# Applying Mexican Law in U.S. Courts? Mexico v Smith & Wesson

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Mexico's ongoing transnational litigation against the firearms industry in U.S. courts is raising important questions of private international law, in particular as regards the application of Mexican tort law in U.S. courts. In its civil complaint against seven gun manufacturers and one wholesale arms distributor filed in federal court in 2021, Mexico argues that the defendant companies aid and abet the unlawful trafficking of guns into Mexico through irresponsible manufacturing, marketing and distribution practices. On this basis, Mexico claims that all relevant illegal conduct—resulting in human casualties, as well as material and economic loss—occurs on its territory and that, therefore, Mexican domestic tort law applies to six of its claims following the principle of *lex loci damni*.

Last September, the defendant's motion to dismiss was granted by the District Court for the District of Massachusetts largely on the basis of the Protection of Lawful Commerce in Arms Act (PLCAA, 15 U.S.C. §§ 7901-7903). PLCAA prohibits bringing a "qualified civil liability action" in federal or state court against gun manufacturers and distributors for harm "solely caused by the criminal or unlawful misuse of firearm products" by third parties. On appeal in the U.S. First Circuit, Mexico argues that the district court's application of PLCAA to bar its claims under Mexican tort law was "impermissibly extraterritorial". In particular, the claims that PLCAA prohibits, avers Mexico, only prohibit damages arising from the "criminal and unlawful misuse" of firearms in the U.S. and in respect to U.S. legislation—not Mexican laws. The high profile nature of the case suggests that the First circuit might address the extent of PLCAA's scope of application, including whether the district court's interpretation was "impermissibly extraterritorial".

For a detailed outline of the litigation history and the transnational issues at stake, including a discussion of two amicus briefs filed by professors of international and transnational law, you are welcome to read my recent post in *Just Security*, available here.

# 17th Anniversary & New General Editors

17 years ago on this day, the very first post was published on conflictoflaws.net. While the Rome I Regulation has remained relevant, the discipline has certainly undergone significant changes throughout the years – without losing any of its importance. Many, if not most, of those changes have been covered across the over 5,000 posts that have appeared on this blog. More than 2,500 readers are subscribed to our e-mail newsletter, while an even larger number of people now follows us on Twitter and LinkedIn.

In light of our continued commitment to cover all relevant developments in PIL, regionally and globally, we are happy to use the occasion of the blog's birthday for two announcements.

Most significantly, Thalia Kruger and Matthias Weller are handing over their responsibilities as General Editors to us, Jeanne Huang and Tobias Lutzi.

Matthias initially assumed this position alongside Giesela Rühl in 2017. He continued to serve as General Editor when Giesela handed over the baton to Thalia in 2019. It is no overstatement that without their tireless work behind the scenes, the blog would be unlikely to exist in its present form. During their tenure, they put the blog on a solid technical foundation, secured its funding, and ensured quality and diversity of its Editorial Board.

As new General Editors, we are deeply grateful for the excellent shape in which they are leaving this project – although it makes us all the more aware of the big shoes we have been asked to fill.

What is more, after several years of fruitful partnership with Hart Publishing, we are happy to announce that we have been able to secure a new sponsor for the blog. The Lindemann Foundation, a German non-profit foundation dedicated to supporting research in private international law, will allow us to continue running the blog. We are deeply grateful for the trust they are putting into us and this

blog. We also appreciate the support from Hart in the past, and we will keep in touch with them.

Speaking on behalf of the entire Editorial Board, we are reiterating our heartfelt gratitude to Thalia and Matthias and look forward to the next seventeen years of News & Views in Private International Law.

Jeanne and Tobias

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# Foreign Child Marriages and Constitutional Law – German Constitutional Court Holds Parts of the German Act to Combat Child Marriages Unconstitutional


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Update: the Court's press release is now available in English.

I.

Yesterday, on March 29, 2023, the German Constitutional Court published its long-awaited (and also long) decision on the German "Act to Combat Child Marriage" (Gesetz zur Bekämpfung von Kinderehen). Under that law, passed in 2017 in the midst of the so-called "refugee crisis", marriages celebrated under foreign law are voidable if one of the spouses was under 18 at the time of marriage (art. 13 para. 3 no. 2 EGBGB), and null and void if they were under 16 (art. 13 para. 3 no. 1 EGBGB) – regardless of whether the marriage is valid under the normally applicable foreign law. In 2018, the German Federal Court of Justice refused to apply the law in a concrete case and asked the Constitutional Court for a decision on the constitutionality of the provision.

That was a long time ago. The wife in the case had been fourteen when the case started in the first instance courts; she is now 22, and her marriage certainly no longer a child marriage. And as a matter of fact, the Constitutional Court decision itself is already almost two months old; it was rendered on February 1. This and the fact that the decision cites almost no sources published after 2019 except for new editions of commentaries, suggests that it may have existed as a draft for much longer. One reason for the delay may have been internal: the president of the Court, Stephan Harbarth, was one of the law's main drafters. The Court decided in 2019 that he did not have to recuse himself, amongst others for the somewhat questionable reason that his support for the bill was based on political, not constitutional, considerations. (Never mind that members of parliament are obligated by the constitution also in the legislative process, and that a judge at the Constitutional Court may reasonably be expected to be hesitant when judging on the unconstitutionality of his own legislation.)

II.

In the end, the Court decided that the law is, in fact, unconstitutional: it curtails the special protection of marriage, which the German Constitution provides, and this curtailment is not justified. The decision is long (more than sixty pages) but characteristically well structured so a summary may be possible.

Account to the Court, the state's duty to protect marriage (art. 6 para. 1 of the Basic Law, the German Constitution) includes not only marriage as an institution but also discrete, existing marriages, and not only the married status itself but also the whole range of legal rules surrounding it and ensuing from it. Now, the Court has provided a definition of marriage as protected under the Basic Law: it is a union, in principle in perpetuity, freely entered into, equal and autonomously structured, and established by the marriage ceremony as a formalized, outwardly recognizable act. (Early commentators have spotted that "between one man and one woman" is no longer named as a requirement, but it seems far-fetched to view this as a stealthy inclusion of same-sex marriage within the realm of the Constitution.) The stated definition includes marriages celebrated abroad under foreign law. Moreover, it includes marriages celebrated at a very young age as long as the requirement is met that they were entered into freely.

A legislative curtailment of this right could be justified. But the legislator has comparably little discretion where a rule, as is the case here, effectively amounts to an actual impediment to marriage. Whether a curtailment is in fact justified is a matter for the classical test of proportionality: the law must have a proper and legitimate purpose; it must be suitable towards that purpose; it must be necessary towards that purpose; and it must be adequate ("proportional" in the narrow sense) towards the purpose, in that the balance between achieving the purpose and curtailment of the right must not be out of proportion.

Here, the law's purposes themselves – the protection of minors, the public ostracization of child marriage, and legal certainty – isarelegitimate. The worldwide fight against child marriage is a worthy goal. So is the desire for legal certainty regarding the validity of specific marriages.

The law is also suitable to serve these purpose: the minor is protected from the legal and factual burdens arising from the marriage; the law may deter couples abroad from getting married (or so the legislator may legitimately speculate; empirical data substantiating this is not available.) A clear age rule avoids the uncertainty of a case-by-case *ordre public* analysis as the law prior to 2017 had required.

According to the Court, the measures are also necessary towards these purposes, because alternative measures would not be similarly successful. Automatic nullity of the affected marriages is more effective, and potentially less intrusive, than

determining nullity in individual proceedings. It is also more effective than case-by-case determinations under a public policy analysis. And it offers better protection of minors than forcing them to go through a procedure aimed at annulling the marriage would.

Nonetheless, the Court sees in the law a violation of the Constitution: the measure is disproportionate to the curtailment of rights. That curtailment is severe: the law invalidates a marriage that the spouses may have considered valid, may have consummated, and around which they may have built a life. Potentially, they would be barred from living together although they consider themselves to be married.

The Court grants that the protection of minors is an important counterargument in view of the risks that child marriages pose to them. So is legal certainty regarding the question of whether a marriage is or is not valid.

But the legislation is disproportionate for two reasons. First, the law does not regulate the consequences of its verdict on nullity. So, not only does the minor spouse lose the legal protections of marriage, including the right to cohabitation; they also lose the rights arising from a proper dissolution of the marriage, including financial claims against the older, and frequently wealthier, spouse. These consequences run counter to the purpose of protecting the minor. Second, the law does not enable the spouses to carry on their marriage legally after both have reached maturity unless they remarry, and remarriage may well be complicated. This runs counter to the desire to protect free choice.

The court could have simply invalidated the law and thereby have gone back to the situation prior to 2017. Normally, substantive validity of a marriage is determined by the law of each spouse's nationality (art. 13 para. 1 EGBGB). Whether that law can be applied in fact, is then a matter of case-by-case determinations based on the public policy exception (art. 6 EGBGB). That is in fact the solution most private international lawyer (myself included) preferred. The Court refused this simple solution with the speculation that this might have resulted in bigamy for (hypothetical) spouses who had married someone else under the assumption that their marriages were void. (Whether such cases do in fact exist is not clear.) Therefore, the Court has kept the law intact and given the legislator until June 30, 2024 to reform it. In the meantime, the putative spouses of void marriages are also entitled to maintenance on an analogy to the rules on

divorce.

III.

The German Constitutional Court has occasionally ruled on the constitutionality of choice-of-law rules before. Its first important decision – the Spaniard decision of 1971 – dealt with whether the Constitution had anything to say about choice of law at all, given that choice of law was widely considered to be purely technical at the time, with no content of constitutional relevance. That decision, which addressed a Spanish prohibition on remarrying after divorce, already concerned the right to marry. Another, more recent decision held that a limping marriage, invalid under German law though valid under foreign law, must nonetheless be treated as a marriage for purposes of social insurance. Both decisions rear their heads in the current decision, forming a prelude to a constitutional issue that now resurfaces: the court is interested less in the status of marriage itself and more in the actual protections that emerge from a marriage.

The legal consequences of a marriage are, of course, manifold, and the legislator's explicit determination that the child marriage should yield no consequences whatsoever is therefore far-reaching. (Konrad Duden's proposal to interpret the act so as to restrict this statement to consequences that are negative for the minor is not discussed, unfortunately). Interestingly, the Court accords no fewer than one fifth of its decision, thirteen pages, to a textbook exposition of the relevance of marriage in private international law. Its consequences were among the main reasons for near-unanimity in the German conflict-of-laws field in opposition to the legal reform. Indeed, another fifth of the decision addresses the positions of a wide variety of stakeholders and experts –the federal government and several state governments, the Max Planck Institute for Comparative and International Private Law, a variety of associations concerned with the rights of women, children, and human rights as well as psychological associations. Almost all of them urged the Court to rule the law unconstitutional.

These critics will regard the decision as an affirmation, though perhaps not as a full one, because the Court, worried only about consequences, essentially upholds the legislator's decision to void child marriages entered into before the age of sixteen. This is unfortunate not only because the status of marriage itself is often

highly valuable to spouses, as we know from the long struggles for the acceptance of same-sex marriage rather than mere life partnership. Moreover, the result is the acceptance of limping marriages that are however treated as though they were valid. This may be what the Constitution requires. From the perspective of private international law, it seems slightly incoherent to uphold the nullity of a marriage on one hand and then afford its essential protections on the other, both times on the same justification of protecting minors. In this logic, the Court does not question whether the voiding of the marriage is generally beneficial to all minors in question. Moreover, in many foreign cultures, these protections are the exclusive domain of marriage. It must be confusing to tell someone from that culture that the marriage they thought was valid is void, but that it is nonetheless treated as though it were valid for matters of protection.

## IV.

An interesting element in the decision concerns the Court's use of comparative law. Germany's law reform was not an outlier: it came among a whole flurry of reforms in Europe that were quite comprehensively compiled and analyzed in a study by the Hamburg Max Planck Institute (it is available, albeit only in German, open access). In recent years, many countries have passed stricter laws vis-à-vis child marriages celebrated under foreign law: France (2006), Switzerland (2012), Spain (2015), the Netherlands (2015), Denmark (2017), Norway (2007/2018), Sweden (2004/2019) and Finland (2019). Such reforms were successful virtue-signaling devices vis-a-vis rising xenophobia (not surprisingly, right-wingers in Germany have already come out again to criticize the Constitutional Court). Substantively, these laws treat foreign child marriages with different degrees of severity – the German law is especially harsh. However, comparative law reveals more than just matters of doctrine. Several empirical reports have demonstrated that foreign laws were not more successful at reducing the number of child marriages than was the German law, which is more a function of economic and social factors elsewhere than of European legislation. Worse, the laws sometimes had harmful consequences, not only for couples separated against their will, but even for politicians: in Denmark, one former immigration minister was impeached after reports by the Danish Red Cross of a suicide attempt, depression, and other negative psychosocial effects of the law on married minors. And surveys have shown that enforcement of the laws has been

spotty in Germany and elsewhere.

The Constitutional Court did not need to pay much attention to these empirical reports. In assessing whether annulling foreign marriages was necessary, the Court did however take guidance from the Max Planck comparative law study, pointing out (nos 182, 189) that the great variety of alternative measures in foreign legislation made it implausible that the German solution – no possibility to validate a marriage at age eighteen – is necessary . This makes for a good example of the usefulness of comparative law – comparative private international law, to be more precise – even for domestic constitutional law. If demonstrating that a measure is necessary requires showing a lack of alternatives, then comparative law can furnish both the alternatives as well as empirical evidence of their effectiveness. That comparative law can be put to such practical use is good news.

V.

The German legislator must now reform its law. What should it do? The Court has hinted at a minimal solution: consider these marriages void without exception, but extend post-divorce maintenance to them, and enable the couple to affirm their marriage, either openly or tacitly, once they are of age. In formulating such rules, comparative analysis of various legal reforms in other countries would certainly be of great help.

But the legislator may also take this admonition from the Constitutional Court as an impetus for a bigger step. Not everything that is constitutionally permissible is also politically and legally sound. The German reform was rushed through in 2017 in the anxiousness of the so-called refugee crisis. The same was true, with some modifications, of other countries' reforms. What the German legislator can learn from them is not only alternative modes of regulation but also that these reforms' limited success is not confined to Germany. This insight could spark legislation that focuses more on the actual situation and needs of minors than on the desire to ostracize child marriage on their backs.

Such legislation may well reintroduce case-by-case analysis, something private international lawyers know not to be afraid of. This holds true especially in view of the fact that the provision does not regulate a mass problem but rather a

relatively small number of cases which is unlikely to create excessive burdens on agencies and the judiciary. If the legislature does not want to go back to the ordre public test, perhaps it could extend the provision of Article 13 para. 3 no. 2 for marriages entered into after the age of 16 to marriages entered into earlier. This would make the marriage merely annullable; in cases of hardship, the sanction could be waived. The legislator could also substitute the place of celebration for the spouses' nationality as the relevant connecting factor for substantive marriage requirements, as the German Council for Private International Law, an advisor to the legislator, has already proposed (Coester-Waltjen, IPRax 2021, 29). This would make it possible to distinguish more clearly between two very different situations: couples wanting to get married in Germany (where the age restriction makes eminent sense) on the one hand, and couples who already got married, validly, in their home countries and find their actually existing marriage to be put in question. Indeed, this might be a good opportunity to move from a system that designates the applicable law to a system that recognizes foreign acts, as is the case already in some other legal systems.

In any case, the Court decision provides Germany with an opportunity to move the fight against child marriage back to where it belongs and where it has a better chance of succeeding – away from private international law, and towards economic and other forms of aid to countries in which child marriage would be less rampant if they were less afflicted with war and poverty.

# Anti-enforcement injunction granted by the New Zealand court

For litigants embroiled in cross-border litigation, the anti-suit injunction has become a staple in the conflict of laws arsenal of common law courts. Its purpose being to restrain a party from instituting or prosecuting proceedings in a foreign country, it is regularly granted to uphold arbitration or choice of court agreements, to stop vexatious or oppressive proceedings, or to protect the jurisdiction of the forum court. However, what is a party to do if the foreign proceeding has already run its course and resulted in an unfavourable judgment? Enter the anti-enforcement injunction, which, as the name suggests, seeks to restrain a party from enforcing a foreign judgment, including, potentially, in the country of judgment.

Decisions granting an anti-enforcement injunction are "few and far between" (*Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309, [2016] 1 WLR 2231, [118]). Lawrence Collins LJ (as he then was) described it as "a very serious matter for the English court to grant an injunction to restrain enforcement in a foreign country of a judgment of a court of that country" (*Masri v Consolidated Contractors International (UK) Ltd (No. 3)* [2008] EWCA Civ 625, [2009] QB 503 at [93]). There must be a good reason why the applicant did not take action earlier, to prevent the plaintiff from obtaining the judgment in the first place. The typical scenario is where an applicant seeks to restrain enforcement of a foreign judgment that has been obtained by fraud.

This was the scenario facing the New Zealand High Court in the recent case of *Kea Investments Ltd v Wikeley Family Trustee Limited* [2022] NZHC 2881. The Court granted an (interim) anti-enforcement injunction in relation to a default judgment worth USD136,290,994 obtained in Kentucky (note that the order was made last year but the judgment has only now been released). The decision is noteworthy not only because anti-enforcement injunctions are rarely granted, but also because the injunction was granted in circumstances where the foreign proceeding was not also brought in breach of a jurisdiction agreement.

Previously, the only example of a court having granted an injunction in the absence of a breach of a jurisdiction agreement was the case of *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599 (see Tiong Min Yeo "Foreign Judgments and Contracts: The Anti-Enforcement Injunction" in Andrew Dickinson and Edwin Peel *A Conflict of Laws Companion – Essays in Honour of Adrian Briggs* (OUP, 2021) 254).

*Kea Investments Ltd v Wikeley Family Trustee Limited* involves allegations of "a massive global fraud" perpetrated by the defendants – a New Zealand company (Wikeley Family Trustee Ltd), an Australian resident with a long business history in New Zealand (Mr Kenneth Wikeley), and a New Zealand citizen (Mr Eric Watson) – against the plaintiff, Kea Investments Ltd (Kea), a British Virgin Islands company. Kea alleges that the US default judgment is based on fabricated claims intended to defraud Kea. Its substantive proceeding claims tortious conspiracy and a declaration that the Kentucky judgment is not recognised or enforceable in New Zealand. Applying for an interim injunction, the plaintiff argued that "the New Zealand Court should exercise its equitable jurisdiction now to prevent a New Zealand company … from continuing to perpetrate a serious and massive fraud on Kea" (at [27]) by restraining the defendants from enforcing the US judgment.

The judgment is illustrative of the kind of cross-border fraud that private international law struggles to deal with effectively: here, alleged fraudsters using the Kentucky court to obtain an illegitimate judgment and, apparently, frustrate the plaintiff's own enforcement of an earlier (English) judgment, in circumstances where the Kentucky court is unwilling (or unable?) to intervene because Kea was properly served with the proceeding in BVI.

Gault J considered that the case was "very unusual" (at [68]). Kea had no connection to Kentucky, except for the defendants' allegedly fabricated claim involving an agreement with a US choice of court agreement and a selection of the law of Kentucky. Kea also did not receive actual notice of the Kentucky proceedings until after the default judgement was obtained (at [73]). In these circumstances, the defendants were arguably "abusing the process of the Kentucky Court to perpetuate a fraud", with the result that "the New Zealand Court's intervention to restrain that New Zealand company may even be seen as consistent with the requirement of comity" (at [68]).

One may wonder whether the Kentucky Court agrees with this assessment – that a foreign court's injunction restraining enforcement of its judgment effectively amounts to an act of comity. In fact, Kea had originally advanced a cause of action for abuse of process, claiming that the alleged fraud was an abuse of process of the Kentucky Court. It later dropped the claim, presumably due to a recent English High Court decision (*W Nagel (a firm) v Chaim Pluczenik* [2022] EWHC 1714) concluding that the tort of abuse of process does not extend to foreign proceedings (at [96]). The English Court said that extending the tort to foreign proceedings "would be out of step with [its] ethos", which is "the Court's control of its own powers and resources" (at [97]). It was not for the English court "to police or to second guess the use of courts of or law in foreign jurisdictions" (at [97]).

Since Gault J's decision granting interim relief, the defendants have protested the Court's jurisdiction, arguing that Kea is bound by a US jurisdiction clause and that New Zealand is not the appropriate forum to determine Kea's claims. The Court has set aside the protest to jurisdiction (*Kea Investments Ltd v Wikeley Family Trustee Limited* [2023] NZHC 466). The Court also ordered that the interim orders continue, although the Court was not prepared to make a further order that the defendants consent to the discharge of the default judgment and withdraw their Kentucky proceedings. This, Gault J thought, was "a bridge too far" at this interim stage (at [98]).

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# Of Hints, Cheats, and Walkthroughs – The Australian Consumer Law, The Digital Economy, and International Trade

**By Dr Benjamin Hayward**

Those who enjoy playing video games as a pastime (though certainly not in the

competitive esports environment) might take advantage of different forms of assistance when they find themselves stuck. Once upon a time, they might have read up on tips and tricks printed in a physical video game magazine. These days, they are more likely to head online for help. They might seek out hints – tidbits of information that help point the gamer in the right direction, but that still allow them to otherwise work out a solution on their own. They might use cheats – which allow the gamer 'to create an advantage beyond normal gameplay'. Otherwise, they might use a walkthrough – which, as the name suggests, might walk a player through the requirements of perhaps even 'an entire video game'.

Despite initial appearances, these definitions do more than just tell us about recreation in general, and gaming culture in particular. They also help us understand the state of play in relation to the Australian Consumer Law's application to the digital economy, and, in turn, the ACL's implications for international digital economy trade.

This video game analogy is actually very apt: gaming set the scene for recent litigation confirming the ACL's application to off-shore video game vendors. In the *Valve* case concerning the Steam computer gaming platform, decisions of the Federal Court of Australia and (on appeal) its Full Court confirmed that reach, via interpretation of the ACL's s 67 conflict of laws provision. The High Court of Australia denied special leave for any further appeal. In the subsequent Sony Europe case, concerning the PlayStation Network, liability was not contested. On the other hand, there was a live issue in Valve – at least at first instance – as to whether or not video games constitute 'goods' for the purposes of the ACL's consumer guarantees. The ACL's statutory definition of goods includes 'computer software'. Expert evidence, not contested and accepted by the Federal Court, treated computer software as equivalent to executable files; which may work with reference to non-executable data, which is not computer software in and of itself.

Understanding the ACL's definition of 'goods' has significant implications. The 'goods' concept is a gateway criterion: it determines whether or not the ACL's consumer guarantees apply, and in turn, whether it is possible to mislead consumers about the existence of associated rights. So far as digital economy trade is concerned, case law addressing Australia's regular Sale of Goods Acts confirms that purely-digital equivalents to traditional physical goods are not 'goods' at common law. Any change to this position, according to the New South Wales Supreme Court, requires statutory intervention. Such intervention did

occur when the *Trade Practices Act 1974* (Cth) transitioned into the *Competition and Consumer Act 2010* (Cth). Now, 'computer software' constitutes a statutory extension to the common law definition of 'goods' that would otherwise apply.

It is against all this context that a very recent decision of the Federal Court of Australia – *ACCC v Booktopia Pty Ltd* [2023] FCA 194 – is of quite some interest. Whilst most of the decision is uncontroversial, one aspect stands out: the Court held, consistently with Booktopia's admission, that eBooks fall within the scope of the ACL's consumer guarantee protections. This finding contributed to an AUD $6 million civil pecuniary penalty being imposed upon Booktopia for a range of breaches of the ACL. But is it actually correct? Whether or not that is so depends upon whether the statutory phrase 'computer software' extends to digital artefacts other than traditional desktop computer programs. There is actually good reason, based upon the expert evidence tendered and accepted in the Valve litigation, to think not.

So what does the Booktopia case represent? It could be a hint – an indication that will eventually lead us to a fully-explained understanding of the ACL's wide reach across the digital economy. In this sense, it might be a pointer that helps us to eventually solve this interpretative problem on our own. Or it could be a cheat – a conclusion possibly justified in the context of this individual case given Booktopia's admissions, but not generalisable to the ACL's normal operation. Either way, given the ACCC's expressed view (not necessarily supported by the ACL's actual text) that '[c]onsumers who buy digital products … have the same rights as those who shop in physical stores', what we really need now is a walkthrough: a clear and reasoned explanation of exactly what 'computer software' actually means for the purposes of the ACL. This will ensure that traders have the capacity to know their legal obligations, and will also allow Parliament to extend the ACL's digital economy protections if its reach is actually limited in the way that my own scholarship suggests.

All of this has significant implications for international trade, as 'many transfers' of digital assets 'are made between participants internationally'. The increasing internationalisation and digitalisation of trade makes it imperative that this ambiguity be resolved at the earliest possible opportunity. Since, in the words of the Booktopia judgment, ACL penalties 'must be of an appropriate amount to ensure that [their] payment is not simply seen as a cost of doing business', traders – including international traders – do need to know with certainty whether or not

they are subject to its consumer protection regime.

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# The Fourth Private International Law Conference for Young Scholars in Vienna

*Written by Alessa Karlinski and Maren Vogel (both Free University Berlin).*

On February 23rd and 24th, 2023, young scholars came together at the Sigmund Freud University, Vienna, to discuss different views on private international law under the theme of "Deference to the foreign – empty phrase or guiding principle of private international law?". Continuing the success of the previous three German-Speaking Conferences of Young Scholars in PIL from previous years in Bonn, Würzburg and Hamburg, this year's conference was hosted in Austria by Martina Melcher and Florian Heindler who organized the event together with Andreas Engel, Katharina Kaesling, Ben Köhler, Bettina Rentsch, Susanna Roßbach and Johannes Ungerer.

As keynote speaker, ***Professor Horatia Muir Watt (Sciences Po Paris)*** borrowed from the often-used metaphor of the "dismal swamp" to present an "ecosophical" approach to private international law. For this purpose, she engaged anthropological and philosophical insights of Western and indigenous origin on the meaning of law and the regulatory functions of private international

law in particular.

***Vanessa Grifo (University of Heidelberg)*** presented possible insights from the theory of the post-migrant society for international family law. Based on sociological accounts of "post-migrant" identities, *Grifo* discussed that a person's cultural identity can form "hybrid" solidarity to different legal systems and oppose the collective national identity of the country of immigration. While previously, according to *Kegel*, connecting factors were understood to build upon certain generally neutral conflict-of-laws interests, cultural identity is becoming a relevant aspect of party interests, which she demonstrated with the help of different recent judgement of the German Federal Court of Justice. This paradigm, *Grifo* argued, shows a shift from the system of the traditional German understanding of connecting factors following Kegel.

***Victoria Garin (European University Institute, Florence)*** examined the connection between private international law and the concept of Relativism. The basis of her analysis is the contemporary private international law attempting to coordinate conflicting regulatory claims of several legal systems. *Garin* identified extraterritoriality, difference and equivalence as assumptions used in private international law to solve this conflict. These assumptions, *Garin* argued, are premised on Relativism in its forms as descriptive and normative theory. Through the lens of Relativism a critical examination of private international law, especially regarding current developments in literature, was made. *Garin* explained to what extent the criticism of Relativism can be applied to private international law theory.

***Dr Shahar Avraham-Giller (Hebrew University Jerusalem)*** presented two seemingly contradictory developments in private international law. First *Avraham-Giller* pointed out, that legal questions are increasingly restrictively categorised as procedural questions in the EU and in common law states which leads to a broader application of foreign law as the *lex causae*. The application of the *lex fori* to procedural questions can itself be understood as an overriding mandatory provision of the forum. On the other hand, as *Avraham-Giller* projected, an increased recourse of courts to the means of other overriding mandatory provisions to safeguard national public interests can be observed. In her opinion, these seemingly contradictory developments can be explained as an answer to the development of a more "private" understanding of civil proceedings, seeking primarily peaceful settlement of private disputes, while

enforcing other values and public goals through mandatory overriding provisions at the same time.

***Raphael Dummermuth (University of Fribourg)*** then shed light on deference to the foreign in the context of the interpretation of the Lugano Convention. First, he addressed the question of the implementation of the objective of taking into account the case law of the ECJ by non-EU courts, as stated in Art. 1(1) Protocol 2 Lugano Convention. The application of the Lugano Convention, he pointed out, requires a double consideration of the foreign: the court must consider standards or judgments that are outside the Lugano Convention and in doing so apply a foreign methodology. Nonetheless, the one-sided duty of consideration is limited where the results of interpretation are decisively based on principles of EU law. He came to the conclusion, that precedent effect should therefore only be given to results that are justifiable within the scope of the classical methodology.

The first day of the conference closed with a panel discussion between ***Professor Dietmar Czernich, Professor Georg Kodek*** *and* ***Dr Judith Schacherreiter*** on deference to the foreign in private international legal practice and international civil procedure. The discussants shared numerous insights: from the appointment of expert opinions on foreign law, to deference to the foreign in international commercial arbitration and the practice of legal advice.

***Selina Mack (LMU Munich)*** opened the second day of the conference examining the *ordre public* in the field of succession law using the example of the right to a compulsory portion in Austria and Germany. *Mack* began by comparing similar regulations in Germany and Austria with the so-called family provision in England. She then contrasted a decision of the Supreme Court of Austria (OGH) with a decision of the German Federal Court of Justice (BGH), both of which deal with the *ordre public* according to Art. 35 of the European Inheritance Regulation when applying English law. The *ordre public* clause under Art. 35 is to be applied restrictively. While the OGH did not consider the *ordre public* to be infringed, the BGH, on the other hand, assumed an infringement. *Mack* concluded that this is a fundamental disrespect of the foreign by the BGH.

***Tess Bens (MPI Luxembourg)*** examined methods of enforcing foreign judgments under the Brussels Ia Regulation. Said Regulation does not, in principle, harmonise enforcement law. She presented the enforcement mechanism as applying the enforcement law of the enforcing state by means of

substitution or, insofar as the order or measure was unknown to the enforcement law, by means of transposition. Due to structural differences in the enforcement law of the Member States, as *Bens* outlines, practical problems can nevertheless arise. Especially since the abolition of the exequatur procedure in the case of insufficient concretisation of the enforcement order, the Brussels Ia Regulation does not provide a procedure. Finally, she discussed that these frictions might be mitigated by anticipating differences and requirements of the enforcing by the courts, nonetheless limited due to the difficulty of predictability.

Afterwards, the participants were able to discuss various topics in a small group for one hour in three parallel groups, each introduced by two impulse speeches.

The first group looked at the factor of nationality in private international law. ***Stefano Dominelli (Università di Genova)*** introduced into the current debate on the connecting factor of nationality in matters concerning the personal status. In his opinion, it is debateable whether a shift towards the application of local law really strengthens deference to the foreign. ***Micheal Cremer (MPI Hamburg)*** looked at the handling of so-called golden passports in the EU. He pointed out, that European conflict of laws regularly does not take the purchased nationality into account, being in line with most of the theoretical approaches to the nationality principle.

The second group focused on the influence of political decisions on the application of foreign law. ***Dr Adrian Hemler (University of Konstanz)*** presented the concept of distributive justice as a reason for applying foreign law. He emphasised, that the difference between purely national and foreign constellations makes the application of foreign law necessary. In his presentation, ***Felix Aiwanger (LMU Munich)*** looked at different standards of control with regard to foreign law. He argued that legal systems that can be considered as reliable are subject to a simplified content review.

The third group discussed the treatment of foreign institutions in international family law. ***Dr Lukas Klever (JKU Linz)*** presented the recognition of decisions on personal status in cases of surrogacy carried out abroad. He discussed differences and possible weaknesses in the recognition under the Austrian conflict of laws and procedural law. ***Aron Johanson (LMU Munich)*** then provided a further perspective with a look at the institute of polygamy. He explained, that while in Germany a partial recognition can be possible, Sweden

had switched to a regular refusal of recognition. Subsequently the question of a duty of recognition arising from the free movement of persons as soon as one member state recognises polygamy was asked.

***Dr Tabea Bauermeister (University of Hamburg)*** devoted her presentation to the conflict of laws dimension of the claim for damages in Art. 22 of the European Commission's proposal for a directive on corporate sustainability due diligence (CSDDD), paragraph 5 of which compels the member states to design it as an overriding mandatory provision. She outlined, that regulatory goals can also be achieved through mutual conflict-of-laws provisions. An example of this is the codification of international cartel offence law. *Bauermeister* concluded, that the use of mandatory overriding provisions instead of special conflict-of-laws provisions expresses a distrust of the foreign legislature's competence or willingness to regulate and therefore represents a disregard of the foreign.

***Dr Sophia Schwemmer (Heidelberg University)*** then examined private enforcement under the CSDDD vis-à-vis third-state companies. She stated, that while third-state companies were included in the scope of application insofar as they are active in the EU internal market, the applicability of the CSDDD could normally not be achieved using the classic conflict-of-laws rules. The CSDDD resorts to an overriding mandatory provision for this purpose. However, *Schwemmer* concluded that a different approach, e.g. an extended right of choice of law for the injured party, was also imaginable and preferable.

As last speaker, ***Dr Lena Hornkohl (University of Vienna/Heidelberg University)*** addressed the effects of EU blocking regulations on private law. She stated that the application of EU blocking statutes as a reaction to extraterritorial third-country regulations can lead to almost irresolvable conflicts in private law relationships. *Hornkohl* then critically examined the ECJ case law that postulates the direct applicability of the Blocking Regulation in private law relationships. Binding private parties to the Blocking Regulation, she concluded, leads to the instrumentalisation of private law at the expense of private parties with the aim of enforcing foreign policy objectives.

A conference volume will be published by Mohr Siebeck Verlag later this year. The next PIL Young Researchers Conference will take place in Heidelberg in 2025.

# The Dutch Supreme Court on how to deal with the CISG on appeal (Willemen Infra v Jura)

*On 24 February 2023, the Dutch Supreme court has ruled in the case Willemen Infra v Jura, ECLI:NL:HR:2023:313. The ruling clarifies the scope of the Dutch courts' duty to apply the CISG (UN Convention on Contracts for the International Sale of Goods, 1980) ex officio on appeal. The Dutch appellate courts shall not review of their own motion whether the first instance court had to apply the CISG to the dispute, if the question of governing law was not the subject of parties' objections on appeal and thus got "beyond the parties' dispute".*

**Facts**

The facts of this case related to a sale of gutters by a Dutch seller to a Belgian buyer. The gutters were to be used for the renovation of a runway at Zaventem airport. According to the seller's general terms and conditions, the disputes were to be resolved before a Dutch court on the basis of Dutch law.

After the start of performance, the buyer had reasons to assume that that the seller was unable to timely supply the products of the required quality. The buyer refused to take all the purchased gutters.

**Proceedings**

The seller disagreed and claimed damages for the loss of profit caused by the breach of contract. In the proceedings, the buyer submitted a counterclaim, invoking partial avoidance of contract and, alternatively, nullity of contract due to vitiation of consent. The buyer submitted namely that it had concluded the contract based on misrepresentation relating to the products' quality (the certificates which the products should have) and the delivery time.

The seller relied on both the CISG and Dutch law in its written submissions,

including the statement that the choice for Dutch law in the general terms and conditions should be interpreted as excluding the application of the CISG. During the oral hearing, both parties referred to Dutch law only (see on this the Conclusion of the Advocate General, at [3.4]). The first instance court ruled as follows in relation to applicable law: '*According to the [seller], the contract is governed by Dutch law. (…) 'The court contends that [the buyer] also relies on Dutch law in its arguments, and thus follows [the seller's] reasoning. The court follows the parties in this and shall apply Dutch law*." (the formulation is quoted in *Willemen Infra* v *Jura* at [4.3.1], compare to Advisory Council's Opinion nr 16). The court has then applied the Dutch civil code, not the CISG, to the dispute.

The seller appealed against the decision, but not against the applicable law. Nevertheless, the appellate court considered of its own motion, whether the contract was governed by the CISG. It ruled that the contract fell under the CISG's scope; the Convention was directly applicable on the basis of article 1(1)(a) CISG, as both Belgium and the Netherlands are Contracting States to CISG. Furthermore, the parties to the dispute have not explicitly excluded the CISG's application based on article 6. The appellate court has applied the CISG to the contractual claim, and Dutch law – to the claim relating to the vitiation of consent, as this matter falls outside the Convention's scope. The buyer has labelled the application of the CISG 'surprising', because no claim in appeal targeted applicable law.

In cassation, the Dutch Supreme has ruled that applicable law was indeed "beyond the parties' dispute" on appeal. Therefore, the appellate court was neither free to determine applicable law anew nor free to apply CISG of its own motion (*Willemen Infra* v *Jura* at [2.1.2]- [3.1.6]).

**CISG and procedural ordre public?**

The ruling is logical from the point of view of civil procedure. Appellate review follows up on – and is limited by – the points invoked on appeal. Issues "beyond the parties' dispute" are not reviewed, unless these issues fall under the rules of procedural ordre public, which the appellate courts must apply of their own motion. While there is no unanimously accepted definition of the Dutch procedural ordre public, the cassation claim explicitly suggested that 'the CISG is not of ordre public' (see Conclusion of the Advocate General, at [3.3.]). Whereas this element of the cassation claim has been satisfied, neither the Advocate

General nor the Court have engaged with the discussion whether procedural ordre public covers direct application (or applicability) of the Convention's uniform substantive sales law, even if it would be confined to establishing whether the parties have opted-out the CISG based on its article 6.

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# A New Court Open for International Business Soon: The Commercial Court in Cyprus

*Written by Georgia Antonopoulou (Birmingham Law School) & Xandra Kramer (Erasmus University/Utrecht University; research funded by an NWO Vici grant, www.euciviljustice.eu).*

*We are grateful to Nicolas Kyriakides (University of Nicosia) for providing us with very useful information.*

**The Novel Commercial Court and Admiralty Court in Cyprus**

New courts geared to dealing with international commercial disputes have been established in Europe, the Middle East and Asia, as has also been reported in earlier blogposts in particular on Europe (see, among others, here and here). They have various distinctive features such as the focus on cross-border commercial disputes and the use of the English language as the language of court proceedings. It seems that Cyprus will soon be joining other European countries that have established such courts in recent years, including France, the Netherlands, and Germany.

In May 2022, the House of Representatives in Cyprus passed Law 69(I)/2022 on the Establishment and Operation of the Commercial Court and Admiralty Court. The law creates two new specialised courts, namely the Commercial Court and Admiralty Court, focusing on commercial and maritime law disputes respectively. The courts were planned to open their doors on 1 January 2023. However, the

Supreme Court of Cyprus, which is responsible for administrative matters, requested an extension and the courts are expected to be operational in July 2023 (see here).

According to the preamble to this Law, the establishment of these specialised courts aims at expediting the resolution of disputes and improving the efficiency of the administration of justice. In addition, the Courts' establishment is expected to enhance the competitiveness of Cyprus, attract foreign investment, and contribute to its overall economic development. Similar arguments have been put forward in other European countries, notably in the Netherlands (Kramer & Antonopoulou 2022).

The Cypriot Commercial Court shall have jurisdiction to determine at first instance any type of commercial dispute, provided that the amount in dispute or the value of the dispute exceeds 2,000,000 Euros. The law defines commercial disputes broadly and offers an indicative list of such disputes for which the court has jurisdiction. The Commercial Court shall also have jurisdiction over competition law disputes, intellectual property law disputes, and arbitration related matters irrespective of the value of the dispute. The Commercial Court shall have territorial jurisdiction over disputes that have arisen, in part or wholly in Cyprus, as well as over defendants residing in Cyprus. In cross-border disputes parties can agree on the court's jurisdiction in a choice of court agreement. Typically, the Brussels I-bis Regulation would apply to determine the validity of such clause. At the request of at least one party and in the interest of justice, the court shall accept procedural documents in English and shall conduct hearings and publish judgements in English. The Commercial Court will consist of five judges drawn from the Cypriot judiciary based on their expertise in commercial law disputes and practices and their English language skills.

**A Genuine International Commercial Court for Cyprus?**

While the definition of an international commercial court is open to interpretation and there are different types of international commercial courts (Bookman 2020; Dimitropoulos 2022), the Commercial Court's specialised focus on high-value commercial disputes as well as the option to litigate in English suggest that Cyprus has just added itself to the growing number of countries that have established an international commercial court in recent years (see also Kramer & Sorabji 2019). This possibility of English-language court proceedings is a key

feature of these new courts. However, the degree to which this is possible differs per country. The Netherlands Commercial Court (NCC) uses English throughout the proceedings apart from cassation at the Supreme Court. Due to the lack of a relevant constitutional provision, the use of the English language in NCC court proceedings was made possible by including a new provision in the Dutch Code of Civil Procedure. By contrast, the German Chambers for International Commercial Disputes and the Paris International Chambers limit the use of English in court to documentary evidence or oral submissions and on the basis of a lenient interpretation of existing rules. Cyprus is the first country in Europe that amended its constitution with a view to permitting the use of the English language in court proceedings. The new Article 4(3)(b) provides that the Commercial Court and the Admiralty Court as well as the higher courts ruling on appeals may allow the use of English in court including oral and written submissions, documentary evidence, witness statements and the pronouncement of judgements or orders. In addition, unlike other international commercial courts established as chambers or divisions within existing courts the Commercial Court in Cyprus is structured as a self-standing court. Its jurisdiction is not exclusively limited to cross-border disputes but extends to domestic disputes with territorial links to Cyprus. The court's focus on both cross-border and domestic disputes might be explained by the objective to accelerate trials and increase the efficiency of public court proceedings especially with regard to disputes related to the financial crisis and its aftermath.

**The Reasons for Creating the Cypriot Commercial Court**

The establishment of international commercial courts in Europe and in Asia has been thus far mainly driven by access to justice and economic considerations. International commercial courts aim at improving commercial dispute resolution by offering litigating parties specialised, faster, and therefore better court proceedings. It has been also underpinned by the aim of improving the business climate, attracting foreign investment, and creating litigation business.

In line with these considerations, Law 68(I)/2022 reiterates the benefits of a specialised commercial court both for the Cypriot civil justice system and the economy. Despite these similarities between the reasons driving the worldwide proliferation of international commercial courts and the establishment of a commercial court in Cyprus, the Cypriot context is slightly different. The financial crisis suggests that the Cypriot international commercial court is also part of a

broader array of measures aimed at meeting the particular dispute resolution demands following the crisis (see also Mouttotos 2020). The establishment of the Commercial Court in Cyprus therefore indicates that international commercial courts might no longer be seen as a luxury available to the few countries willing and able to participate in a global competition of courts, but also as an essential measure for countries aiming to recover from a financial crisis. Yet, whether specialised courts bring about direct economic benefits or if they only indirectly benefit national economies by signalling to foreign investors a well-functioning justice system remains open to debate (among others Farber 2002; Coyle 2012).

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# The DSA/DMA Package and the Conflict of Laws

A couple of weeks ago, I had the pleasure of speaking about the scope of application of the Digital Services Act (DSA) and Digital Markets Act (DMA), which together have been labelled the 'European constitution for the internet', at an event at the University of Strasbourg, organized by Etienne Farnoux and Delphine Porcheron. The preprint of my paper, forthcoming at Dalloz IP/IT, can be found on SSRN.


Disappointingly, both instruments only describe their territorial scope of application through a unilateral conflicts rule (following a strict 'marketplace' approach; see Art. 2(1) DSA and Art. 1(2) DMA), but neither of them contains any wider conflicts provision. This is despite the many problems of private international law that it raises, e.g. when referring to 'illegal' content in Art. 16 DSA, which unavoidably requires a look at the applicable law(s) in order to establish this illegality. I have tried to illustrate some of these problems in the

paper linked above and Marion Ho-Dac & Matthias Lehmann have also mentioned some more over at the EAPIL Blog.

Unfortunately, though, this reliance on unilateral conflicts rules that merely define the scope of application of a given instrument but otherwise defer to the general instruments of private international law seems to have become the norm for instruments regulating digital technology. It can be found, most famously, in Art. 3 of the GDPR, but also in Art. 1(2) of the P2B Regulation, Art. 3(1) of the proposed ePrivacy Regulation, and in Art. 1(2) of the proposed Data Act. Instruments that have taken the form of directive (such as the DSM Copyright Directive) even rely entirely on the general instruments of private international law to coordinate the different national implementations.

These general instruments, however, are notoriously ill-equipped to deal with the many cross-border problems raised by digital technology, usually resulting in large overlaps between national laws. These overlaps risk to undermine the regulatory aims of the instrument in question, as the example of the DSM Copyright Directive aptly demonstrates: With some of the most controversial questions having ultimately been delegated to national law, there is a palpable risk of many of the compromises that have been found at the national level to be undermined by the concurrent application of other national laws pursuant to Art. 8 I Rome II.

The over-reliance on general instruments of PIL despite their well-established limitations also feels like a step back from the e-Commerce Directive, which at least made a valiant attempt to reduce the number of national laws, although arguably not at the level of the conflict of laws (see CJEU, *eDate*, paras. 64–67). The balance struck by, and underlying rationale of, the e-Commerce Directive can certainly be discussed – indeed, given its importance for the EU's ambition of creating a 'Digital Single Market', it should be. The drafting of the DSA/DMA package would arguably have provided the perfect opportunity for this discussion.

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

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There has recently been a new and disappointing development in the saga of the Sánchez-Hill, a Spanish-Cuban-US family who filed a lawsuit before Spanish courts against a Spanish Hotel company (Meliá Hotels) for unjust enrichment. Meliá is exploiting several hotels located on land owned by Gaviota S.A., a Cuban company owned by the Republic of Cuba. That land was expropriated by Cuba without compensation, following the revolution of 1959.

In 2019, the First Instance Court of Mallorca (Spain) held that the lawsuit was a means to circumvent the sovereign immunity of Cuba, given the fact that, in order to decide on the right to compensation of the claimants for the unjust enrichment of the defendant, the court would allegedly have to decide on the lawfulness of a sovereign act – i.e. expropriation –, because only if the expropriation had been unlawful could the defendant be exploiting land which did not belong to Gaviota but to the claimants. The court held that the claimants were also arguing that they had a right *in rem* – such as property or possession – over assets of a sovereign state and that such assets were also protected by the rules of sovereign immunity. This alone would have been enough to dismiss the lawsuit but, unnecessarily, the court added that it did not have jurisdiction to decide about property rights concerning real estate assets located outside Spain.

The Court of Appeal of Mallorca disagreed with the lower court. It held that sovereign immunity was not an issue because Cuba had not been named a defendant in the claim. Besides, Spanish courts had jurisdiction because Spain was the place of the domicile of the defendant and the claim was one of unjust enrichment – i.e. a claim in tort –, not one whose subject matter was the existence or scope of a right *in rem* over a real estate asset. In brief, the claimants were not asking Cuba to give back their land and were not asking monetary compensation neither from Cuba nor from Gaviota.

Meliá then filed a motion arguing that the claim was an attempt to eschew the EU

Blocking Statute meant to prevent the effectiveness of US court rulings against EU companies, under the Helms-Burton Act of 1996. The defendants further requested that the matter be taken to the European Court of Justice for a preliminary ruling on the scope and correct interpretation of the Blocking Statute. The CJEU may have taken years to issue such a ruling but the Spanish First Instance Court denied the motion.

Later on, Meliá filed another motion requesting that Gaviota and the Republic of Cuba be joined to the lawsuit (*exceptio plurium litisconsortium*) and the First Instance Court granted the motion on the basis, once again, that any ruling on unjust enrichment would previously and necessarily require a decision about the property rights of Gaviota and Cuba, which should therefore be heard in the Spanish proceedings. Probably making a very serious strategic mistake, the claimants did not appeal this decision of the First Instance Court and agreed to join Gaviota and Cuba to their claim with the result that, last January 2023, the First Instance Court once again dismissed the lawsuit on grounds of sovereign immunity, given the fact that, now, a sovereign entity is in fact a defendant in the proceedings.

In the meantime, the Cuban Government had been correctly notified and had claimed that it enjoyed sovereign immunity before foreign courts. Beyond that, Cuba never made an appearance in the proceedings but Gaviota did, requesting that the proceedings be stayed on the basis that it also enjoyed sovereign immunity. Besides, the Spanish Government had also issued a report requested by Spanish law, indicating that the Cuban acts of expropriation must indeed be considered acts *iure imperii*.

The potential implications of a claimants' improbable victory for the Spanish tourism industry in Cuba are worrisome but, above all, this muddled and already long-lasting lawsuit has given rise to much interest among Spanish scholars, especially conflict of laws specialists. The 2019 decision of the First Instance Court was criticised for applying the doctrine of sovereign immunity in the absence of a sovereign defendant – e.g. something much more similar to the Act of State doctrine, which has no place in Spanish law – and for confusing an action in rem with an action *in personam*. That initial ruling of the First Instance Court may have also inappropriately mentioned and relied on immunity from execution against property of a sovereign state, which is mostly relevant in enforcement proceedings.

Now, however, the Spanish First Instance Court apparently feels vindicated because its recent an relatively short ruling reiterates verbatim practically everything it said in its 2019 decision. The judge also warns the claimants that they had the chance to appeal the ruling granting the motion to join Gaviota and Cuba but did not do so, which means that such decision is now *res judicata*. The logic of the argument is somewhat baffling. The judge initially dismissed the claim on grounds of sovereign immunity, despite the fact that no sovereign was a party. Then, the judge requested that the sovereign be joined as a party and, when the claimant yielded and did so, the judge once again dismissed the claim on grounds of sovereign immunity.

The key to this stage of the proceedings may have been the joinder of Gaviota and Cuba to the claim. Arguably, it was not necessary to do so. In Spanish law, the *exceptio plurium litisconsortium* can be raised in certain cases provided by statute as well as in certain cases provided by case law. Whenever there is a plurality of parties to the same legal relationship, which is the subject-matter of the proceedings, a joinder is obligatory as a condition for a decision on the merits, based on the inseparable nature of that legal relationship. Its justification lies in the right to be heard of all those who might be affected by the ruling on the merits. A joinder is not necessary when the ruling only affects certain individuals or entities in an indirect manner. In the case at hand, the parties to the unjust enrichment are Meliá, i.e. the party who has allegedly enriched itself at the expense of the other party, i.e. the claimants. Cuba is therefore not a party to the alleged unjust enrichment. Moreover, any findings of Spanish courts concerning the unlawfulness of the expropriation would have no bearing on the property rights of Cuba over that land.

In fact, Spanish courts are no strangers to litigation related to the Cuban nationalisation program and, on several occasions, the Supreme Court has taken into consideration the unlawfulness of that nationalisation process with respect to, for instance, ownership rights over trademarks registered in Spain, emphasising that it is not for Spanish courts to decide on such lawfulness but that they can accept or reject some of the extraterritorial effects of the sovereign acts of the foreign state in the territory of the forum. In those cases, the Supreme Court said that the Cuban nationalization was against the public policy of Spain because of the absence of due process and compensation. However, the Supreme Court added that the applicable law to property rights over trademarks registered

in Spain was Spanish law, not Cuban law.

The Sánchez-Hill family has just a few more days left to appeal this new decision of the First Instance Court, in proceedings which may potentially have opened a new venue for victims of the Cuban revolution, given the EU Blocking Statute and given the fact that, since the end of the suspension of Title III of the Helms-Burton Act, claims before US Federal Courts based on that piece of legislation have not been very being successful.