# Kenneth Anderson on Kiovel v. Royal Dutch Petroleum

*Many thanks to professor Kenneth Anderson for authorizing this post, meant as a suite of Trey's.*

As both Trey and professor Anderson state, the most important holding of the Court seems to be that the ATS does not embrace corporate liability at all:

*Plaintiffs assert claims for aiding and abetting violations of the law of nations against defendants—all of which are corporations—under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, a statute enacted by the first Congress as part of the Judiciary Act of 1789. We hold, under the precedents of the Supreme Court and our own Court over the past three decades, that in ATS suits alleging violations of customary international law, the scope of liability—who is liable for what—is determined by customary international law itself. Because customary international law consists of only those norms that are specific, universal, and obligatory in the relations of States inter se, and because no corporation has ever been subject to any form of liability (whether civil or criminal) under the customary international law of human rights, we hold that corporate liability is not a discernable—much less universally recognized—norm of customary international law that we may apply pursuant to the ATS. Accordingly, plaintiffs' ATS claims must be dismissed for lack of subject matter jurisdiction*

Being very much interested myself on this subject, I reproduce here under a comment by professor Anderson in The Volokh Conspiracy blog and Opinio Iuris – where you will find also comments from Kevin Jon Heller and Julian Ku.

"I've now had a chance to read a little more closely the decision, majority and concurrence, in Kiobel v. Royal Dutch Petroleum (issued today by a 2nd Circuit panel of Judge Cabranes writing for himself and Judge Wood, and a concurrence in the judgment by Judge Leval). On second reading, it still looks to me like a blockbuster opinion, both because of the ringing tone of the Cabranes decision and the equally strong language of a concurrence that, on the key point of corporate liability, amounts to a dissent. With circuits having gone different directions on this issue, this perhaps tees up a SCOTUS review that would revisit

its last, delphic pronouncement on the Alien Tort Statute in Sosa v. Alvarez-Machain. Here are a few thoughts that add to, but also partly revise and extend, things I said in my earlier post today.

Let me start by trying to sum up the gist of the majority opinion and its reasoning. (I am reconstructing it in part, in my own terms and terminology, and looking to basic themes, rather than tethering myself to the text of the opinion here.) The Cabranes opinion sets out the form of the ATS, that single sentence statute, as having a threshold part, which is established by international law (treaties of the United States and the law of nations, or customary international law), and a substantive part, which is the imposition of civil tort liability as a matter of US domestic law. It does not use quite those terms, but it seems to me to set up the statute in a way that I've sometimes characterized as a "hinge," in which something has to "swing" between the threshold and the substantive command once the threshold is met. The question has been whether the threshold that serves as a hinge to swing over to connect and kick start the substantive part of the ATS, so to speak, the US domestic tort law substance, must be international law.

The ATS cases in various district courts and circuit courts have gone various directions on this, and indeed some of the early cases did not seem to recognize that there is a threshold part and a substance part. One sizable group of more recent cases have gone the direction of saying that even if the threshold has to be the law of nations or treaties of the United States, it is satisfied if there is some body of conduct that constitutes a violation of it (and further meets the requirements under Sosa). Call this conduct the "what" of this threshold requirement in the ATS. But what about the "who" of the conduct? Do the legal qualities of the alleged perpetrator of the violative conduct matter? Two possible answers are:

One is: if there is conduct, then the status under international law of whoever is alleged to have done it is not relevant. The existence of a "what" is enough, and the "who" is merely to show that this named defendant did it; further consideration of the juridical qualities of the defendant is irrelevant.

Alternatively, but to the same result of allowing a claim to go forward, even if it does matter, it is answered by looking to US domestic law in order to determine that it is an actor that can be held liable under the ATS. Thus, under this latter

view, a corporation could be such a party alleged to have engaged in conduct violating international law (and further meeting the Sosa standard). Why? Because it is enough that US civil law recognizes that a corporation is a legal person that can be held to legal accountability. So, for example, Judge Weinstein declared flatly in the Agent Orange litigation that notwithstanding weighty opinion that corporations are not subjects of liability in international law, well, as a matter of policy, they are so subject in US domestic law and that fact about US law will be enough to meet the threshold of the ATS international law violation. Put in my terminology, the "hinge" to an ATS claim can be met by an actor determined to be liable under US, rather than international law, standards. If there is conduct — the "what" under international law, such as genocide or slavery, meeting the Sosa standard — the question of "who" is subject to the ATS will be determined by the rules of US domestic law. The US domestic rules accept the proposition of a corporation being so subject, hence a claim will lie under the ATS.

The Second Circuit majority sharply rejects that view. It says that in order for the threshold of the ATS to be met, there must be a violation of international law. Conduct might very well violate international law, but for there to be a violation, it must be conduct by something that is recognized as being subject to liability in international law. If it is not something that is recognized or juridically capable of violating international law and being liable for it, then the conduct — whatever else it might be — is not actually a violation of international law by that party. States can violate international law, are subjects of international law, and can be liable under international law. Individuals under some circumstances can violate (a relatively narrow list of things in) international law, can be subjects of it, and can be liable under international law. But what about juridical persons, artificial persons — corporations? The opinion says flatly that corporations are not liable under international law — not even to discern a rule, let alone a rule that would meet the standards of Sosa. To reach this conclusion, the opinion walks through the history of arguments over corporate liability since WWII, ranging from Nuremberg to the considered refusal of the states-party to include corporations in the Rome Statute of the International Criminal Court.

By that point, the court has done two things. One, it has rejected the view that it is enough to find that US domestic law accepts corporate liability, and that it can be used to satisfy the threshold of an international law violation in the ATS. The

hinge has to be international law; the threshold must answer both "what" and "who" as a matter of international law, with no reach to US domestic law. Hence, given that you can't rely on US domestic law to reach it, then to satisfy the threshold, you have to show that it exists in international law as a treaty or customary norm (and then add to that the further burden of Sosa). Two, then, as to that latter requirement, the court says, no, it is not the case that a corporation meets the requirements of liability under the current state of customary international law or treaty law. The majority opinion accepts that if the international law threshold is met, then US domestic law in the ATS itself flips into civil tort mode. But you can't get there without an international law violation on its own terms — and that means that there must be a "what" of conduct that violates international law and a "who" in the sense of an actor that, on international law's own terms, is regarded as juridically capable of violating it.

It is important to note that this is all logically prior to Sosa's requirements. What the Second Circuit has held here regarding corporate liability is not driven by Sosa at all. Sosa says that even if a claim satisfies the requirement of a violation of international law, the nature of the violation must meet a set of additional criteria — criteria that are established not as a matter of international law, but as matter of US Constitutional law imposed by the Court upon international law as considered in US courts to ensure, for domestic law reasons, that these ATS claims are, so to speak, really serious ones. The Second Circuit holding on corporate liability does not rest on the Sosa criteria; it never gets to them because it says that, quite apart from being "really serious" kinds of international law violations, the party alleged to have violated them must in the first place be a party capable in international law itself of violating them, in the sense of bearing legal liability. Only if the "who" is met, in other words, do the Sosa requirements come up as a further, domestic-law burden on the "what" of the claims.

This leaves an important point, however — one that is not so relevant to this case, but which will presumably be deeply relevant in other settings, perhaps in a SCOTUS case on this. On this I am somewhat less certain as to the court's meaning, and will re-read the case and perhaps revise my views. At this point however, I'd say this. As the opinion observes, the nature of the ATS is to create in US domestic law a civil action in tort, premised upon meeting an international law threshold. However, it is a liability in tort — a remedy in tort — for violations that have to be international law violations themselves. We are now back at the

"what." The violations have to be international law violations (done by a "who" capable of being liable); once those violations of international law are met (and then further meeting the Sosa burdens as a kind of further threshold requirement in domestic law), then a tort remedy is available.

Even if the "who" is an individual person — capable of violating at least some actionable things in international law, including meeting the Sosa standard — as a matter of international law today, all the violations are criminal. They are all international crimes. International law recognizes no regime of civil liability in international law imposed upon persons; the violations that exist are such criminal acts as war crimes, crimes against humanity, genocide, and a few others that would meet the Sosa requirements.

To cut to the chase, the point is that nowhere in this list is there anything that looks like an environmental tort, because there is no international law of tort. And what many ATS cases seek to do is create out of the putty of American tort law a regime of international civil liability that, alas, does not exist. The court seems to recognize this implicitly, I think, although the holding about corporate liability does not turn on it. Let me step beyond the case, however, to the implication of this second point in practical terms.

Where ATS plaintiffs seek to state a claim (and even leaving aside the question of "who") there is a large and logically independent problem, in many instances, of how plaintiffs can succeed in plausibly pleading a "what," given the short list of things for which individuals can be liable. First off, they are all criminal. Particularly following Sosa, they are all criminal and all at the approximate level of serious war crimes and genocide. Whereas the actual substantive acts that plaintiffs wish to sue over, if they could be honest about it in the pleadings, are environmental torts — perhaps very serious ones, but not genocide or war crimes. The only way into the ATS, given that the threshold "what" are all the most serious international crimes in the canon, has the perverse result that plaintiffs or, anyway, their lawyers, today utterly and routinely submit pleadings alleging war crimes, genocide, crimes against humanity, etc., at every turn.

Speaking for myself, anyway, this is not a good thing from the standpoint of convincing anyone outside the US civil tort process that the US is serious about these crimes. Trying to leverage the ATS into a global civil liability system in a sort of jerry-rigged, spliced together, bits of US and bits of international law,

arrangement that has precedential value only in US District Courts, and only by citing each other — well, it seems like a bad idea. I'm no fan of creating such a global system of civil tort liability, heaven knows, but if I were, I'd think this perhaps the worst of all worlds as a way of going about it.

But given the "whats" that can be plead, the result is inevitably a form of defining deviancy down. Defendants in these suits from outside the United States in particular seem often stunned that American courts so freely entertain allegations of the most serious crimes possible. In my personal experience, corporate defendants, in particular, often believe that they must fight to the wall even for things that in other circumstances they might be willing to negotiate as "ordinary" issues of labor rights, environmental claims, etc. Part of it is simply calculation — if they settle, they risk being forever characterized as having settled claims of … genocide, crimes against humanity, etc., in what was actually a fairly routine labor rights dispute in the developing world. But part of it, again in my experience, is that senior executives take this really personally; it is a slur on them and they won't settle, not if the claims are war crimes rather than argument over ground water contamination. I agree with them and think that those who see the ATS as somehow promoting the universal rule of law should consider the many ways in which it instead promotes cynicism about international human rights claims in their most serious form, or at least the meaning of human rights claims in US courts.

That said on my own part, the Cabranes opinion is careful to emphasize that the Second Circuit has accepted that in appropriate cases, there can be aiding and abetting and secondary liability. The standard is a demanding one, to be sure, under the Second Circuit's own holdings. In addition, the opinion emphasizes that individuals are, of course, liable in international law for certain serious crimes. Which goes to a question that Kevin Jon Heller posed in the comments, and on which I do not regard myself as expert. What is the big deal about this decision on corporate liability, if the same claims can simply be refiled against corporate officers and executives and other individuals? Why is the loss of corporate level liability such a big deal? I don't regard myself as sufficiently expert in litigation to say definitively, and I welcome expert answers. However, for what it is worth, everyone I've dealt with with — plaintiff side or defendant side — in these cases thinks it is a very big deal, in terms of what has to be proved as well as damages. I leave this to those more knowledgeable than I — but I have never had any sense

that anyone in this practice area thought it was a red herring, although perhaps people will re-think it.

The majority opinion as well as Judge Leval's concurrence both say quite a lot about the parlous issue of authority in answering the vexed questions of what constitutes customary international law. The role of experts, scholars, and "publicists" in the traditional term is discussed in both opinions. Certainly in the majority, professors do not come off so well, despite the fact that the Cabranes opinion leans heavily on declarations by Professor James Crawford and then-Professor (now Justice) Christopher Greenwood in speaking to the content of customary international law. Without saying so in so many words, it seems clear that the court took into account that these are both globally important defenders of "international law" in its received sense, and not merely American academics; the court seemed implicitly to use them as an anchor for suggesting that international law needed to be tested, not merely within the parochial precincts of the US District Courts, citing each other in a gradually upward cascade of precedents, increasingly sweeping but also increasingly removed from sources of "international" law outside themselves, but against something genuinely international.

One can, of course, dispute whether Crawford and Greenwood are the right sources for that. But the opinion perhaps seemed to sense that ATS doctrines are increasingly sweeping but increasingly issued in a hermetically sealed US ATS system with less and less recourse to international law as the rest of the world sees it. I don't know how else one takes a magisterial declaration by Judge Weinstein that it would simply be against public policy not to have corporate liability in a US court, irrespective of the authority for the proposition, or not, in actual international law. Maybe that is just me seeing what I want, to be sure; I think it is a correct concern, in any case.

Ironically, then, for those who would argue that the Cabranes opinion undermined "international law," I would say that a view held more widely than one might guess (looking only to the sympathies that often lie with these claims) among international law experts outside the United States is that ATS jurisprudence actually undermines international law by contributing to its fragmentation among "communities of authority and interpretation," as I've sometimes called it. International law is fracturing into churches and sects that increasingly do not recognize the existence or validity of others. The existence of more and more

courts and tribunal systems contributes greatly to this fragmentation, I believe, because unlike the traditional ways of seeing international law as a pragmatic fusion of diplomacy, politics, and law in a loose sense — with the implied ability to see other points of view and accept them in a pluralist way — tribunals thrive in large part by asserting their own authority, on their internal grounds, in ways that achieve maximum authority inside their own systems precisely by denying the validity of other views. After all, if you're going to lock up some defendant at the ICC, you have maximum claims to legitimacy for the holding if you take zero account of any other community of interpretation that thinks there is no ground to do so. The authority of courts, by contrast to the authority of Ministries of Foreign Affairs, is very much one that maximizes legitimacy by going "inside." I've talked about this a lot in my own work — the fractious question of "Who owns international law?"

I do not want to try and characterize Judge Leval's eloquent and passionate opinion; I don't understand it as well at this point, and being less sympathetic to its point of view, I fear that without more careful study, I would characterize it unfairly. But I would note that the disputes between his opinion and that of the majority over experts and professors might best be settled by getting rid of us professors pretty much in toto. I am pleased to say that I said so in my own expert declaration in the Agent Orange case; I thought it incumbent on me to tell Judge Weinstein that I didn't think that professors' opinions merited much weight if any, including my own.

And now a final thought, one that reaches far outside the case. It seems to me that this Second Circuit opinion is moving toward a much more confined ATS. There were other ways in which the court reserved on ways in which it might be curtailed still further — in passing, the court noted but declined to take a view on whether the ATS might have no extraterritorial application, limiting it to conduct within the United States. Once corporations were understood as targets, once everyone understood that neither plaintiff nor defendant required any traditional connection to the United States, as parties, in conduct, nothing, and once the plaintiffs bar saw opportunities to join forces with the NGOs and activists, the trend of the ATS has been to turn into a kind of de facto tort forum for the world. Whatever else it might be legally, politically this is a role suited for a hegemonic actor able to make claims against corporations stick on a worldwide basis. What happens if the hegemon goes into decline?

What happens, that is, when plaintiffs in Africa decide to start using the ATS to sue Chinese multinationals engaged in very, very bad labor or environmental practices in some poor and far away place? Does anyone believe that China would not react — in ways that others in the world might like to, but can't? Does anyone believe that the current State Department would not have concerns — or more precisely, the Treasury Department? So let me end by asking whether a possible long run effect of this Second Circuit opinion, if followed in other circuits, and by SCOTUS, and perhaps other things that confine the ATS, is not over the long run an ATS for a post-hegemonic America?

Update: An international lawyer friend in Europe sent me an email commenting on this. This lawyer, who preferred not to be identified, said that despite agreeing with the opinion on corporate liability, both majority and concurrence once again exhibited that peculiarly American tendency to rely far too much on Nuremberg cases. Even if a Nuremberg panel had held that some German firm could be held liable, international lawyers generally would not take that as very weighty evidence of the content of customary international law today. Rather, one should look to the way in which things had evolved over a long period of time to see what states did as a customary practice from a sense of legal obligation. A finding that a court long ago had ruled this or that was a peculiarly American way of re-configuring an inquiry into the content of customary international law into a common law inquiry.

Americans thought that was okay; not very many international lawyers outside the US agreed with that, said my friend, as a method of inquiry into customary international law. And they thought that American lawyers almost always overemphasized Nuremberg cases, treated them as hallowed ground — rather than looking to the path of treaties and state practice in the sixty years since. Even if a Nuremberg case had held there was corporate liability, nothing else since then supported the idea, and far more relevant, this lawyer friend concluded, was the affirmative consideration and rejection of the proposition in the ICC negotiations."

# Is it the End of the Alien Tort Statute?

Today, the United States Court of Appeals for the Second Circuit entered an important decision in *Kiobel v. Royal Dutch Petroleum* regarding whether corporations may be sued under the Alien Tort Statute. The upshot of the opinion is that corporations cannot be sued under the Alien Tort State for violations of customary international law because "the concept of corporate liability . . . has not achieved universal recognition or acceptance of a norm in the relations of States with each other." Slip op. at 49.

The impact this decision will have cannot be understated. First, the decision comes out of the Second Circuit–the same circuit that started the modern era of ATS litigation in 1980 in the Filartiga case. Second, the opinion provides the most clearly articulated view, backed up with international legal analysis, concluding that corporations cannot be sued as a matter of international law. This analysis will likely be incredibly influential throughout the federal courts. Third, corporations now have the support of caselaw to dismiss ATS cases filed against them.

Given the fact that the majority of ATS litigation in recent years has been directed at corporations, this case may prove to be the end of the expansive use of the ATS. Rest assured, plaintiffs will likely seek en banc and Supreme Court review, and thus we will have to wait and see whether the Second Circuit has fired a warning shot or sounded the death knell for modern ATS litigation.

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# Conference on Party Autonomy in PIL

The eighth regional scientific conference on private international law is scheduled to take place in Opatija, Croatia, today and tomorrow (16 and 17 October 2010).

The conference titled "**The Role of Party Autonomy in Contemporary Private International Law: A Study of International Instruments**" is organised by the University of Rijeka Faculty of Law, with the support of the Deutsche Gesellschaft für Technische Zusammenarbeit (German Society for Technical Cooperation, GTZ) and the Croatian Comparative Law Association.

The topic of the conference is regarded to belong to one of the most dynamic areas of PIL development. As Professor Šarcevic noted in one of his articles published in the beginning of the 1990s, the party autonomy in private international law is constantly being broadened, and at the same time it is being subjected to new restrictions. Appreciating the fact that international legal instruments in the field, including also the European ones, have significant impact on the national laws, these instruments are put in the focus of the conference. Additionally, the sections on national reports are envisaged as the fora where local issues related to party autonomy are discussed. Generally, the conference is divided into two sessions, one devoted to the choice of court clauses, and the other to the choice of applicable law. The conference program is available here.

The last conference in this series was announced here.

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# Conference on Cross Border Successions

On 15 October 2010, the European Commission will organise in Brussels a joint conference with the Council of the Notariats of the European Union on cross-border successions. The conference will be an opportunity to discuss different aspects of the Commission proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the introduction of a European Certificate of Succession.

Information on the conference can be found here.

The event is free. ~~There are only a few places left~~.

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# Vacancy at The Hague Conference

**Vacancy at the Permanent Bureau of the Hague Conference**

By reason of a vacancy as a result of the expected retirement of one of the staff members as of 30 June 2011, a post as a staff member at the diplomatic level will be open at the Permanent Bureau of the Hague Conference on Private International Law , beginning between 15 May and 1 July 2011 for a lawyer with good knowledge of private international law.

The number of Secretaries to the Permanent Bureau has been raised to five since 2008.

The Netherlands Standing Government Committee, instituted by Royal Decree of 20 February 1897, with a view to promoting the codification of private international law, has begun the procedure for recruitment of a highly qualified new official and for this purpose has drawn up a profile for the candidacy, which can be found below for information.

Written applications with an extensive curriculum vitae including publications, should be addressed to the Secretary General of the Hague Conference on Private International Law, before 1 October 2010, at the address indicated below.

The candidates whose applications are retained will be invited to an interview with the members of a special committee named by the President of the Netherlands Standing Government Committee.

Permanent Bureau | Bureau Permanent
6, Scheveningseweg  2517 KT The Hague | La Haye  The Netherlands | Pays-Bas
telephone | téléphone  +31 (70) 363 3303  fax | télécopieur  +31 (70) 360 4867
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Vacancy at the Permanent Bureau of the Hague Conference
(beginning between 15 May and 1 July 2011)

Lawyer of high level, with good knowledge of private international law

– Law school education in private law, including conflicts of laws, preferably in the common law tradition, familiarity with comparative law (substantive and procedural law). Knowledge of public international law including the law of treaties and human rights law desirable.

– Excellent drafting capabilities are important (e.g. dissertation, law review or other publication experience will be taken into account).

– At least 10 to 15 years experience or experience in practice of law desirable. Experience of international negotiations an advantage.

– Excellent command, preferably as native language and both spoken and written, of at least one of the working languages of the Hague Conference (French and English), with good command of the other; knowledge of other languages desirable.

– Personal qualities to contribute to: a good, co-operative working atmosphere both within the Permanent Bureau and in relation with representatives of Members; the administration of the Permanent Bureau; representation of the Hague Conference with other international organisations.

– The job requires more or less frequent travel to both neighbouring and distant countries.

– Medical clearance required.

– The position contemplated for the staff member corresponding to the profile would be in one of the steps of A3/4 of the international co-ordinated organisations.

The person appointed will be expected to take a leadership role in respect of particular areas of work within the Permanent Bureau. Applications will be particularly welcome from persons with experience in the field of international

family law and international child protection.

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# European Parliament Resolution on Brussels I

On September 7th, the European Parliament adopted a Resolution on the Implementenation and the Review of the Brussels I Regulation.

The Resolution addresses many issues. On whether to abolish exequatur, the Parliament:

> *2. Calls for the requirement for exequatur to be abolished, but considers that this must be balanced by appropriate safeguards designed to protect the rights of the party against whom enforcement is sought; takes the view therefore that provision must be made for an exceptional procedure available in the Member State in which enforcement is sought; considers that this procedure should be available on the application of the party against whom enforcement is sought to the court indicated in the list in Annex III to the Regulation; takes the view that the grounds for an application under this exceptional procedure should be the following: (a) that recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (b) where the judgment was given in default of appearance, that the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) that the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought, and (d) that the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; further considers that an*

*application should be able to be made to a judge even before any steps are taken by way of enforcement and that if that judge rules that the application is based on serious grounds, he or she should refer the matter to the court indicated in the list in Annex III for examination on the basis of the grounds set out above; advocates the addition of a recital in the preamble to the effect that a national court may penalise a vexatious or unreasonable application, inter alia , in the order for costs;*

*3. Encourages the Commission to initiate a public debate on the question of public policy in connection with private international law instruments;*

*4. Considers that there must be a harmonised procedural time-frame for the exceptional procedure referred to in paragraph 2 so as to ensure that it is conducted as expeditiously as possible, and that it must be ensured that the steps which may be taken by way of enforcement until the time-limit for applying for the exceptional procedure has expired or the exceptional procedure has been concluded are not irreversible; is particularly concerned that a foreign judgment should not be enforced if it has not been properly served on the judgment debtor;*

*5. Argues not only that there must be a requirement for a certificate of authenticity as a procedural aid so as to guarantee recognition, but also that there should be a standard form for that certificate; considers, to this end, that the certificate provided for in Annex V should be refined, while obviating as far as possible any need for translation;*

*6. Believes that, in order to save costs, the translation of the decision to be enforced could be limited to the final order (operative part and summary grounds), but that a full translation should be required in the event that an application is made for the exceptional procedure;*

Full text of the resolution after the break.

*Many thanks to Jan von Hein for the tip-off.*

**European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil**

**and commercial matters** (2009/2140(INI))

The European Parliament ,– having regard to Article 81 of the Treaty on the Functioning of the European Union,– having regard to Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters(1) (hereinafter "the Brussels I Regulation" or "the Regulation"),– having regard to the Commission's report on the application of that regulation (COM(2009)0174),– having regard to the Commission's Green Paper of 21 April 2009 on the review of the Brussels I Regulation (COM(2009)0175),

– having regard to the Heidelberg Report (JLS/2004/C4/03) on the application of the Brussels I Regulation in the Member States and the responses to the Commission's Green Paper,

– having regard to its resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme(2) , specifically the sections "Greater access to civil justice for citizens and business" and "Building a European judicial culture",

– having regard to the Union's accession to the Hague Conference on private international law on 3 April 2007,

– having regard to the signature, on behalf of the Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements on 1 April 2009,

– having regard to the case law of the Court of Justice, in particular Gambazzi v. DaimlerChrysler Canada (3) , the Lugano opinion(4) , West Tankers (5) , Gasser v. MISAT (6) , Owusu v. Jackson (7) , Shevill (8) ,Owens Bank v. Bracco (9) , Denilauer (10) , St Paul Dairy Industries (11) and Van Uden (12) ;

– having regard to the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters(13) , Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims(14) , Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure(15) , Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure(16) , Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations(17) and Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000(18) ,

– having regard to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)(19) ,

– having regard to the opinion of the European Economic and Social Committee of 16 December 2009,

– having regard to Rules 48 and 119(2) of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs (A7-0219/2010),

A. whereas Regulation No 44/2001, with its predecessor the Brussels Convention, is one of the most successful pieces of EU legislation; whereas it laid the foundations for a European judicial area, has served citizens and business well by promoting legal certainty and predictability of decisions through uniform European rules – supplemented by a substantial body of case-law,– and avoiding parallel proceedings, and is used as a reference and a tool for other instruments,

B. whereas, notwithstanding this, it has been criticised following a number of rulings of the Court of Justice and is in need of modernisation,

C. whereas abolition of exequatur – the Commission's main objective – would expedite the free movement of judicial decisions and form a key milestone in the building of a European judicial area,

D. whereas exequatur is seldom refused: only 1 to 5% of applications are appealed and those appeals are rarely successful; whereas, nonetheless, the time and expense of getting a foreign judgment recognised are hard to justify in the single market and this may be particularly vexatious where a claimant wishes to seek enforcement against a judgment debtor's assets in several jurisdictions,

E. whereas there is no requirement for exequatur in several EU instruments: the European enforcement order, the European payment order, the European small claims procedure and the maintenance obligations regulation(20) ,

F. whereas abolition of exequatur should be effected by providing that a judicial decision qualifying for recognition and enforcement under the Regulation which is enforceable in the Member State in which it was given is enforceable throughout the EU; whereas this should be coupled with an exceptional procedure available to the party against whom enforcement is sought so as to guarantee an adequate right of recourse to the courts of the State of enforcement in the event that that party wishes to contest enforcement on the grounds set out in the Regulation; whereas it will be necessary to ensure that steps taken for enforcement before the expiry of the time-limit for applying for review are not irreversible,

G. whereas the minimum safeguards provided for in Regulation No 44/2001 must be maintained,

H. whereas officials and bailiffs in the receiving Member State must be able to tell that the document of which enforcement is sought is an authentic, final judgment from a national court,

I. whereas arbitration is satisfactorily dealt with by the 1958 New York Convention and the 1961 Geneva Convention on International Commercial Arbitration, to which all Member States are parties, and the exclusion of arbitration from the scope of the Regulation must remain in place,

J. whereas the rules of the New York Convention are minimum rules and the law of the Contracting States may be more favourable to arbitral competence and arbitration awards,

K. whereas, moreover, a rule providing that the courts of the Member State of the seat of the arbitration should have exclusive jurisdiction could give rise to considerable perturbations,

L. whereas it appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counterproductive, having regard to world competition in this area, to try to force their hand,

M. whereas the various national procedural devices developed to protect arbitral jurisdiction (anti-suit injunctions so long as they are in conformity with free movement of persons and fundamental rights, declaration of validity of an arbitration clause, grant of damages for breach of an arbitration clause, the negative effect of the 'Kompetenz-Kompetenz principle', etc.) must continue to be available and the effect of such procedures and the ensuing court decisions in the other Member States must be left to the law of those Member States as was the position prior to the judgment in West Tankers ,

N. whereas party autonomy is of key importance and the application of the lis pendens rule as endorsed by the Court of Justice (e.g. in Gasser ) enables choice-of-court clauses to be undermined by abusive "torpedo" actions,

O. whereas third parties may be bound by a choice-of-court agreement (for instance in a bill of lading) to which they have not specifically assented and this may adversely affect their access to justice and be manifestly unfair and whereas, therefore, the effect of choice-of-court agreements in respect of third parties needs to be dealt with in a specific provision of the Regulation,

P. whereas the Green Paper suggests that many problems encountered with the Regulation could be alleviated by improved communications between courts; whereas it would be virtually impossible to legislate on better communication between judges in a private international law instrument, but it can be promoted as part of the creation of a European judicial culture though training and recourse to networks (European Judicial Training Network, European Network of Councils for the Judiciary, Network of the Presidents of the Supreme Courts of the EU, European Judicial Network in Civil and Commercial Matters),

Q. whereas, as regards rights of the personality, there is a need to restrict the possibility for forum shopping by emphasising that, in principle, courts should accept jurisdiction only where a sufficient, substantial or significant link exists with the country in which the action is brought, since this would help strike a better balance between the interests at stake, in particular, between the right to freedom of expression and the rights to reputation and private life; whereas the problem of the applicable law will be considered specifically in a legislative initiative on the Rome II Regulation; whereas, nevertheless, some guidance should be given to national courts in the amended regulation,

R. whereas, as regards provisional measures, the Denilauer case-law should be clarified by making it clear that ex parte measures can be recognised and enforced on the basis of the Regulation provided that the defendant has had the opportunity to contest them,

S. whereas it is unclear to what extent protective orders aimed at obtaining information and evidence are excluded from the scope of Article 31 of the Regulation,

*Comprehensive concept for private international law*

1. Encourages the Commission to review the interrelationship between the different regulations addressing jurisdiction, enforcement and applicable law; considers that the general aim should be a legal framework which is consistently structured and easily accessible; considers that for this purpose, the terminology in all subject-matters and all the concepts and requirements for similar rules in all subject-matters should be unified and harmonised (e.g. lis pendens , jurisdiction clauses, etc .) and the final aim might be a comprehensive codification of private international law;

*Abolition of exequatur*

2. Calls for the requirement for exequatur to be abolished, but considers that this must be balanced by appropriate safeguards designed to protect the rights of the party against whom enforcement is sought; takes the view therefore that provision must be made for an exceptional procedure available in the Member State in which enforcement is sought; considers that this procedure should be available on the application of the party against whom enforcement is sought to the court indicated in the list in Annex III to the Regulation; takes the view that the grounds for an application under this exceptional procedure should be the following: (a) that recognition is manifestly contrary to public policy in the Member State in which recognition is sought; (b) where the judgment was given in default of appearance, that the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so; (c) that the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought, and (d) that the judgment is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed; further considers that an application should be able to be made to a judge even before any steps are taken by way of enforcement and that if that judge rules that the application is based on serious grounds, he or she should refer the matter to the court indicated in the list in Annex III for examination on the basis of the grounds set out above; advocates the addition of a recital in the preamble to the effect that a national court may penalise a vexatious or unreasonable application, inter alia , in the order for costs;

3. Encourages the Commission to initiate a public debate on the question of public policy in connection with private international law instruments;

4. Considers that there must be a harmonised procedural time-frame for the exceptional procedure referred to in paragraph 2 so as to ensure that it is conducted as expeditiously as possible, and that it must be ensured that the steps which may be taken by way of enforcement until the time-limit for applying for the exceptional procedure has expired or the exceptional procedure has been concluded are not irreversible; is particularly concerned that a foreign judgment should not be enforced if it has not been properly served on the judgment debtor;

5. Argues not only that there must be a requirement for a certificate of authenticity as a procedural aid so as to guarantee recognition, but also that there should be a standard form for that certificate; considers, to this end, that the certificate provided for in Annex V should be refined, while obviating as far as possible any need for translation;

6. Believes that, in order to save costs, the translation of the decision to be enforced could be limited to the final order (operative part and summary grounds), but that a full translation should be required in the event that an application is made for the exceptional procedure;

*Authentic instruments*

7. Considers that authentic instruments should not be directly enforceable without any possibility of challenging them before the judicial authorities in the State in which enforcement is sought; takes the view therefore that the exceptional procedure to be introduced should not be limited to cases where enforcement of the instrument is manifestly contrary to public policy in the State addressed since it is possible to conceive of circumstances in which an authentic act could be irreconcilable with an earlier judgment and the validity (as opposed to the authenticity) of an authentic act can be challenged in the courts of the State of origin on grounds of mistake, misrepresentation, etc. even during the course of enforcement;

*Scope of the Regulation*

8. Considers that maintenance obligations within the scope of Regulation No 4/2009/EC should be excluded from the scope of the Regulation, but reiterates that the final aim should be a comprehensive body of law encompassing all subject-matters;

9. Strongly opposes the (even partial) abolition of the exclusion of arbitration from the scope;

10. Considers that Article 1(2)(d) of the Regulation should make it clear that not only arbitration proceedings, but also judicial procedures ruling on the validity or extent of arbitral competence as a principal issue or as an incidental or preliminary question, are excluded from the scope of the Regulation; further considers that a paragraph should be added to Article 31 providing that a judgment shall not be recognised if, in giving its decision, the court in the Member State of origin has, in deciding a question relating to the validity or extent of an arbitration clause, disregarded a rule of the law of arbitration in the Member State in which enforcement is sought, unless the judgment of that Member State produces the same result as if the law of arbitration of the Member State in which enforcement is sought had been applied;

11. Considers that this should also be clarified in a recital;

*Choice of court*

12. Advocates, as a solution to the problem of "torpedo actions", releasing the court designated in a choice-of-court agreement from its obligation to stay proceedings under the lis pendens rule; considers that this should be coupled with a requirement for any disputes on jurisdiction to be decided expeditiously as a preliminary issue by the chosen court and backed up by a recital stressing that party autonomy is paramount;

13. Considers that the Regulation should contain a new provision dealing with the opposability of choice-of-court agreements against third parties; takes the view that such provision could provide that a person who is not a party to the contract will be bound by an exclusive choice-of-court agreement concluded in accordance with the Regulation only if: (a) that agreement is contained in a written document or electronic record; (b) that person is given timely and adequate notice of the court where the action is to be brought; (c) in contracts for carriage of goods, the chosen court is (i) the domicile of the carrier; (ii) the place of receipt agreed in the contract of carriage; (iii) the place of delivery agreed in the contract of carriage, or (iv) the port where the goods are initially loaded on a ship or the port where the goods are finally discharged from a ship; considers that it should further be provided that, in all other cases, the third party may bring an action before the court otherwise competent under the Regulation if it appears that holding that party to the chosen forum would be blatantly unfair;

*Forum non conveniens*

14. Suggests, in order to avoid the type of problem which came to the fore in Owusu v. Jackson , a solution on the lines of Article 15 of Regulation No 2201/2003 so as to allow the courts of a Member State having jurisdiction as to the substance to stay proceedings if they consider that a court of another Member State or of a third country would be better placed to hear the case, or a specific part thereof, thus enabling the parties to bring an application before that court or to enable the court seised to transfer the case to that court with the agreement of the parties; welcomes the corresponding suggestion in the proposal for a regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession(21) ;

*Operation of the Regulation in the international legal order*

15. Considers, on the one hand, that the question whether the rules of the Regulation should be given reflexive effect has not been sufficiently considered and that it would be premature to take this step without much study, wide-ranging consultations and political debate, in which Parliament should play a leading role, and encourages the Commission to initiate this process; considers, on the other hand, that, in view of the existence of large numbers of bilateral agreements between Member States and third countries, questions of reciprocity and international comity, the problem is a global one and a solution should also be sought in parallel in the Hague Conference through the resumption of negotiations on an international judgments convention; mandates the Commission to use its best endeavours to revive this project, the Holy Grail of private international law; urges the Commission to explore the extent to which the 2007 Lugano Convention(22) could serve as a model and inspiration for such an international judgments convention;

16. Considers in the meantime that the Community rules on exclusive jurisdiction with regard to rights in rem in immovable property or tenancies of immovable property could be extended to proceedings brought in a third State;

17. Advocates amending the Regulation to allow reflexive effect to be given to exclusive choice-of-court clauses in favour of third States" courts;

18. Takes the view that the question of a rule overturning Owens Bank v. Bracco should be the subject of a separate review;

*Definition of domicile of natural and legal persons*

19. Takes the view that an autonomous European definition (ultimately applicable to all European legal instruments) of the domicile of natural persons would be desirable, in order in particular to avoid situations in which persons may have more than one domicile;

20. Rejects a uniform definition of the domicile of companies within the Brussels I Regulation, since a definition with such far-reaching consequences should be discussed and decided within the scope of a developing European company law;

*Interest rates*

21. Considers that the Regulation should lay down a rule so as to preclude an enforcing court from declining to give effect to the automatic rules on interest rates of the court of the State of origin and applying instead its national interest rate only from the date of the order authorising enforcement under the exceptional procedure;

*Industrial property*

22. Considers that, in order to overcome the problem of "torpedo actions", the court second seised should be relieved from the obligation to stay proceedings under the lis pendens rule where the court first seised evidently has no jurisdiction; rejects the idea, however, that claims for negative declaratory relief should be excluded altogether from the first-in-time rule on the ground that such claims can have a legitimate commercial purpose; considers, however, that issues concerning jurisdiction would be best resolved in the context of proposals to create a Unified Patent Litigation System;

23. Considers that the terminological inconsistencies between Regulation No 593/2008 ("Rome I")(23) and Regulation No 44/2001 should be eliminated by including in Article 15(1) of the Brussels I Regulation the definition of "professional" incorporated in Article 6(1) of the Rome I Regulation and by replacing the expression "contract which, for an inclusive price, provides for a combination of travel and accommodation" in Article 15(3) of the Brussels I Regulation by a reference to the Package Travel Directive 90/314/EEC(24) as in Article 6(4)(b) of the Rome I Regulation;

*Jurisdiction over individual contracts of employment*

24. Calls on the Commission to consider, having regard to the case-law of the Court of Justice, whether a solution affording greater legal certainty and suitable protection for the more vulnerable party might not be found for employees who do not carry out their work in a single Member State (e.g . long distance lorry drivers, flight attendants);

*Rights of the personality*

25. Believes that the rule in Shevill needs to be qualified; considers, therefore, that, in order to mitigate the alleged tendency of courts in certain jurisdictions to accept territorial jurisdiction where there is only a weak connection with the country in which the action is brought, a recital should be added to clarify that, in principle, the courts of that country should accept jurisdiction only where there is a sufficient, substantial or significant link with that country; considers that this would be helpful in striking a better balance between the interests at stake;

*Provisional measures*

26. Considers that, in order to ensure better access to justice, orders aimed at obtaining information and evidence or at preserving evidence should be covered by the notion of provisional and protective measures;

27. Believes that the Regulation should establish jurisdiction for such measures at the courts of the Member State where the information or evidence sought is located, in addition to the jurisdiction of the courts having jurisdiction with respect to the substance;

28. Finds that "provisional, including protective measures" should be defined in a recital in the terms used in the St Paul Dairy case;

29. Considers that the distinction drawn in Van Uden, between cases in which the court granting the measure has jurisdiction over the substance of the case and cases in which it does not, should be replaced by a test based on the question of whether measures are sought in support of proceedings issued or to be issued in that Member State or a non-Member State (in which case the restrictions set out in Article 31 should not apply) or in support of proceedings in another Member State (in which case the Article 31 restrictions should apply);

30. Urges that a recital be introduced in order to overcome the difficulties posed by the requirement recognised in Van Uden for a "real connecting link" to the territorial jurisdiction of the Member State court granting such a measure, to make it clear that in deciding whether to grant, renew, modify or discharge a provisional measure granted in support of proceedings in another Member State, Member State courts should take into account all of the circumstances, including (i) any statement by the Member State court seised of the main dispute with respect to the measure in question or measures of the same kind, (ii) whether there is a real connecting link between the measure sought and the territory of the Member State in which it is sought, and (iii) the likely impact of the measure on proceedings pending or to be issued in another Member State;

31. Rejects the Commission's idea that the court seised of the main proceedings should be able to discharge, modify or adapt provisional measures granted by a court from another Member State since this would not be in the spirit of the principle of mutual trust established by the Regulation; considers, moreover, that it is unclear on what basis a court could review a decision made by a court in a different jurisdiction and which law would apply in these circumstances, and that this could give rise to real practical problems, for example with regard to costs;

*Collective redress*

32. Stresses that the Commission's forthcoming work on collective redress instruments may need to contemplate special jurisdiction rules for collective actions;

*Other questions*

33. Considers, on account of the special difficulties of private international law, the importance of Union conflicts-of-law legislation for business, citizens and international litigators and the need for a consistent body of case-law, that it is time to set up a special chamber within the Court of Justice to deal with references for preliminary rulings relating to private international law;

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34. Instructs its President to forward this resolution to the Council and the Commission.

# Again on Article 20 of Regulation (EC) No 2201/2003

Reference for a preliminary ruling from the Bundesgerichtshof, Germany, in case C- 256/09 was lodged on 10 July 2009 (see V. Gaertner). The ECJ answered a year later; the judgment was published yesterday in OJ, C, 246.

*The Facts*

The order for reference states that in mid-2005 Ms Purrucker went to Spain to live with Mr Vallés Pérez. She gave premature birth to twins in May 2006. The boy -Merlín- was able to leave hospital in September 2006, whilst the girl -Samira- remained in hospital until March 2007.

Not wanting to be together any more, on 30 January 2007 the parties signed before a notary an agreement concerninginter alia parental responsibility, custody and rights of access to the children. According to Spanish Law the agreement had to be approved by a court in order to be enforceable. In the instant case it was never judicially ratified.

Ms Purrucker returned to Germany with the boy in February 2007; she intended also to bring her daughter to Germany after she left hospital.

*Proceedings in Spain. Application for enforcement in Germany*

Since Mr Vallés Pérez no longer felt bound by the agreement signed before a notary, he brought proceedings in June 2007 to obtain the granting of provisional measures and, in particular, rights of custody of the children before the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial. After some discussion, the Court confirmed her jurisdiction to rule on the application for provisional measures, and adopted the following urgent provisional measures:

"1. Joint rights of custody of the two children Samira and Merlín Vallés Purrucker are awarded to the father, Mr Guillermo Vallés Pérez; both parents are to retain parental responsibility.

In implementation of this measure, the mother must return the infant son Merlín to his father who is domiciled in Spain. Appropriate measures must be taken to allow the mother to travel with the boy and to visit Samira and Merlín whenever she wishes, and, for that purpose, accommodation, which may serve as a family meeting place, must be placed at her disposal or may be placed at her disposal by a family member or by the trusted person who must be present during the visits for the entire time which the mother spends with the children, it being understood that the accommodation concerned may be that of the father if both parties so agree.

2. Prohibition on leaving Spain with the children without the court's prior approval.

3. Delivery of passports of each of the children to the possession of the parent exercising rights of custody.

4. Any change in the residence of the two children is subject to the prior approval of the court.

5. No maintenance obligation is imposed on the mother".

On 11 January 2008 the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial issued a certificate pursuant to Article 39(1) of Regulation No 2201/2003, certifying that its judgment was enforceable and that notice of it had been served. Immediately after, Mr Vallés Pérez brought in Germany, as a precautionary measure, an action for a declaration that the judgment delivered by the Juzgado de Primera Instancia No 4 of San Lorenzo de El Escorial was enforceable. Next, he sought the enforcement of that judgment. Consequently, the Amtsgericht Stuttgart, by a decision of 3 July 2008, and the Oberlandesgericht Stuttgart, by a decision on appeal of 22 September 2008, ordered enforcement of the judgment of the Spanish court and warned the mother that she could be fined if she did not comply with the order.

Ms Purrucker challenged the judgment of the Oberlandesgericht Stuttgart of 22 September 2008 before the Bundesgerichtshof on the ground that, under Article 2(4) of Regulation No 2201/2003, the recognition and enforcement of judgments delivered by the courts of other Member States is not applicable to provisional measures within the meaning of Article 20 of that regulation, because they cannot be classed as judgments relating to parental responsibility.

*The preliminary question*

The Bundesgerichtshof observes that the question whether the provisions laid down in Article 21 et seq. of Regulation No 2201/2003 are also applicable to provisional measures within the meaning of Article 20 of that regulation or only to judgments on the substance is a matter of debate in academic writing which has not been definitively resolved by the case-law. Therefore, he decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

"Do the provisions of Article 21 et seq. of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000 1 (the Brussels IIa Regulation) concerning the recognition and enforcement of decisions of other Member States, in accordance with Article 2(4) of that regulation, also apply to enforceable provisional measures, within the meaning of Article 20 of that regulation, concerning the right to child custody?"

*AG's Opinion*

Advocate general E. Sharpston delivered a quite long opinion on 20 May 2010. In her view the ECJ should answer as follows:

– Provisional measures adopted by a court of a Member State on the basis of competence derived by that court from the rules on substantive jurisdiction in Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and [in] matters of parental responsibility must be recognised and enforced in other Member States in the same way as any other judgment adopted on the same basis, in accordance with Article 21 et seq. of that Regulation.

– Provisional measures adopted by a court of a Member State on the basis of national law in the circumstances set out in Article 20 of Regulation No 2201/2003 do not have to be recognised or enforced in other Member States in accordance with Article 21 et seq. of the Regulation. That Regulation does not, however, preclude their recognition or enforcement in accordance with procedures derived from national law, in particular those required by multilateral or bilateral conventions to which the Member States concerned are parties.

– A court hearing an application for recognition or non-recognition of a provisional measure, or for a declaration of enforceability, is entitled to ascertain the basis of jurisdiction relied on by the court of origin either from the terms or content of its decision or, if necessary, by communicating with that court directly or through the appropriate central authorities. If, but only if, neither of those means produces a clear and satisfactory result, it should be presumed that jurisdiction was assumed in the circumstances set out in Article 20(1). In the case of provisional decisions on parental responsibility, the same means of communication may be used to verify whether the decision is (still) enforceable in the Member State of origin, if the accuracy of a certificate issued pursuant to Article 39 of Regulation No 2201/2003 is challenged; and, if such communication is unsuccessful, other means of proof may be used, provided that they are adduced in a timely manner.

*The judgment*

This is the concise ruling of the ECJ:

"The provisions laid down in Article 21 et seq. of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, do not apply to provisional measures, relating to rights of custody, falling within the scope of Article 20 of that regulation."

*Some points that deserve consideration*

We believe that some points of the ECJ's reasoning invite to reflection:

.- Concerning the scope of Article 20. In paragraph 64 the ECJ establishes which decisions fall within the scope of article 20. Following the Court, it is not only the nature of the measures which may be adopted by the court – provisional, including protective, measures as opposed to judgments on the substance – which determines whether those measures may fall within the scope of Article 20 of the regulation but rather, in particular, the fact that the measures were adopted by a court whose jurisdiction is not based on another provision of that regulation. Realistically, in paragraph 65, the ECJ acknowledges that "it is not always straightforward, from reading a judgment, to make such a classification of a judgment adopted by a court for the purposes of Article 2(1) of Regulation".

.- The meaning of the prohibition of reviewing the assessment of jurisdiction made by a court of a Member State. See paragraph 75, "that prohibition does not preclude the possibility that a court to which a judgment is submitted which does not contain material which unquestionably demonstrates the substantive jurisdiction of the court of origin may determine whether it is evident from that judgment that the court of origin intended to base its jurisdiction on a provision of Regulation No 2201/2003. As stated by the Advocate General in point 139 of her Opinion, to make such a determination is not to review the jurisdiction of the court of origin but merely to ascertain the basis on which that court considered itself competent." I find it difficult not to see this as examining the grounds of jurisdiction -although not in order to make a verdict on the recognition of the foreing judgment.

.- With regard to the system of recognition of the measures adopted under Article 20: "(…) it must be held that, as the Advocate General stated in points 172 to 175 of her Opinion, the system of recognition and enforcement provided for by Regulation No 2201/2003 is not applicable to measures which fall within the scope of Article 20 of that regulation." The ECJ leans on the Borrás Report to the Brussels II Convention, reminding that Article 20(1) of Regulation 2201/2003 has its origins in Article 12 of Regulation No 1347/2000, which is a restatement of Article 12 of the Brussels II convention. The ECJ avoids, however, the differences between both Regulations.

.- On the possibility of recognizing provisional measures taken under Article 20 according to another system of recognition see paragraph 92, "The fact that measures falling within the scope of Article 20 of Regulation No 2201/2003 do not qualify for the system of recognition and enforcement provided for under that regulation does not, however, prevent all recognition or all enforcement of those measures in another Member State, as was stated by the Advocate General in point 176 of her Opinion. Other international instruments or other national legislation may be used, in a way that is compatible with the Regulation." I wish the ECJ had explained this a little bit more.

.- Finally, see the ECJ comments on the domestic system of appeal when used to discuss international jurisdiction. More specifically, the ECJ seems to qualify the Spanish provisions as unsuitable in an international (community) context. To endorse this view the ECJ points out to the primacy of EU law over national law, and reminds  the obligation to revise or interpret national law to ensure its

conformity. That gives us Spaniards (at least) something to think about.

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# Hague Academy, Summer Programme for 2011

**Private International Law**: 25 July – 12 August, 2011

Carolyn LAMM, Partner White and Case (Washington D.C.)
25 July (Opening lecture)

H. Patrick GLENN, Professor at McGill University
1-12 August
General Course (The Conciliation of Laws)*

Adrian BRIGGS, Professor at the University of Oxford
25-29 July
The Principle of Comity in Private International Law

Dominique BUREAU, Professor at the University Paris ll (Panthéon-Assas)
25-29 July
Methodological Mutations in Contemporary Private International Law*

Johan MEEUSEN, Professor at the University of Antwerp
25-29 July
Private International Law and the Principle of Non-Discrimination*

Ronald BRAND, Professor at the University of Pittsburgh
1-5 August
Transaction Planning Using Rules on Jurisdiction and Judgments Recognition

Jan NEELS, Professor at the University of Johannesburg
1-5 August

Cultural Diversity and Constitutional Values in Private International Law

Yuko NISHITANI, Professor at Kyushu University, Japan
8-12 August
Cultural ldentity in Private lnternational Family Law*

Mpazi SINJELA, Former Dean of the WIPO World Wide Academy, Geneva
8-12 August
lntellectual Property: Cross-Border Recognition of Rights and National Development

* Lectures delivered in French, simultaneously interpreted into English.

Registration begins in November 2010.

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# The Saga on the Property in Croatia Taken to Foreigners in the Communist Era Seems to Have Reached the End

In reference to the post of 2008 reporting on the right of foreigners to claim compensation for or return of the property in Croatia taken during the communist era, the new decision of the Croatian Supreme Court merits attention.

The 2008 ruling by the Croatian Administrative Court recognized such right to a Brazilian national, i.e. her descendant of the first degree. This ruling was final and there were only extraordinary legal remedies available, among them the request for legality protection (*zahtjev za zaštitu zakonitosti*). On 19 June 2008, the Croatian State Attorney' Office launched such request before the Croatian Supreme Court, challenging the legality of the mentioned Croatian Administrative Court ruling. They essentially argued that the interpretation of the Administrative Court was incorrect because, in regard to Article 9 and 10 of the Compensation

for the Taken Property during the Yugoslav Communist Government Act as amended in 2002 (often referred to as the Compensation Act), the legislative intention was not to make all foreigners eligible to return of or compensation for the taken property, but only nationals of those countries which have concluded the treaties to that effect with Croatia. They also argued that, pursuant to another provision of the Act, the right to return or compensation belonged only to those persons having acquired the Croatian nationality after 11 October 1996.

Deciding in the chamber of five, the Croatian Supreme Court rendered a judgment on 25 May 2010. The Court entirely rejected the request for legality protection and upheld the challenged decision stating that the authentic legislative intent should be sought by looking into the context of the statutory amendments which were consequential to the 1999 Croatian Supreme Court decision. The judges continued:

> *Starting from this, and taking into account, inter alia, the argumentation of the Constitutional Court of the Republic of Croatia that the former owners which are not Croatian nationals have to be in principle recognized the right to compensation or return of the property, and that the conditions under which those persons should be recognized the right to compensation need to be defined, the conclusion has to be drawn that the legislator linked the right of a foreign person (natural and legal) to enforce the right to compensation for the taken property the to the concluded intergovernmental agreement.*
>
> *In this context it is obvious that in construing and searching for the genuine legislator's intent in regulating this matter, the provisions of Art. 10 paras. 1 and 2 of the Compensation Act need to be interpreted observing their mutual connection. The contents of para. 1 of this Article shows, thus, that the former owner shall not have the right to compensation for the taken property where this matter has been resolved under an intergovernmental agreement. By way of exception, according to para. 2 of the same Article, even where the issue of compensation for the taken property has already been resolved under the interstate agreement, the right to compensation may be acquired by the foreign persons if it is established by [another] interstate agreement. It derives under the interpretation argumentum a contrario that in other situations, where the issue of compensation is not resolved by an intergovernmental agreement, the former owner shall have the right to compensation for the taken property.*

> *By virtue of this, implementing the decision of the Constitutional Court of the Republic of Croatia, the legal statuses of former owners of taken properties are consequently made equal irrespective of their nationality, thus achieving the equality of citizens before the law.*

The Court concludes its reasons by stating that the requirement of Croatian nationality acquired after 11 October 1996, does not refer to the case at hand, and that this case falls under another provision which does not impose such requirements.

Such insistence of the Government of the Republic of Croatia not to recognize the right to return or compensation to foreigners must be understood against the background of more than 4000 requests being made from abroad, primarily from Israel, Austria, USA, Serbia, Argentina and Brazil, and of the estimation that these requests if accepted will cost the Republic of Croatia in between €350 and €500 million in the fortcomming period. However, in a view of 13 years that have passed from the date the application for return was submitted in this case, it is to be hoped that this is truly the final chapter of the saga.

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# Proving Foreign Law in U.S. Federal Court: Is The Use Of Foreign Legal Experts "Bad Practice"?

A panel of the United States Court of Appeals for the Seventh Circuit last week decided a fairly routine contract case—applying French law (opinion here). In doing so, Judges Easterbrook, Posner and Wood stated their views on the best means to prove foreign law. Of course, they each noted (in separate opinions) that the Federal Rules of Civil Procedure give courts a wide berth to rely on any source or authority, including sworn statements by experts in foreign law. But

Judges Easterbrook and Posner see the use of such experts as "bad practice"—in their view, it's better for judges to consult English-language translations and treatises, which will be relatively objective, rather than the statements of experts hired by each party. According to Judge Easterbrook:

> *Trying to establish foreign law through experts' declarations not only is expensive (experts must be located and paid) but also adds an adversary's spin, which the court then must discount. Published sources such as treatises do not have the slant that characterizes the warring declarations presented in this case. Because objective, English-language descriptions of French law are readily available, we prefer them to the parties' declarations.*

Indeed, Judge Easterbrook gave more credence to a Danish Court's resolution of a parallel case than the parties' experts. In his view, "Denmark is a civil-law nation, and a Danish court's understanding and application of the civil-law tradition is more likely to be accurate than are the warring declarations of the paid experts in this litigation."

Judge Posner was even more scathing of foreign legal experts. He wrote separately "merely to express emphatic support for, and modestly to amplify, the court's criticism of a common and authorized but unsound judicial practice. That is the practice of trying to establish the meaning of a law of a foreign country by testimony or affidavits of expert witnesses":

> *Lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client. These are the banes of expert testimony. When the testimony concerns a scientific or other technical issue, it may be unreasonable to expect a judge to resolve the issue without the aid of such testimony. But judges are experts on law, and there is an abundance of published materials, in the form of treatises, law review articles, statutes, and cases, . . . to provide neutral illumination of issues of foreign law. I cannot fathom why in dealing with the meaning of laws of English-speaking countries that share our legal origins judges should prefer paid affidavits and testimony to published materials. It is only a little less perverse for judges to rely on testimony to ascertain the law of a country whose official language is not English, at least if is a major country and has a modern*

> *legal system [(because law and secondary sources are readily translated into English)]. . . . [O]ur linguistic provincialism does not excuse intellectual provincialism. It does not justify our judges in relying on paid witnesses to spoon feed them foreign law . . . . I do not criticize the district judge in this case, because he was following the common practice. But it is a bad practice, followed like so many legal practices out of habit rather than reflection. . . .*

Judge Wood disagreed, arguing that judges are too likely err in interpreting foreign law, especially when it is in a foreign language:

> *Exercises in comparative law are notoriously difficult, because the U.S. reader is likely to miss nuances in the foreign law, to fail to appreciate the way in which one branch of the other country's law interacts with another, or to assume erroneously that the foreign law mirrors U.S. law when it does not. . . .*
>
> *There will be many times when testimony from an acknowledged expert in foreign law will be helpful, or even necessary, to ensure that the . . . U.S. judge understands the full context of the foreign provision. Some published articles or treatises, written particularly for a U.S. audience, might perform the same service, but many will not, even if they are written in English, and especially if they are translated into English from another language. It will often be most efficient and useful for the judge to have before her an expert who can provide the needed precision on the spot, rather than have the judge wade through a number of secondary sources. In practice, the experts produced by the parties are often the authors of the leading treatises and scholarly articles in the foreign country anyway. In those cases, it is hard to see why the person's views cannot be tested in court, to guard against the possibility that he or she is just a mouthpiece for one party.*

Both Judges Easterbrook and Posner recognized a caveat. According to the latter, the use of foreign law experts was "excusable only when the foreign law is the law of a country with such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn." The former would allow an expert to help determine the law of countries who do not "engage in extensive international commerce." This begs a question of line-drawing. One might assume that a U.S. judge would do his own research of an English-speaking common law

system, irrespective of how much “international commerce” flowed through its ports. At the other end of the spectrum, the law of the Congo might be best explained by an expert. In between, as queried by Eugene Volokh, what about a country like Saudi Arabia, which is economically quite significant, but its legal system is so different from ours in many ways that I suspect most judges would want to hear from experts? What would Judges Easterbrook and Posner say about Chinese law, which is also radically different from ours but is an economic powerhouse and is the subject of a good deal of written English-language commentary? Perhaps, in close cases, courts may be more willing to hire their own foreign law experts pursuant to Federal Rule of Evidence 706, as is sometimes done. *See, e.g., Saudi Basic Indust.Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 866 A.2d 1, 30-32 (Del. 2005).