exercising the jurisdiction provided for by that regulation in a dispute relating to such an action, where that court **finds that such corporations have not had recourse to public powers** within the meaning of international law." Again, for the examination of these matters in the framework of determining international jurisdiction, a greater level of scrutiny is required. A national judge would have to dig dipper in the facts and party allegations to come to the conclusion that a certain party did not have recourse to public powers. Something that is everything but a swift and easy exercise.

- ## Does the case-law developed in the context of State bodies apply to international organisations?

Be that as it may, while an immunity claim does not automatically rule out the application of the Brussels I bis Regulation according to AG Saugmandsgaard Øe, the key question in his analysis is to determine if actions related to *acta iure imperii* under Article 1(1) of the Regulation are applicable to international organisations. It flows from the Court of Justice well-settled case-law that disputes between a State body and a person governed by private law come within the scope of civil and commercial matters, if the public authority in question does not act in the exercise of its public powers. At point 75 of his Opinion, AG made a reference to the judgment in Eurocontrol and indicated that exceptions under Article 1(1) *in fine* can extend to acts and omissions carried out by an international organisation. He remarked that, the concept of "public powers" established under the Court's case-law, not only relates to State responsibility but refers also to those situations where a public authority acts under the umbrella of its public powers.

Advocate General moved then to analyse the Court of Justice case-law concerning liability of the State for acts and omissions carried out in the exercise of sovereign authority. Here matters get a bit complicated.

On the one hand, **it remains to be seen how that case-law could be applied mutatis mutandis to international organisations**. Leaving aside the question of immunities and putting emphasis on the notion of "civil and commercial matters" within the meaning of Article 1(1) of the Brussels I bis Regulation, the acts and omissions of an international organization are strictly connected with the powers conferred to the organisation for its proper functioning. Thus, one could wonder whether a functional test would be more suitable to determine if the acts or omissions were carried out by an international organization in the exercise of its public powers: a demarcating line could be drawn between non-official (non-related to the mission of the organization) acts and omissions and those of official nature, therefore necessary to fulfil the organisation's mandate.

On the other hand, concerning the criteria applied by the Court when analysing if a public authority has exercised its powers of State authority, there is no "one size fits all" solution. As AG rightly pointed out at point 84 of his Opinion, the Court has still to sort out the interplay between different criteria: matters characterising the legal relationship between the parties, the subject-matter of the dispute and the basis of the action and the detailed rules governing the action brought.

To illustrate this point: in Préservatrice Foncière TIARD, the Court looked mainly at the legal relationship between the parties, while in Baten and Sapir and Others the Court did not refer to the legal relationship between the parties but focused on the subject-matter of the dispute and the basis of the action brought. Hence, the alternative or cumulative use of these criteria – or a flexible one- seem to reflect the need to provide an adequate response to the case-specific factual context of a particular case.

In that sense, AG pointed out that the criterion concerning the basis of the action is not relevant in all cases, it will be determinant in situations where is not established that the substantive basis of the claim is an act carried out in the exercise of public powers. For that reason, at 90, AG considered more appropriate that **the action is based on a right originating from an act of public authority or in a legal relationship characterized by a manifestation of public power**.

- ### Does the perspective of anticipated recognition/enforcement influence the interpretation of the notion of "civil and commercial matters"?

It is worth mentioning that some commentators (see also Van Calster, G., European Private International Law, Hart Publishing, 2016, p. 32) pointed out that, in the light of the judgment in Eurocontrol, the scope of application of the Brussels I bis Regulation should be interpreted by taking into account the perspectives of recognition and enforcement. Thus, if immunity bears no significance at the stage of determining jurisdiction, but it is later granted/recognised resulting in refusal of recognition and/or enforcement, concerns are raised regarding what is the practical use of exercising jurisdiction under the Brussels I bis Regulation against public authorities when there are little chances of recognition/enforcement.

On this point, the Spanish Supreme Court – in a case concerning the enforcement of a judgment rendered in Germany in favour of a private party against the Republic of Argentina –, held that a declaration of enforceability issued in relation to a general enforcement order does not breach the rules on immunity of execution. The Spanish Court precised that only when specific legal attachment measures are taken, a court should determine if the property in question is subject to execution. Thus, **the issue of immunity of execution and the assessment whether the property to be executed is for commercial or official purposes would be at stake at a second stage of the enforcement procedure, not interfering with the application of the Brussels I regime.**

A true game changer and the apex stone of international commercial litigation – the NILR Special Edition on the 2019 HCCH Judgments Convention is now available as final, paginated volume

On 2 July 2019, the Hague Conference on Private International Law (HCCH) adopted the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019 HCCH Judgments Convention). The instrument has already been described as a true game changer and the apex stone in international commercial litigation.

To celebrate the adoption of the 2019 HCCH Judgments Convention, the Netherlands International Law Review (NILR) produced a special edition entirely dedicated to the instrument.

Volume 67(1) of the NILR, which is now available in its final, paginated version, features contributions from authors closely involved in the development of the instruments. The articles provide deep insights into the making, and intended operation, of the instrument. They are a valuable resource for law makers, practitioners, members of the judiciary and academics alike.

The NILR's Volume comprises the following contributions (in order of print, open access contributions are indicated; the summaries are, with some minor modifications, those published by the NILR).

Thomas John ACIArb, "Foreword" (open access)

Ronald A. Brand, "Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and the Path Ahead"

Ron Brand considers the context in which a Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments was first proposed in 1992. It then traces the history of the Hague negotiations, both from within those negotiations and in regard to important developments outside the negotiations, through the completion of the 2005 Convention on Choice of Court Agreements and the 2019 HCCH Judgments Convention. The article ends with comments on whether it is advisable to now resume discussion of a separate convention on direct jurisdiction.

Francisco Garcimartín, "The Judgments Convention: Some Open Questions"

Francisco Garcimartín explores some of the open issues that were discussed in the negotiation process but remained open in the final text, such as, in particular, the application of the 2019 HCCH Judgments Convention to pecuniary penalties (2) and negative obligations (4), as well as the definition of the res judicata effect (3).

Cara North, "The Exclusion of Privacy Matters from the Judgments Convention"

Cara North considers on issue of particular focus in the later phases of the negotiations of the Convention, namely, what, if any, judgments ruling on privacy law matters should be permitted to circulate under the 2019 HCCH Judgments Convention. Having acknowledged that privacy is an evolving, broad and ill-defined area of the law and that there are obvious differences in the development and operation of privacy laws and policies in legal systems globally, the Members of the Diplomatic Session on the Judgments Convention determined to exclude privacy matters from the scope of the Convention under Article 2(1)(l). The purpose of this short article is to describe how and why the Diplomatic Session decided to exclude privacy matters from the 2019 HCCH Judgments Convention and to offer some observations on the intended scope of that exclusion.

Geneviève Saumier, "Submission as a Jurisdictional Basis and the HCCH 2019 Judgments Convention"

The 2019 HCCH Judgments Convention establishes a list of jurisdictional filters, at least one of which must be satisfied for the judgment to circulate. One of those is the implied consent or submission of the defendant to the jurisdiction of the court of origin. While submission is a common jurisdictional basis in international litigation, its definition and treatment vary significantly across states, whether to establish the jurisdiction of the court of origin or as a jurisdictional filter at the enforcement stage in the requested court. This diversity is most evident with respect to the mechanics and consequences of objecting to jurisdiction to avoid submission. The 2019 HCCH Judgments Convention adopts a variation on an existing approach, arguably the least complex one, in pursuit of its goal to provide predictability for parties involved in cross-border litigation. This contribution canvasses the various approaches to submission in national law with a view to highlighting the points of convergence and divergence and revealing significant complexities associated with some approaches. It then examines how the text in the 2019 HCCH Judgments Convention came to be adopted and whether it is likely to achieve its purpose.

Nadia de Araujo, Marcelo De Nardi, "Consumer Protection Under the HCCH 2019 Judgments Convention"

The 2019 HCCH Judgments Convention aims at mitigating uncertainties and risks associated with international trade and other civil relationships by setting forth a simple and safe system according to which foreign judgments can easily circulate from country to country. The purpose of this article is to record the historical moment of the negotiations that took place under the auspices of the HCCH, as well as to pinpoint how consumer cases will be dealt with by the Convention under Article 5(2).

Niklaus Meier, "Notification as a Ground for Refusal"

The 2019 HCCH Judgments Convention provides for several grounds for the refusal of recognition, including refusal based on insufficient notification. While this ground for refusal of the 2019 HCCH Judgments Convention seems quite similar to those applied in other conventions, the comparison shows that there are several differences between this instrument and other texts of reference, both with respect to the context of application as well as with respect to the details of the wording. The optional nature of the grounds for refusal under the 2019 HCCH Judgments Convention indicates that its primary focus is the free circulation of judgments, and not the protection of the defendant. The latter's protection is left to the discretion of the state of recognition: a sign of trust amongst the negotiators of the 2019 HCCH Judgments Convention, but also a risk for the defendant. Practice will show whether the focus of the negotiators was justified.

Junhyok Jang, "The Public Policy Exception Under the New 2019 HCCH Judgments Convention"

The public policy exception is inherently a fluid device. Its content is basically left to each State. A shared public policy is an exception. Therefore, the obligation of uniform interpretation, as provided in Article 20 of the 2019 HCCH Judgments Convention, will have an inherent limit here. Moreover, the 2019 HCCH Judgments Convention leaves some important issues, including procedure, to national rules. Each requested State retains a discretion to invoke the Convention grounds of refusal in a concrete case, and on whether to make an ex officio inquiry or have the parties prove those refusal grounds. The 2019 HCCH Judgments Convention also provides for the concrete applications of the public policy exception, following the model of the 2005 Choice of Court Convention. Here, a purely grammatical reading may create some peripheral problems, especially with the specific defences of conflicting judgments and parallel proceedings. Solutions may be found in the method of purposive interpretation and some general principles, particularly the evasion of the law and the abuse of rights, before resorting to the public policy defence.

Marcos Dotta Salgueiro, "Article 14 of the Judgments Convention: The Essential Reaffirmation of the Non-discrimination Principle in a Globalized Twenty-First Century"

The 2019 HCCH Judgments Convention includes a non-discrimination disposition in Article 14, according to which there shall be no security, bond or deposit required from a party on the sole ground that such a party is a foreign national or is not domiciled or resident in the State in which enforcement is sought. It also deals with the enforceability of orders for payment of costs in situations where the precedent disposition applied, and lays down an 'opt-out' mechanism for those Contracting States that may not wish to apply that principle. This article frames the discussion of the non-discrimination principle in the wider context of previous private international law instruments as well as from the perspectives of access to justice, human rights and Sustainable Development Goals (SDGs), understanding that its inclusion in the 2019 HCCH Judgments Convention was an important, inescapable and necessary achievement.

Paul R. Beaumont, "Judgments Convention: Application to Governments" (open access)

The 2019 HCCH Judgments Convention makes the classic distinction between private law matters within its scope (civil or commercial matters) and public law matters outside its scope. It also follows the same position in relation to State immunity used in the Hague Choice of Court Convention 2005 (see Art. 2(5) in 2019 and 2(6) in 2005). The innovative parts of the 2019 HCCH Judgments Convention relate to the exclusions from scope in Article 2 relating to the armed forces, law enforcement activities and unilateral debt restructuring. Finally, in Article 19, the Convention creates a new declaration system permitting States to widen the exclusion from scope to some private law judgments concerning a State, or a State agency or a natural person acting for the State or a Government agency. This article gives guidance on the correct Treaty interpretation of all these matters taking full account of the work of the Hague Informal Working Group dealing with the application of the Convention to Governments and the other relevant supplementary means of interpretation referred to in Article 32 of the Vienna Convention on the Law of Treaties.

João Ribeiro-Bidaoui, "The International Obligation of the Uniform and Autonomous Interpretation of Private Law Conventions: Consequences for Domestic Courts and International Organisations"

This article addresses the issue of the uniform and autonomous interpretation of private law conventions, including of private international law conventions, from the perspective of their Contracting States, particularly their judiciaries, and of the international organizations. Firstly, the author analyses the use of standard uniform interpretation clauses, and the origin of such clauses, in the context of the Hague Conference on Private International Law. The following part the article addresses negative and positive obligations imposed on States and their judiciaries under international law regarding the uniform and autonomous interpretation of international treaties. It is argued that States are not only obliged to refrain from referring to concepts from national laws for the purpose of the interpretation of international law instruments, but also that they face certain positive obligations in the process of applying the conventions. Those include referring to foreign case law, international scholarship, and under certain circumstances, also to travaux préparatoires. Thirdly, the author discusses the role of international organizations—e.g. HCCH, UNCITRAL, UNIDROIT, in safeguarding and facilitating the uniform and autonomous interpretation of private law conventions. It does so by describing various related tools and approaches, with examples and comments on their practical use (e.g. advisory opinions, information sharing, access to supplementary material, judicial exchanges and legislative action).

The NILR's Special Edition on the 2019 HCCH Judgments Convention concludes with a reproduction of the text of the *2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, as adopted on 2 July 2019.

Equality of the parties in investment arbitration – public international law aspects

Written by Silja Vöneky, University of Freiburg

<u>Note:</u> *This blogpost is part of a series on „Corporate social responsibility and international law" that presents the main findings of the contributions published in August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020.*

I. Introduction

1. The question of the status of transnational corporations in investment arbitration is of central importance for the division of spheres of responsibility, for the pursuit and enforcement of values, and thus for the bases of legitimation of the international legal order today.

2. The promotion of foreign direct investments and the deepening of economic cooperation between States to promote economic development with the common welfare objective of increasing the prosperity of the peoples of the contracting States parties has been the legitimating basis of the ICSID Convention, which is central to investment protection under international law, and of the bilateral investment protection agreements.

3. Investment protection law, as part of public international law – from its basis and purpose – should not be understood as a departure from a state-centered international order.

4. From the point of view of international law, the following questions have to be answered: What are the implications for the investment protection regime and investment arbitration as its core

a) if the triad justifying economic globalization (foreign private investment – promotion of economic development – promotion of prosperity) loses its persuasiveness as a paradigm for its justification in a normative sense, and

b) if a discourse of delegitimization prevails that accuses profit-oriented transnational corporations in their role as investors of irresponsible conduct, which is incompatible with the public welfare, and States of enabling this conduct to the detriment of their own population by means of international treaties establishing investment arbitration?

5. The aim to align investment treaties with the principle of sustainable development can be seen by the reforms initiated by States, groups of States, and the United Nations Conference on Trade and Development; besides, this aim should have an impact on already existing investment treaties and investment arbitration as far as it is coherent with international law.

II. Transnational corporations as equal parties under international law within the framework of investment arbitration

6. A necessary condition for the equality of the host State and an investing foreign corporation as parties is that both by consent agree to arbitration in respect of a legal dispute directly related to an investment, i.e. that the State, which is a contracting party to the ICSID Convention and a subject of international law, besides ratifying the convention additionally gives its written consent (Art. 25 (1),

Art. 36 (2) ICSID Convention), which has a threefold function (legitimating element, transformative element and constitutive element).

7. For various reasons, the procedural equality of the host State and the transnational corporations within the framework of a concrete arbitration procedure is justified and thus legitimate with regard to the international legal order as a whole. In particular, it complies with the principle of fair trial and the rule of law as enshrined in international law.

8. The principle of the equality of the parties does not preclude that transnational corporations are given preferential access to arbitration on the basis of international treaties and that arbitration is open only to transnational corporations.

9. The principle of the equality of the parties is inter alia observed during the composition of an arbitral tribunal if the judges are appointed by both parties in the same manner and each judge fulfils criteria which plausibly ensure impartiality. However, the appointment by the parties is not a necessary condition for the equality of the parties.

10. Questions about how to implement the principle of the equality of the parties arise in the arbitral proceedings themselves, in particular with regard to the possibility that several investors seek to bring their claims against the same host State, with regard to the admissibility of a counterclaim by the host State, with regard to the admissibility of "amicus curiae briefs" (third person submissions), with regard to the so-called equality of arms, and with regard to the problem of safeguarding confidentiality interests (in particular State secrecy).

11. Questions of the applicable law within the scope of the merits, such as the possibility of the host State to invoke justifications under international law (e.g. necessity) and the principles of interpretation of the investment protection agreements, are not considered to be questions of the principle of the equality of the parties.

III. (Un)justified unequal treatment to the detriment of transnational corporations as parties with regard to corruption problems

12. The decisions of arbitral tribunals, which deny their jurisdiction or the admissibility of the investor claim if the defendant host State asserts corruption,

are convincing (only) with regard to limited types of cases.

13. The lack of jurisdiction of the tribunal or the inadmissibility of the investor's claim does not seem to be justified even if the transnational corporation's act of corruption made the investment possible in the first place: The contrary reasoning in investment arbitration decisions, based inter alia on the wording of bilateral investment treaties, the scope of the host State's consent and/or a violation of fundamental general principles (such as, inter alia, the so-called "clean hands" principle, the "international public policy" or "transnational public policy", or the principle that no one shall profit from his/her own wrong) is not convincing for various reasons .

14. The same is true even more – in accordance with recent investment arbitration decisions – if the foreign investor acted corruptly after the investment had already been initiated in the host State.

15. Instead, corruption should be taken into account in the decision on the merits of a case in accordance with the objectives and principles of the international legal order in such a way that central values of investment protection are not disproportionately undermined, but nevertheless relevant disadvantages arise for transnational corporations if they engage in acts of corruption abroad for or during investments. This can be achieved if the amount of investors compensation is reduced for example by a multiple of the sum of the corruption.

16. When considering acts of corruption in the merits of a case, the arbitral tribunal should therefore consider the distribution of responsibility, the pursuit and enforcement of global values, and the bases of legitimacy of the current international legal order, also taking into account the state's anti-corruption obligations, in particular as enshrined in anti-corruption conventions and human rights treaties.

IV. Concluding remarks

17. The procedural equality of host States and transnational corporations within the framework of an investment arbitration procedure has no implications on the status of transnational corporations in the international legal order as a whole; other views, which argue that transnational corporations are (full or partial) subjects of international law in a normative sense, exceed the – *de lege lata* – narrowly limited equality.

18. The risks associated with a normative enhancement of transnational corporations in the international legal order present another argument against the view that corporations are (full or partial) subjects of international law. These risks are hinted at in the delegitimization discourse, which grants profit-oriented companies less influence in the international legal order of the 21st century.

19. Even without the status as subjects of international law, transnational corporations can be bound by norms of international law (international law in the narrow sense and so-called soft law). The UN Guiding Principles for the Business and Human Rights are, inter alia, of particular relevance.

20. If – with good reasons – foreign direct investments by transnational corporations continue to be promoted via international law as a means of increasing prosperity in the participating States for the benefit of the respective population, the public-good orientation of international investment arbitration tribunals should be further developed, on the one hand, by reforming the constitutional aspects of the arbitral procedure, and, on the other hand, by further focusing their jurisprudence on public-good aspects including the proportionate protection of responsible investments.

Full (German) version: *Silja Vöneky,* Die Stellung von Unternehmen in der Investitionsschiedsgerichtsbarkeit unter besonderer Berücksichtigung von Korruptionsproblemen – Unternehmen als völkerrechtlich gleichberechtigte Verfahrensparteien?, in: August Reinisch, Stephan Hobe, Eva-Maria Kieninger & Anne Peters (eds), Unternehmensverantwortung und Internationales Recht, C.F. Müller, 2020, pp. 339 et seq.

Private International Law Aspects of Corporate Social Responsibility Ius Comparatum – Global Studies in Comparative Law – Volume 42

A new volume in the series of Ius Comparatum – Global Studies in Comparative Law has been recently published by Springer. The volume was edited by Prof. *Catherine Kessedjian***,** Université Panthéon-Assas Paris II Paris, France, and Prof. *Humberto Cantú Rivera,* School of Law University of Monterrey, Mexico.

The book addresses one of the core challenges in the corporate social responsibility (or business and human rights) debate: how to ensure adequate access to remedy for victims of corporate abuses that infringe upon their human rights. However, ensuring access to remedy depends on a series of normative and judicial elements that become highly complex when disputes are transnational. In such cases, courts need to consider and apply different laws that relate to company governance, to determine the competent forum, to define which bodies of law to apply, and to ensure the adequate execution of judgments. The book also discusses how alternative methods of dispute settlement can relate to this topic, and the important role that private international law plays in access to remedy for corporate-related human rights abuses.

This collection comprises 20 national reports from jurisdictions in Europe, North America, Latin America and Asia, addressing the private international law aspects of corporate social responsibility, most of which were prepared for the Fukuoka Conference of the
International Academy of Comparative Law in the summer of 2018. They were last
updated in February 2019 for this publication. The model questionnaires, in French
and English, are included after the national reports.

The book draws two preliminary conclusions: that there is a need for a better understanding of the role that private international law plays in cases involving transnational elements, in order to better design transnational solutions to the issues posed by economic globalisation; and that the treaty negotiations on business and human rights in the United Nations could offer a forum to clarify and unify several of the elements that underpin transnational disputes involving corporate human rights abuses, which could also help to identify and bridge the existing gaps that limit effective access to remedy. Adopting a comparative approach, this book appeals to academics, lawyers, judges and legislators concerned with the issue of access to remedy and reparation for corporate abuses under the prism of private international law.

The list of contributors is the following:

Joost Blom Peter A. Allard School of Law, University of British Columbia, Vancouver, BC, Canada
Angelica Bonfanti Dipartimento di Diritto pubblico italiano e sovranazionale, Università degli Studi di Milano, Milano, Italy
Andrea Bonomi University of Lausanne, Lausanne, Switzerland
Nicolas Bueno University of Zurich, Zürich, Switzerland
Humberto Cantú Rivera School of Law, University of Monterrey, Monterrey, Mexico
Nicolás Carrillo Santarelli Universidad de La Sabana, Bogotá, Colombia
Si Chen Faculty of Law, McGill University, Montreal, QC, Canada
Steven Comerford U.S. State Department, Washington, DC, USA
Juan Ignacio Contardo Universidad Diego Portales, Santiago, Chile
Anne Danis-Fatôme Université de Brest, Brest, France
Mafalda de Sá Faculty of Law, University of Coimbra, Coimbra, Portugal
Marilda Rosado de Sá Ribeiro Universidad do Estado do Rio de Janeiro, Rio de Janeiro, Brazil
Katrin Deckert Université Paris-Nanterre, Paris, France
Siel Demeyere KU Leuven, Leuven, Belgium
Liesbeth F. H. Enneking Erasmus School of Law, Erasmus University Rotterdam, The Netherlands
Monika Feigerlová Institute of State and Law, Czech Academy of Sciences, Prague, Czech Republic
Leonhard Hübner Institut für ausländisches und internationales Privat- und Wirtschaftsrecht, Universität Heidelberg, Heidelberg, Germany
Luca Kaller Max-Planck-Institut für ausländisches und internationales Privatrecht,

More information about this series may be found here.