Polish Constitutional Court about to review the constitutionality of the jurisdictional immunity of a foreign State?

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In the aftermath of the judgment of the ICJ of 2012 in the case of the Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) that needs no presentation here (for details see, in particular, the post by Burkhard Hess), by its judgment of 2014, the Italian Constitutional Court recognized the duty of Italy to comply with the ICJ judgment of 2012 but subjected that duty to the "fundamental principle of judicial protection of fundamental rights" under Italian constitutional law (for a more detailed account of those developments see this post on EAPIL by Pietro Franzina and further references detailed there). In a nutshell, according to the Italian Constitutional Court, the fundamental human rights cannot be automatically and unconditionally sacrificed in each and every case in order to uphold the jurisdiction immunity of a foreign State allegedly responsible for serious international crimes.

Since then, the Italian courts have reasserted their jurisdiction in such cases, in some even going so far as to decide on the substance and award compensation from Germany. The saga continues, as Germany took Italy to the ICJ again in 2022 (for the status of the case pending before the ICJ see here). It even seems not to end there as it can be provocatively argued that this saga has its spin-off currently taking place before the Polish courts.

A. Setting the scene…

In 2020, a group of members of the Sejm, lower chamber of the Polish Parliament, brought a request for a constitutional review that, in essence, concerns the application of the jurisdictional immunity of the State in the cases pertaining to liability for war crimes, genocide and crimes against humanity. The request has

been registered under the case number K 25/20 (for details of the, in Polish, see here; the request is available here). This application is identical to an application previously brought by a group of members of the lower chamber of the Parliament in the case K 12/17. This request led to no outcome due to the principle according to which the proceedings not finalized during a given term of the Sejm shall be closed upon the expiration of that term.

This time, however, the Polish Constitutional Court has even set the date of the hearing in the case K 25/20. It is supposed to take place on May 23, 2023.

The present post is not drafted with the ambition of comprehensively evaluating the request for a constitutional review brought before the Polish Constitutional Court. Nor it is intended to speculate on the future decision of that Court and its ramifications. By contrast, while the case is still pending, it seems interesting to provide a brief overview of the request for a constitutional review and present the arguments put forward by the applicants.

Under Polish law, a request for a constitutional review, such as the one in the case K 25/20, can be brought before the Polish Constitutional Court by selected privileged applicants, with no connection to a case pending before Polish courts.

Such a request has to identify the legislation that raise concerns as to its conformity with the Polish constitutional law ("subject of the review", see point B below) and the relevant provisions of the Polish Constitution of 1997 against which that legislation is to be benchmarked against ("standard of constitutional review", see point C). Furthermore, the applicant shall identify the issues of constitutional concern that are raised by the said legislation and substantiate its objections by arguments and/or evidence (see point D).

B. Subject of constitutional review in question

By the request for a constitutional review of 2020, the Polish Constitutional Court is asked to benchmark two provisions of Polish Code of Civil Procedure (hereinafter: "PL CCP") against the Polish constitutional law, namely Article 1103[7](2) PL CCP and Article 1113 PL CCP.

i) Article 1103[7](2) PL CCP

The first provision, Article 1103[7] PL CCP lays down rules of direct jurisdiction that, in practice, can be of application solely in the cases not falling within the ambit of the rules of direct jurisdiction of the Brussels I bis Regulation. In particular, pursuant to Article 1103[7](2) PL CCP, the Polish courts have jurisdiction with regard to the cases pertaining to the extra-contractual obligations that arose in Poland.

In the request for a constitutional review of 2020, the applicants argue that, according to the settled case law of the Polish Supreme Court, Article 1103[7](2) PL CCP does not cover the torts committed by a foreign State to the detriment of Poland and its nationals. For the purposes of their request, the applicants do focus on the non-contractual liability of a foreign State resulting from war crimes, genocide and crimes against humanity. The applicants claim that, according to the case law of the Polish Supreme Court, such a liability is excluded from the scope of Article 1103[7](2) PL CCP.

Against this background, it has to be noted that the account of the case law of the Polish Supreme Court is not too faithful to its original spirit. Contrary to its reading proposed by the applicants, the Polish Supreme Court does not claim that the scope of application of the rule of direct jurisdiction provided for in Article 1103[7](2) PL CPP is, *de lege lata*, circumscribed and does not cover the liability of a foreign State for international crimes. In actuality, this can be only seen as the practical effect of the case law of the Polish Supreme Court quoted in the request for a constitutional review. Pursuant to this case law, also with regard to liability for international crimes, the foreign States enjoy jurisdiction immunity resulting from international customary law, which prevents claimants from suing those States before the Polish courts.

ii) Article 1113 PL CPP

The second provision subject to constitutional review is Article 1113 PL CPP, according to which jurisdictional immunity shall be considered by the court *ex officio* in every phase of the proceedings. If the defendant can rely on the jurisdictional immunity, the court shall reject the claim. According to the applicants, the Polish courts infer from this provision of the PL CPP the right of

the foreign States to rely on the jurisdictional immunity with regard to the cases on liability resulting from war crimes, genocide and crimes against humanity.

C. Standard of constitutional review (relevant provisions of Polish constitutional law)

In the request for a constitutional review of 2020, four provisions of Polish constitutional law are referred to as the standard of constitutional review, namely:

i) Article 9 of the Polish Constitution of 1997 ("Poland shall respect international law binding upon it");

according to the applicants, due to the general nature of Article 9, it cannot be deduced thereof that the rules of international customary law are directly binding in Polish domestic legal order. The applicants contend that the Polish Constitution of 1997 lists the sources of law that are binding in Poland. In particular, Article 87 of the Constitution indicates that the sources of law in Poland are the Constitution, statutes, ratified international agreements, and regulations. No mention is made there to the international customary law. Thus, **international customary law does not constitute a binding part of the domestic legal order and is not directly applicable in Poland. Rather, Article 9 of the Polish Constitution of 1997 must be understood as providing for the obligation to respect international customary law exclusively "in the sphere of international law"**;

ii) Article 21(1) of the Polish Constitution of 1997: "Poland shall protect ownership and the right of succession",

here, the applicants contend that Article 21(1) covers not only the property currently owned by the individuals, but also property that was lost as a result of the international crimes committed by a foreign State, which, had it not been lost, would have been the subject of inheritance by Polish nationals;

iii) Article 30 of the Polish Constitution of 1997: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities",

the applicants infer from Article 30 that the respect and protection of dignity is the duty of public authorities. Such a protection can be guaranteed by creating an institutional and procedural framework, which enables the pursuit of justice against the wrongdoers who have taken actions against human dignity. For the applicants, this is particularly relevant in the case of liability for war crimes, genocide and crimes against humanity;

iv) Article 45(1) of the Polish Constitution of 1997: "Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court",

in short, Article 45(1) enshrines to the right to access to a court; this provision conceptualizes this right as a mean by which the protection of other freedoms and rights guaranteed by the Constitution can be realized; the applicants argue that the jurisdictional immunity of a foreign State is a procedural rule that, in its essence, limits the right to a court. They acknowledge that the right to a court is not an absolute right and it can be subject to some limitations. However, the Constitutional Court should examine whether the limitation resulting from the operation of jurisdiction immunity is proportionate.

D. Issues and arguments raised by the request for a constitutional review

After having presented the subject of the request and the relevant provisions of Polish constitutional law, the applicants identify the issues of constitutional concern that, in their view, are raised by the jurisdictional immunity of a foreign State upheld via the operation of Article 1103[7](2) PL CCP and Article 1113 PL CCP in the cases on the liability resulting from international crimes. The applicants then set out their arguments to substantiate the objection of non-constitutionality directed at Article 1103[7](2) PL CCP and Article 1113 PL CCP.

The main issue and arguments put forward boil down to the objection that the upholding of the jurisdictional immunity results in the lack of access to a court and infringes the right guaranteed in the Polish Constitution of 1997, as well as enshrined in the international agreements on human rights, ratified by Poland,

- in this context, first, the applicants reiterate the contention that **while ratified international agreements constitute a part of the domestic legal order, this is not the case of the rules of international customary law**; furthermore, in order to "reinforce" this contention, a recurring statement appears in the request for a constitutional review, according to which the international customary law is not consistently applied with regard to the jurisdictional immunity of a foreign State;

- second, **a foreign State cannot claim immunity from the jurisdiction of a court of another State in proceedings which relate to the liability for war crimes, genocide or crimes against humanity, if the facts which occasioned damage occurred in the territory of that another State**; there is a link between those international crimes and the territory of the State of the forum and the latter must be authorised to adjudicate on the liability for those acts;

- third, the applicant claim that **a foreign State does not enjoy jurisdictional immunity in the cases involving clear violations of universally accepted rules of international law** – a State committing such a violation implicitly waives its immunity;

- fourth, the applicants acknowledge the ICJ judgment of 2012 but claim that it (i) failed to take into account all the relevant precedent on the scope of jurisdictional immunity; (ii) held that the illegal acts constituted *acta iure imperii*, disregarding the conflict between the jurisdictional immunity and the acts violating fundamental human rights; (iii) preferred not to explicitly address the question as to whether the jurisdictional immunity should be enjoyed by a State that violated human dignity or not – doing so, the ICJ left space for the national courts to step in; (iv) the ICJ judgments are biding only to the parties to the proceedings; with regard to the non-parties they have the same binding force as national decisions;

(v) due to the evolving nature of the doctrine of jurisdictional immunity and its scope, a national court can settle the matter differently than the ICJ did in 2012.

Subsequent issues of constitutional concern seem to rely on the same or similar arguments and concern:

- violation of international law binding Poland due to the recognition of jurisdictional immunity of a State with regard to the cases on liability for war crimes, genocide or crimes against humanity;
- violation of the human dignity as there is no procedural pathway for claiming the reparation of damages resulting from those international crimes;
- violation of the protection of ownership and other proprietary rights by barring the actions for damages resulting from those international crimes.

E. The controversies regarding the Constitutional Court

The overview of the request for a constitutional review in the case K 25/20 would not be complete without a brief mention of the current state of affairs in the Polish Constitutional Court itself.

In the 2021 judgement in Xero Flor v. Poland, the European Court of Human Rights held, in essence, that the Constitutional Court panel composed in violation of the national constitution (i.e. election of one of the adjudicating judges "vitiated by grave irregularities that impaired the very essence of the right at issue") does not meet the requirements allowing it to be considered a "tribunal established by law" within the meaning of the Article 6(1) of the European Convention.

One of the judges sitting on the panel adjudicating the case K 25/20 was elected under the same conditions as those considered by the ECHR in its 2021 judgment. The other four were elected during the various stages of the constitutional crisis ongoing since 2015. In practice, and most regretfully, the case K 25/20 that revolves around the alleged violation of the right to a court provided for in Polish constitutional law risks to be deliberated in the circumstances that, on their own, raise concerns as to the respect of an equivalent right enshrined in the European

Convention.

BNP Paribas sued in France for financing fossil fuel companies

This post was written bu Begüm Kilimcioglu, PhD candidate at the University of Antwerp

On 23 February 2023, one of the biggest commercial banks in the Eurozone, BNP Paribas (BNP) was sued by Oxfam, Friends of the Earth and Notre Affaire à Tous for having allegedly provided loans to oil and gas companies in breach of the vigilance duty enshrined in la Loi de Vigilance (2017) of France. This case constitutes an important hallmark for the business and human rights world as it is the first climate action case against a commercial bank and so timely considering that the European Union (EU) is currently discussing whether or not to include the financial sector within the scope of the proposed Corporate Sustainability Due Diligence Directive (CSDDD) (see here).

Article 1 of la Loi de Vigilance imposes a duty to establish and implement an effective vigilance plan on any company whose head office is located on French territory and complies with the thresholds stated. This vigilance plan is supposed to include vigilance measures for risk identification and prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls, its subcontractors and suppliers with whom the company has an established commercial relationship. As such, there is no distinction under the French law regarding the sector in which the company is operating which is in line with the United Nations Guiding Principles. Thus, it was surprising to see that France was quite vocal about not including the financial sector within the scope of CSDDD, as France was the first Member State to adopt a law on the duty of vigilance of the multinational companies and la Loi de Vigilance itself does not make distinctions

based on the sector in which the company is operating.

According to la Loi de Vigilance, companies are required to conduct human rights and environmental due diligence which includes the following steps: identification and the analysis of the risks, regular assessment of the situation (in accordance with the previously identified risks) of the subsidiaries, subcontractors or suppliers with whom the company has an established commercial relationship, mitigation and prevention of serious violations through appropriate means, establishment of an alert mechanism which collects reports of existing or actual risks, establishment of a monitoring scheme to follow up on the measures implemented and assessment of their efficiency. This plan must be publicly disclosed.

In case the company does not comply with its vigilance obligations, a court can issue a formal notice, ordering the company to comply with la Loi de Vigilance. Furthermore, la Loi de Vigilance also provides for a civil remedy when a company does not meet its obligations. If damage caused by non-compliance with la Loi de Vigilance, any person with legitimate interest can seek reparation under tort law. Consequently, as a company headquartered in France and complying with the thresholds in Article 1 of la Loi de Vigilance, BNP has the duty to effectively establish, implement and monitor a vigilance plan to prevent, if not possible mitigate and bring an end to its adverse impacts on human rights and the environment.

The case against BNP before the French courts is a reminiscent of the case against Shell before the Dutch courts in 2019 where the environmental group (Milieudefensie) and co-plaintiffs argued that Shell's business operations and sold energy products worldwide contributes significantly to climate change (and also much more than it has pledges to in its corporate policies and to the levels internationally determined by conventions) was a violation of its duty of care under Dutch law and human rights obligations. It is important here to highlight that the plaintiffs took Shell to the Dutch courts based on the environmental damage caused in the Netherlands, due to Shell's operations worldwide.

In the said case, the applicable law to the dispute was determined by Rome II Regulation on non-contractual obligations, article 7. Article 7 presents an additional venue to the general rule for determining the applicable law (article 4) and grants the victims of environmental damage an opportunity to base their

claims on the law of the country in which the event giving rise to the damage occurred. As such, the claimant primarily chose to base its claims on the law of the country in which the even giving rise to the damage occurred, as they claimed that the corporate policies for the Shell group were decided in its headquarters in the Netherlands. The Court considered the adoption of the corporate policy of the Shell group as an independent cause of the damage which may contribute to environmental damage with respect to Dutch residents. Thus, the Court considered that the choice of Dutch law by Milieudefensie was in line with the idea of protection of the victims behind the applicable law clauses in Rome II Regulations and upheld the choice to the extent that the action aimed to protect the interests of the Dutch residents (see paragraphs 4.3-4.4 of the decision).

In 2021, the Hague District Court ordered Shell to reduce both its own carbon emissions and end-use emissions by 45% by 2030 in relation to the 2019 figures. Naturally, the legal basis in the Dutch case was different than the legal basis in the French case, considering that the Netherlands does not yet have a national law like la Loi de Vigilance. Consequently, the core of the arguments of the applicants lied on the duty of care in Article 6:162 of the Dutch Civil Code and Articles 2 (right to life) and 8 (rights to private life, family life, home and correspondence) of the European Convention on Human Rights.

In contrast, the BNP case has a more preventive nature and aims to force BNP to change and adapt its actions to the changing climate and scientific context. The NGOs primarily request an injunction for BNP to comply with the obligations provided for in the French Vigilance Law, as BNP falls within the scope of the French Law. More specifically, the NGOs request that BNP publishes and implements a new due diligence plan, containing the measures explained in the writ of summons. Therefore, the obligations arising from the French Vigilance Law are of a civil nature. Consequently, the law applicable to this dispute should also be determined by Rome II Regulation on non-contractual obligations. As explained above, Rome II Regulation gives an additional option for the plaintiffs to choose the applicable law in cases of environmental damage as either the country of damage or the country where the event that gives rise to the damage occurred. In the BNP case, the plaintiffs' claim was based on French law. Applying Rome II Regulation, France can be considered as the country of the event which gives rise to the damage because it is where the corporate policies are prepared. Alternatively, it is also where the environmental damage occurs, as well as the

rest of the world. Moreover, the plaintiffs relied on the general obligation of environmental vigilance as enshrined in the Charter of the Environment, which is considered an annex to the French Constitution and thus has the same authoritativeness. Invoking the constitution might bring in an argument on the basis of Article 16 Rome II, namely overriding principles of mandatory law.

If we rewind the story a little bit, the non-governmental organizations (NGOs) stated above, firstly, served a formal notice to BNP on 26 October 2022 to stop supporting the development of fossil fuels. In the formal notice, the NGOs state that, to achieve the Paris Agreement trajectories, no more funding or investment should be given to the development of new fossil fuel projects, either directly or to the companies that carry out such operations (see p 3). They also draw attention to the fact that BNP has joined the Race to Zero campaign which aim for the inclusion of the nonstate actors in the race for carbon neutrality (p 3).

Basic research into BNP's publicly available documents reveals that it, indeed, has committed to sustainable investment, acknowledging that air pollution and climate change deplete many resources. BNP further claims that it only supports companies that contribute to society and the environment and exclude coal, palm oil and nonconventional hydrocarbons. Moreover, as can be seen from its 2021 activity report, BNP presents itself as organizing its portfolios in a way that upholds the aims of the Paris Agreement. Lastly, BNP's code of conduct, states that it commits to limiting any environmental impact indirectly resulting from its financing or investment activities or directly from its own operations (p 31). Furthermore, BNP also presents combatting climate change as its priority while stating that they finance the transition to a zero-carbon economy by 2050 by supporting its customers in energy and ecological transitions (p 31).

However, the NGOs claim that contrary to these commitments, through various financing and investment activities, BNP becomes one of the main contributors to the fossil fuel sector by supporting the big oil and gas companies (p 4 of the formal notice). In this regard, BNP allegedly provides funds for the companies that actually put fossil fuel projects into action rather than financing these projects directly. As such, the NGOs aver that BNP's vigilance plan is not in compliance with la Loi de Vigilance or its obligations to limit the climate risks resulting from its activities (p 6 of the formal notice). In this regard, the report draws attention to BNP's prior public commitments to strengthen its exclusion policies regarding coal, oil and gas sectors (see pp 8-9 of the formal notice).

Consequently, claiming that BNP has failed to comply with the notice, NGOs have referred the matter to the court.

In a bid to address the negative allegations on its behalf, BNP stated that it is focused on exiting the fossil fuel market, accelerating financing for renewable energies and supporting its clients in this regard. Furthermore, BNP also stated its regret in the advocacy groups choosing litigation over dialogue and that it was not able to stop all fossil-fuel financing right away.

In the course of these proceedings, the applicants will have to prove that if BNP were able to establish, implement and monitor a vigilance plan, the damage caused by these fossil fuel projects put into motion by different energy companies could have been avoided. In other words, the fact that BNP (or any other provider of the financial means) is the facilitator of these projects and that the damage is indirectly caused by its actions, make it more difficult for it to be held liable. As such, it may be more difficult for the claimants in the BNP case to prove the causality between the action and the damage than the Dutch case.

Consequently, this intricate web of interrelations demonstrates how important it is to include the financial actors within the scope of the CSDDD and explicitly put obligations on them to firstly respect and uphold human rights and environmental standards and then to proactively engage with an effective due diligence mechanism to prevent, mitigate and/or bring an end to actual/potential human rights and environmental impact.

Therefore, I hope that the European Commission and the Parliament will hold strong positions and not cave in to the proposal by the Council to leave it up to the Member States whether or not to include the financial sector within the scope. Such a compromise would significantly hinder the effectiveness of the proposed Directive.

Rivista di diritto internazionale privato e processuale (RDIPP) No 4/2022: Abstracts

The fourth issue of 2022 of the *Rivista di diritto internazionale privato e processuale* (RDIPP, published by CEDAM) was just released. It features:

Christian Kohler, Honorary Professor at the University of Saarland, **Private International Law Aspects of the European Commission's Proposal for a Directive on SLAPPs ('Strategic Lawsuits Against Public Participation')**

> The Commission's proposal for a Directive on SLAPPs ('Strategic lawsuits against public participation') aims at protecting journalists and human rights defenders who engage in public debates from manifestly unfounded or abusive court proceedings with cross-border implications. *Inter alia*, it protects SLAPP defendants against judgments from third countries that would have been considered manifestly unfounded or abusive if they had been brought before the courts or tribunals of the Member State where recognition or enforcement is sought, and allows SLAPP defendants to seek compensation of the damages and the costs of the third country-proceedings before the courts of the Member State of his or her domicile. This article examines the conflicts rules in question and discusses the broader private international law context of the proposed Directive, in particular the rules of jurisdiction and the mosaic approach of the CJEU for the interpretation of Article 7(2) of Regulation Brussels Ia. In order to limit the forum shopping potential of the present rules on jurisdiction and applicable law in defamation cases, an intervention by the EU legislature should be envisaged.

Pietro Franzina, Professor at the Università Cattolica del Sacro Cuore, **Il contenzioso civile transnazionale sulla corporate accountability** (Cross-Border Civil Litigation on Corporate Accountability) [in Italian]

> Civil proceedings are brought with increasing frequency against corporations for allegedly failing to prevent or mitigate the adverse impact of their activity on the protection of human rights and the environment. Most of these proceedings are initiated by non-governmental organisations whose activity

consists in safeguarding or promoting the collective interests at issue, or otherwise benefit from support provided by such organisations. A cross-border element is almost invariably present in these proceedings, as they often involve persons from different countries and/or relate to facts which occurred in different States. Litigation in matters of corporate accountability is, distinctively, strategic in nature. The aim pursued by those bringing the claim does not consist, or at least does not only or primarily consist, in achieving the practical result that the proceedings in question are meant, as such, to provide, such as compensation for the prejudice suffered. Rather, the goal is to induce a change in the business model or industrial approach of the defendant (and, possibly, of other corporations in the same field or with similar characteristics) and increase the sustainability of their corporate activity at large. The paper gives an account of the factors that determine the impact of the described proceedings, that is, the ability of those proceedings to effectively prompt the pursued change. The analysis focuses, specifically, on the factors associated with the rules of private international law, chiefly the rules that enable the claimant to sue the defendant before the courts of one State instead of another. The purpose of the article is not to examine the latter rules in detail (actually, they vary to a large extent from one State to another), but to assess the strategic opportunities, in the sense explained above, that the rules in question may offer to the claimant, depending on their structure and mode of operation.

The following review and comments are also featured:

Lenka Válková, Researcher at the University of Milan, **The Commission Proposal for a Regulation on the Recognition of Parenthood and Other Legislative Trends Affecting Legal Parenthood**

The developments in science and changing family patterns have given rise to many problems, including those of non-recognition of parenthood, which affects mostly children of same-gender parents and children in cases of surrogacy. The basic drivers of the current difficulties in recognising parenthood lie in the differences of the national rules on the establishment and recognition of parenthood and the lack of the uniform conflict rules and rules on recognition of judgments in the area of parenthood. Despite the copious case law of CJEU and ECtHR, which plays a crucial role in allowing flexibility in law with regard to parenthood, there is still no legal instrument

which provides for a clear framework seeking to outline a consistent and systematic approach in this area. In 2021 and 2022, three important legislative actions have been taken. The Parenthood Proposal for a Regulation on jurisdiction, applicable law, recognition of decisions has been published on 7 December 2022. At the same time, the Final Report of the Experts Group on the Parentage/Surrogacy Project of the HCCH has been issued on 30 November 2022. Moreover, the Report on Review of the Implementation of the European Convention on the Legal Status of Children Born Out of Wedlock has been prepared in November 2021 as a preliminary step to a possible future update of the substantive law provisions of the Convention. All regulatory initiatives are addressed in this article, with a special focus on the Parenthood Proposal. In particular, this article offers a first appraisal of the Parenthood Proposal in light of other two legislative efforts and examines whether the works on international level may eliminate the need for an action concerning recognition of parenthood at EU level.

Stefano Dominelli, Researcher at the University of Genoa, **Emoji and Choice of Court Agreements: A Legal Appraisal of Evolutions in Language Methods through the Prism of Article 25 Brussels Ia Regulation**

Starting from the consideration that emoji and the alike are becoming increasingly common in computer-based communication, this article transposes current debates in material law surrounding emoji and their aptitude to express intent into the field of choice of court agreement through the prism of Art 25 Brussels Ia Regulation. The aim of this article is to develop some hypotheses and methods for the assessment of emoji in the conclusion of choice of court agreements.

Michele Grassi, Research fellow at the University of Milan, **Revocazione della sentenza civile per contrasto con la Convenzione europea per la salvaguardia dei diritti dell'uomo e delle libertà fondamentali** (Revocation of a Civil Judgment for Conflict with the European Convention for the Protection of Human Rights and Fundamental Freedoms) [in Italian]

This article comments on the recent reform of the Italian Code of Civil Procedure, with a specific focus on the introduction of the possibility to seek revocation of a civil judgment conflicting with a decision of the ECtHR. The possibility to re-open proceedings in breach of the ECHR was not

contemplated by the previous rules applicable to the matter, and the Italian Constitutional Court had excluded that the obligation of Contracting States to conform to the judgments of the ECtHR could imply the need to review national res judicata in civil or administrative law matters. Against this background, this article examines the new mechanism of review of national decisions introduced by the recent reform, pointing out that such mechanism has been designed to apply in limited circumstances and that, consistently with the reparatory perspective adopted by the Italian Constitutional Court, it gives little to no consideration to the obligation of cessation of international wrongful acts consisting in violations of human rights protected by ECHR.

This issue also features an account by *Silvia Favalli*, Researcher at the University of Milan, **Bellini c. Italia: Il Comitato ONU sui diritti delle persone con disabilità si pronuncia sulla situazione dei *caregiver* familiari in Italia** (*Bellini v. Italy:* The UN Committee on the Rights of Persons with Disabilities on the Situation of Family Caregivers in Italy) [in Italian].

Finally, this issue features the following book review by *Francesca C. Villata*, Professor at the University of Milan: Louise MERRETT, **Employment Contracts in Private International Law**, Oxford University Press, Oxford (2nd ed., 2022) pp. XXXII-329.

The standard of human rights review for recognition and enforcement of foreign judgments: ‘due satisfaction’ or ‘flagrant

denial of justice’?

Note on *Dolenc v. Slovenia* (ECtHR no. 20256/20, 20 October 2022)

by Denise Wiedemann, Hamburg

1. Facts and Holding

On 20 October 2022, the ECtHR issued a decision that provides guidance regarding the human rights review of recognition and enforcement decisions. The decision concerns the recognition of Israeli civil judgments by Slovenian courts. The Israeli judgments obliged Vincenc Vinko Dolenc, an internationally renowned neurosurgeon, to compensate a former patient for pecuniary and non-pecuniary damage in an amount equivalent to approximately 2.3 million euros (para. 22). Dolenc had performed surgery on the claimant, who was left severely disabled. After Slovenian courts recognized the Israeli judgments, Dolenc applied to the ECtHR. He contended that Slovenia had violated Art. 6(1) ECHR because it had recognized Israeli judgments that resulted from an unfair proceeding. Specifically, he argued that he had been unable to participate effectively in the trial in Israel because the Israeli court had refused to examine him and his witnesses by way of the procedure provided under the Hague Evidence Convention (para. 61).

The ECtHR found that the Slovenian courts had not examined the Israeli proceedings duly and had not given enough weight to the consequences that the non-examination of the witnesses had for the applicant’s right to a fair trial (para. 75). Therefore, the ECtHR unanimously held that Slovenia had violated Art. 6(1) ECHR.

2. Standard of Review

In its reasoning, the Court confirmed the standard of review that it had laid down in *Pellegrini v. Italy* (no. 30882/96, ECtHR 20 July 2001). In *Pellegrini*, the ECtHR found that Contracting States to the ECHR have an obligation to refuse recognition or enforcement of a foreign judgment if the defendant’s rights were violated during the adjudication of the dispute in the state of the judgment’s origin (para. 40). As in *Dolenc v. Slovenia*, the ECtHR in *Pellegrini* did not

examine whether the proceedings before the court of origin complied with Art. 6(1) of the Convention. Instead, the Court scrutinized whether the Italian courts, i.e. courts in the state of enforcement, applied a standard of review in reviewing the foreign judgment which was in conformity with Art. 6(1) ECHR. As regards the standard of review, the ECtHR required the Italian courts to 'duly satisfy' themselves that the proceedings in the state of the judgment's origin fulfilled the guarantees of Art. 6(1) ECHR (para. 40). Thus, when recognizing or enforcing a civil judgment from a non-Contracting State, Contracting States have to verify that the foreign proceedings complied with Art. 6(1) ECHR.

Yet, in respect of other issues, the ECtHR has limited the standard of review from due satisfaction to that of a 'flagrant denial of justice'. In the criminal law context, the ECtHR held in *Drozd and Janousek v. France and Spain* that Contracting States are obliged to refuse the enforcement of a foreign sentence only if 'it emerges that the conviction is the result of flagrant denial of justice' (para. 110). The same limited review has been applied to extradition cases (*Othman (Abu Qatada) v. the United Kingdom*) and to child return cases (*Eskinazi and Chelouche v. Turkey)*. A flagrant denial of justice is a breach that 'goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article.' (*Othman*, para. 260).

It has been argued that in cases regarding the recognition or enforcement of a foreign civil judgement, the review should likewise be limited because the fundamental rights violation in the state of recognition or enforcement would be only of an indirect nature (e.g. *Matscher*, 'Der Begriff des fairen Verfahrens nach Art. 6 EMRK' in Nakamura et al. (eds), Festschrift Beys, Sakkoulas, Athens 2003, pp. 989–1007, 1005). Contrary to this view, the ECtHR confirmed in *Dolenc v. Slovenia* the requirement of an unlimited review of the proceeding in the state of origin; the Court saw 'no reason to depart from the approach set out in *Pellegrini*' (§ 60).

The approach taken in *Pellegrini* and *Dolenc* is convincing with regard to Art. 1 ECHR, which obliges the Contracting States to fully secure all individuals' rights and freedoms. A deviation from the requirement set out in Art. 1 ECHR is not justified by the fact that recognition or enforcement of a decision issued in

violation of Art. 6(1) ECHR would only be of an indirect nature; rather, such a recognition or enforcement would exacerbate the violation and would, therefore, be in direct breach of the Convention. The ECtHR explained the restricted level of review in extradition and child return cases with the fact that, unlike in a recognition or enforcement situation, 'no proceedings concerning the applicants' interests [had] yet been disposed of' (see *Eskinazi and Chelouche v. Turkey*).

However, it is not obvious why the ECtHR applies different standards for the enforcement of foreign criminal judgments ('flagrant denial of justice') and the recognition or enforcement of foreign civil judgment ('due satisfaction'). Whereas Contracting States are not required to verify whether a foreign criminal proceeding was compatible with all the requirements of Art. 6(1) ECHR, they are obliged to do so when a foreign civil proceeding is at issue. In justifying the reduced effect of Art. 6(1) ECHR in criminal cases, the Court explained that a review of all the requirements of Art. 6(1) ECHR would 'thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned.' (*Drozd and Janousek v. France and Spain*, para. 110). Thus, the ECtHR seems to place greater importance on cooperation in criminal matters than on cooperation in civil matters. A reason is not apparent.

3. Situations Allowing for a More Limited Review

Despite the confirmation of *Pellegrini v. Italy* in *Dolenc v. Slovenia*, the ECtHR left open the possibility of a more limited review in certain civil recognition and enforcement cases. First, the *Pellegrini* case and the *Dolenc* case concerned judgments emanating from non-Contracting States. If, in contrast, the recognition or enforcement of a judgment from a Contracting State was at issue, debtors would be obliged to challenge violations of Article 6(1) ECHR in the state of the judgment's origin. If debtors fail to do so – e.g. if they miss the time limit for lodging a complaint at the ECtHR (Art. 35(1) ECHR) –, a further review in the state of enforcement would not be successful. Otherwise, procedural limits for human rights challenges would lose their preclusive effect.

Second, the ECtHR qualified *Pellegrini* as a case having 'capital importance' (para. 40) and *Dolenc* as a case of 'paramount importance to the defendant' (para.

60). While *Pellegrini* concerned a decision annulling a marriage, i.e. determining personal status, the foreign judgment in *Dolenc* caused serious financial and reputational damage to the applicant. However, it is questionable why a judgment for payment of a small amount of money should allow for a more limited review as Art. 1 ECHR does not differentiate between important and less important matters.

Finally, different standards would in any event apply to recognition and enforcement within the EU: In the case of recognition and enforcement under strict EU procedures (without the possibility of refusal), Member States benefit from the 'presumption of compliance' (*Sofia Povse and Doris Povse v. Austria*; *Avoti?š v. Latvia*). With this presumption, the ECtHR seeks to establish a balance between its own review powers vis-à-vis states and its respect for the activities of the EU. In cases with a margin of manoeuvre, in particular through the public policy clause, the ECtHR will not require the Member State of recognition or enforcement to 'duly satisfy' itself that the adjudication proceeding in the Member State of origin complied with Art. 6(1) ECHR. Rather, the ECtHR will assess only whether the application of the public policy clause has been 'clearly arbitrary' (*Royer v. Hungary*, para. 60).

The "Event Giving Rise to the Damage" under Art. 7 Rome II Regulation in CO2 Reduction Claims – A break through an empty Shell?

Written by Madeleine Petersen Weiner/Marc-Philippe Weller

In this article, we critically assess the question of where to locate the "event giving rise to the damage" under Art. 7 Rome II in CO_2 reduction claims. This

controversial – but often overlooked – question has recently been given new grounds for discussion in the much discussed "*Milieudefensie et al. v. Shell*" case before the Dutch district court in The Hague. In this judgment, the court had to determine the law applicable to an NGO's climate reduction claim against *Royal Dutch Shell*. The court ruled that Dutch law was applicable as the law of the place where the damage occurred under Art. 4 (1) Rome II and the law of the event giving rise to the damage under Art. 7 Rome II as the place where the business decision was made, *i.e.*, at the Dutch headquarters. Since according to the district court both options – the place of the event where the damage occurred and the event giving rise to the damage – pointed to Dutch law, this question was ultimately not decisive.

However, we argue that it is worth taking a closer look at the question of where to locate the event giving rise to the damage for two reasons: First, in doing so, the court has departed from the practice of interpreting the event giving rise to the damage under Art. 7 Rome II in jurisprudence and scholarship to date. Second, we propose another approach that we deem to be more appropriate regarding the general principles of proximity and legal certainty in choice of law.

1. *Shell* – the judgment that set the ball rolling (again)

The Dutch environmental NGO *Milieudefensie* and others, which had standing under Dutch law before national courts for the protection of environmental damage claims, made a claim against the *Shell* group's parent company based in the Netherlands with the aim of obliging *Shell* to reduce its CO_2 emissions. According to the plaintiffs, *Shell's* CO_2 emissions constituted an unlawful act. The Dutch district court agreed with this line of reasoning, assuming tortious responsibility of *Shell* for having breached its duty of care. The court construed the duty of care as an overall assessment of *Shell's*obligations by, among other things, international standards like the UN Guiding Principles of Human Rights Responsibilities of Businesses, the right to respect for the private and family life under Art. 8 ECHR of the residents of the Wadden region, *Shell's* control over the group's CO_2 emissions, and the state's and society's climate responsibility etc. This led the district court to ruling in favor of the plaintiffs and ordering *Shell* to reduce its greenhouse gas emissions by 45% compared to 2019.

In terms of the applicable law, the court ruled that Dutch law was applicable to the claim. The court based its choice of law analysis on Art. 7 Rome II as the

relevant provision. Under Art. 7 Rome II, the plaintiff can choose to apply the law of the event giving rise to the damage rather than the law of the place where the damage occurred as per the general rule in Art. 4 (1) Rome II. The court started its analysis by stating that "climate change, whether dangerous or otherwise, due to CO_2 emissions constitutes environmental damage in the sense of Article 7 Rome II", thus accepting without further contemplation the substantive scope of application of Art. 7 Rome II.

The court went on to find that the adoption of the business policy, as asserted by the plaintiffs, was in fact "an independent cause of the damage, which may contribute to environmental damage and imminent environmental damage with respect to Dutch residents and the inhabitants of the Wadden region". The court thereby declined *Shell's* argument that *Milieudefensie's* choice pointed to the law of the place where the actual CO_2 emissions occurred, which would lead to a myriad of legal systems due to the many different locations of emitting plants operated by *Shell*.

2. The enigma that is "the event giving rise to the damage" to date

This line of reasoning marks a shift in the way "the event giving rise to the damage" in the sense of Art. 7 Rome II has been interpreted thus far. To date, there have been four main approaches: A broad approach, a narrower one, one that locates the event giving rise to the damage at the focal point of several places, and one that allows the plaintiff to choose between several laws of events which gave rise to the damage.

(1.) The Dutch district court's location of the event giving rise to the damage fits into the broad approach. Under this broad approach, the place where the business decision is made to adopt a policy can qualify as a relevant event giving rise to the damage. As a result, this place will usually be that of the effective headquarters of the group. On the one hand, this may lead to a high standard of environmental protection as prescribed by recital 25 of the Rome II Regulation, as was the case before the Dutch district court, which applied the general tort clause Art. 6:162 BW. On the other hand, this may go against the practice of identifying a *physical* action which *directly* leads to the damage in question, rather than a purely internal process, such as the adoption of a business policy.

(2.) Pursuant to a narrower approach, the place where the direct cause of the

violation of the legal interest was set shall be the event giving rise to the damage. In the case of CO_2 reduction claims, like *Milieudefensie et al. v. Shell*, that place would be located (only) at the location of the emitting plants. This approach – while dogmatically stringent – may make it harder to determine responsibility in climate actions as it cannot necessarily be determined which plant led to the environmental damage, but rather the emission as a whole results in air pollution.

(3.) Therefore, some scholars are in favor of a focal point approach, according to which the event giving rise to the damage would be located at the place which led to the damage in the most predominant way by choosing one focal point out of several events that may have given rise to the damage. This approach is in line with the prevailing opinion regarding jurisdiction in international environmental damage claims under Art. 7 Nr. 2 Brussels I-*bis* Regulation. In practice, however, it may sometimes prove difficult to identify one focal point out of several locations of emitting plants.

(4.) Lastly, one could permit the victim to choose between the laws of several places where the events giving rise to the damage took place. However, if the victim were given the option of choosing a law, for example, of a place that was only loosely connected to the emissions and resulting damages, Art. 7 Rome II may lead to significantly less predictability.

3. Four-step-test: A possible way forward?

Bearing in mind these legal considerations, we propose the following interpretation of the event giving rise to the damage under Art. 7 Rome II:

First, as a starting point, the laws of the emitting plants which *directly* lead to the damage should be considered. However, in order to adequately mirror the legal and the factual situations, the laws of the emitting plants should only be given effect insofar as they are responsible for the total damage.

If there are several emitting plants, some of which are more responsible for greenhouse gas emissions than others, these laws should only be invoked under Art. 7 Rome II for the *portion of their responsibility regarding the entire claim*. This leads to a *mosaic approach* as adopted by the CJEU in terms of jurisdiction for claims of personality rights. This would give an exact picture of contributions to the environmental damage in question and would be reflected in the applicable

law.

Second, in order not to give effect to a myriad of legal systems, this mosaic approach should be slightly moderated in the sense that courts are given the opportunity to make estimations of proportions of liability in order not to impose rigid calculation methods. For example, if a company operates emitting plants all over the world, the court should be able to roughly define the proportions of each plant's contribution, so as to prevent potentially a hundred legal systems from coming into play to account for a percentile of the total emissions.

Third, as a fall-back mechanism, should the court not be able to accurately determine each plant's own percentage of responsibility for the total climate output, the court should identify the central place of action in terms of the company's environmental tort responsibility. This will usually be at the location of the emitting plant which emits the most CO_2 for the longest period of time, and which has the most direct impact on the environmental damage resulting from climate change as proclaimed in the statement of claim.

Fourth, only as a *last resort*, should it not be possible to calculate the contributions to the pollution of each emitting plant, and to identify one central place of action out of several emitting plants, the event giving rise to the damage under Art. 7 Rome II should be located at the place where the *business decisions* are taken.

This proposal is discussed in further detail in the upcoming Volume 24 of the Yearbook of Private International Law.

Serving Defendants in Ukrainian Territory Occupied by Russia

Jeanne Huang

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Both Russia and Ukraine are member states of the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention (HSC)). After Russia occupied the Autonomous Republic of Crimea and its capital city, Sevastopol, and exercised control over certain areas of Ukraine (the "Occupied Areas"), Ukraine filed a declaration ("Ukraine's Declaration on Crimea") under the HSC. It states that, as a result of Russia's occupation, implementing the HSC in the Occupied Areas is limited, that the procedure for service and relevant communication is determined by the Central Authority of Ukraine, and that documents or requests issued by the Russian and related illegal Authorities in the Occupied Areas are null and void and have no legal effect.

In 2016, Russia declared ("Russia's Declaration on Crimea") that Ukraine's Declaration on Crimea is based on "a bad faith and incorrect presentation and interpretation of facts and law" under the HSC and other Hague Conventions. Thus far, Estonia, Finland, Germany, Latvia, Lithuania, and Poland have each made declarations supporting Ukraine's and announcing that they will not engage in any direct interaction with the Authorities in the Occupied Areas and will not accept any documents or requests emanating from or through such Authorities. The conflicting Declaration made by Ukraine and Russia, respectively, brings challenges for serving a defendant residing in the Occupied Areas—the scope of which has expanded during the recent military conflict—in civil and commercial cases when the defendant neither appoints an agent in the forum nor waives service. On one hand, neither Ukraine nor Russia permit service by postal channels (mail) under HSC Article 10(a). On the other, service via the Ukrainian Central Authority in the Occupied Areas is unguaranteed as indicated in Ukraine's Declaration on Crimea; however, Ukraine and its supporting states do not recognize service conducted by the Russian Central Authority. A practical question for litigators is how to conduct service of process in the Occupied Areas?

This post suggests that the legal effects of service conducted by the Russian Central Authority under the HSC on a defendant in the Occupied Areas should be recognized for two reasons. Firstly, the Ukraine and its supporting states' declarations under the HSC are interpretative declarations rather than reservations (the same is true of the Russian declaration). Secondly, the Namibia Exception can provide certainty and predictability for litigators in international civil and commercial cases and should be applied to service conducted by the

Russian Central Authority in the Occupied Areas.

Legal Dilemmas for the HSC

The competing declarations on Crimea do not identify the HSC provision pursuant to which they are made, nor do they specify the provisions whose legal effect they purport to modify. Arguably, no provision of HSC provides a legal basis for either declaration on Crimea.

1. Provisions for the Designation and Function of a Central Authority

Ukraine's Declaration on Crimea provides that documents or requests made by Russia or a related authority in the Occupied Areas are void. HSC Articles 2–17 do not provide a basis for the declaration, because the purported invalidity of service conducted by the Russian Central Authority does not directly relate to the designation or function of the Ukrainian Central Authority. It is also likely beyond the scope of HSC Article 18, which allows each contracting state to designate other Authorities and determine their competence. A counterargument may be that Russia's invasion violated Ukraine's sovereignty, so Ukraine can invoke Article 18 and claim that Russia and relevant local authorities are illegal and that the documents or requests issued by them are void. Ukraine's territorial sovereignty over the Occupied Areas is, however, an incidental question to the validity of the documents or requests issued by Russia and the relevant local authorities. Importantly, the HSC does not contain a compromissory clause. This distinguishes it from treaties such as the United Nations Convention on the Law of the Sea under which, in some circumstances, tribunals can determine incidental questions "when those issues must be determined in order for the . . . tribunal to be able to rule on the relevant claims."

For the same reasons, Russia's Declaration on Crimea lacks a clear basis in HSC Articles 2-18.

2. Provision for Dependent Territories

Article 29 allows a state to extend the application of the HSC to territories "for the international relations of which [the declaring state] is responsible." The meaning of this language is not clear. Article 56(1) of the European Convention on Human Rights (ECHR) includes a similar phase. Article 56(1) is the so-called "colonial clause," which prevents the automatic application of the ECHR to non-metropolitan territories and empowers a metropolitan state to declare its

application. In 1961, the European Commission extended Article 56(1) to "dependent territories irrespective of domestic legal status." The concept of dependent territories under the ECHR has been defined by almost exclusive deference to a member state's unilateral Article 56(1) declaration. In Quark Fishing Ltd. v. United Kingdom, for example, Protocol No. 1 was held inapplicable to a fishing vessel under a Falklands flag because the UK declaration only extended the ECHR, not Protocol No. 1, to islands that belonged to Falkland Islands (Islas Malvinas) Dependencies.

However, the ECHR's deferential approach should not apply to HSC Article 29. Argentina is not a member state of the ECHR and the court in Quark Fishing relied on the fact that there was no dispute that the islands were a "territory" within the meaning Article 56(1). As an HSC member state, however, Argentina declared its opposition to the UK's extension of the HSC to the Falkland Islands, relying on a UN resolution noting a dispute between the two states about sovereignty over the islands. Due to the unclear relationship between Article 29 and international law on the occupation or succession of territories, Article 29 may not serve as a legal basis for the Declarations on Crimea.

Legal Effect of the Declarations

The Vienna Convention on the Law of Treaties (VCLT) and the Guide to Practice on Reservations to Treaties adopted by the International Law Commission divide declarations formulated by a state under a treaty into reservations and interpretative declarations. A reservation is intended to exclude or modify the legal effect of certain provisions of a treaty, while an interpretative declaration is purported to specify or clarify their meaning or scope. Putting aside whether they are affirmatively authorized by the HSC, the Declarations on Crimea should be presumptively permissible. This is because reservations are generally permissible unless an exception under the VCLT is triggered, so interpretative declarations should also be presumptively permissible.

The Declarations on Crimea are best understood as interpretative declarations for the following reasons.

First, the question of territorial application is not part of the functioning ratione materiae of the HSC. The subject matter of the Convention is service. HSC Article 29 allows member states to determine the territorial application of the Convention, suggesting that the Convention does not require its application to be

extended to the entire territory of a member state.

Second, a declaration purporting to exclude or extend the application of a treaty as a whole to all or part of its territories without modifying its legal effect is not a reservation. The contents of the respective Declaration on Crimea made by Russia and Ukraine show that both countries seek to clarify the application of the HSC as a whole to the Occupied Areas.

Third, none of the declarants explicitly indicates that the Declaration on Crimea is a condition for them to ratify or continue as a member of the HSC. Consequently, they are not conditional interpretative declarations that should be treated as reservations.

Finally, a reservation would modify the legal effect of the HSC, applying between the reserving state and another state if the latter has not objected within twelve months after it was notified, which is not the case here. It is impossible for other state to tacitly accept the conflicting declarations.

Therefore, because the Declaration on Crimea made by Ukraine, its supporting states, and Russia, respectively, are interpretative declarations rather than reservations, they do not exclude or modify the legal effect of the HSC. Neither do they alter the treaty relations between the declarants and the majority of HSC member states that have not expressed a view on these Declarations.

The Namibia Exception

The VCLT does not provide a timeline for a state to accept another state's interpretative declaration. However, private parties in international litigation require certainty about service of process in Ukraine under the HSC. The courts of HSC member states should not recognize only the Ukrainian Central Authority for service in Occupied Areas just because their governments are politically aligned with Ukraine. Instead, for the reasons set out below, the Namibia Exception protecting the rights and interests of people in a territory controlled by non-recognized government should be extended to service conducted by the Russian Central Authority and local authorities in the Occupied Areas under the HSC.

The "Namibia Exception" comes from the Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution case. That decision provides that the non-recognition of a state's

administration of a territory due to its violation of international law should not result in depriving the people of that territory of any advantages derived from international cooperation. The courts of HSC member states should recognize not only the Ukrainian Central Authority for service in the Occupied Areas, but also service conducted by the Russian Central Authority and local authorities in the Occupied Areas under the HSC.

First, service under the HSC concerns private rights. Service of process aims to ensure that a defendant is duly informed of a foreign litigation against it. When the defendant resides in the Occupied Areas, service conducted by the Russian Central Authority under the HSC should belong to the realm of the de facto government. Recognizing the conduct of de facto government does not necessarily lead to de jure recognition (e.g., Luther v. Sagor [1921] 3 KB 532 (Can.)).

Second, service through the Russian Central Authority is the only realistic way to serve a defendant in the Occupied Areas who has no agents in a foreign forum, given that Ukraine made a reservation on service by postal channels under HSC Article 10. Ukraine might be advised to withdraw this reservation during war time.

Third, non-recognition of service conducted by the Russian Central Authority in the Occupied Areas would lead to unjust consequences for Ukrainian people in the Occupied Areas who have to comply with the Russian legal order.

A concern is that applying the Namibia Exception to service of process conducted by the Russian Central Authority may harm Ukrainians in the Occupied Area when they are likely not in a position to defend themselves in a court in the United States, China or other foreign countries. The concern is not a good reason to reject the Namibia Exception because it can be addressed by the foreign courts using legal aids, remote hearing, forum non convenience, temporary stay, or other case management methods.

Recommendations for HSC Member States

The HSC Special Commission is a group of experts designated by member states to discuss issues with the practical operation of the Convention. It has issued recommendations for HSC member states regarding the meaning of “civil or commercial matters”, service by electronic means, and other matters. It should

publish a recommendation to assist member states in adopting a consistent response to the conflicting Declarations on Crimea.

The legal nature of Ukraine's and Russia's Declarations on Crimea are different. Ukraine's Declaration on Crimea is an amplifying interpretative declaration, which intends to address new events not covered by a treaty. Russia's invasion created such an event: the Ukrainian Central Authority can no longer effectuate service in the Occupied Areas. In contrast, Russia's Declaration on Crimea is an interpretation contra legem. This is because Russia's occupation of Ukraine violated international law on the prohibition of the unlawful use of force, which is contrary to the principle of good faith. Although states are free to decide whether to acknowledge Russia's interpretation contra legem, the International Court of Justice has rendered a decision condemning Russia's invasion of Ukraine. Although it does not bind all states, it shows that the international community considers the invasion as a violation of international law. The Special Commission should take this opportunity to assist member states in adopting consistent approaches to apply the HSC to serve defendants in Ukrainian territory occupied by Russia.

See Full text here

LEX & FORUM Vol. 3/2022

This editorial has been prepared by **Prof. Paris Arvanitakis,** Aristotle University of Thessaloniki, Greece.

The European Regulations of Private and Procedural International Law are part of an enclosed legislative system. Since the early stages of European integration, third countries, and in particular the USA, had expressed their objections concerning the European integration process, questioning whether it reflects

a “nationalistic” character, certainly not in the sense of ethnocentric provisions, since the European legislator had chosen the domicile instead of citizenship as the fundamental ground of jurisdiction from the beginning, but mostly because European law applied extreme provisions, such as the exorbitant jurisdiction, only against persons residing outside the EU, as well as the inability of third countries to make use of procedural options provided to member states (see *Kerameus*, Erweiterung des EuGVÜ-Systems und Verhältnis zu Drittstaaten, Studia Juridica V, 2008, pp. 483 ff., 497). However, the EU never intended a global jurisdictional unification. It simply envisioned a regional legislative internal harmonization in favor of its member states. Like any regional unification, EU law involves discriminatory treatment against those who fall outside its scope. But even when the EU regulates disputes between member states and third countries (for example, the Rome Regulations on applicable law), it does so, not to bind third countries to EU law -nor it could do so-, but to avoid divergent solutions among its member states in their relations with third countries. ?owever, as the issue on the relationship between European Regulations and third countries continues to expand, a precise demarcation of the boundaries of application of European rules, which often differ even within the same legislative text, acquires practical importance.

The “Focus” of the present issue intends to highlight these discrepancies, as well as the corresponding convergences between European Regulations of Private / Procedural International Law and third countries. During an online conference on this topic, which took place on the 29th of September 2022, we had the great honor to host a discussion between well-known academics and leading domestic lawyers, who have dealt with this topic in depth. We had the honor to welcome the presentations of: Ms. *Astrid Stadler,* Professor of Civil Law, Civil Procedure, Private International and Comparative Law at the University of Konstanz/Germany, who presented a general introduction on the topic (‘Ein Überblick auf die Drittstaatenproblematik in der Brüssel Ia VO’); Mr. *Symeon Symeonides,* a distinguished Professor of Law, at the Willamette University USA, , who presented an extremely interesting analysis on ‘An Outsider’s View of the Brussels Ia, Rome I, and Rome II Regulations’; Dr. *Georgios Safouris,* Judge and Counselor of Justice of Greece at the Permanent Greek Representation in the EU, , , who examined the application of the Brussels Ia and Brussels IIa Regulations in disputes with third countries, from the lens of the CJEU jurisprudence; Mr. *Nikitas Hatzimichael* ,Professor at the Law Department of the University of

Cyprus, , who developed the important doctrinal issue of the exercise of judge's discretion in the procedural framework of the European Regulations in relation to third countries; Ms. *Anastasia Kalantzi*, PhD Candidate at the Aristotle University of Thessaloniki who dealt with the key issue of European lis pendens rules and third countries; and, finally Mr. *Dimitrios Tsikrikas*, Professor of Civil Procedure at the University of Athens, who developed the fundamental issue of the legal consequences of court judgments vis-à-vis third countries. On the topic of the relations between European Regulations and third countries, the expert opinion of the author of this editorial is also included in the present issue, focusing on multi-party disputes in cases where some of the defendants are EU residents and others residents of a third country.

In the "Praefatio", Mr. *Nikolaos Nikas,* Emeritus Professor at the Faculty of Law of the Aristotle University of Thessaloniki presents his thoughts on what is the "*next stage on the path to European procedural harmonization: the digitization of justice delivery systems*". In the part of the jurisprudence, two recent judgments of the CJEU are presented: the decision No C-572/21 (CC/VO) regarding international jurisdiction on parental responsibility, when the usual residence of the child was legally transferred during the trial to a third state, that is a signatory to the 1996 Convention, , with a comment by the Judge Mr. *I. Valmantonis*, and the important decision No C-700/20 (London Steam/Spain), which is analyzed by Mr. *Komninos Komnios*, Professor at the International Hellenic University, ("Arbitration and Brussels Ia Regulation: Descent of the 'Spanish Armada' in the English legal order?"). Regarding domestic jurisprudence, the present issue includes the Supreme Court judgment No. 1181/2022, which demonstrates the incompatibility of the relevant provision of the new Greek CPC on service abroad with EU and ECHR rules, with a case comment by the undersigned, as well as a judgment of the County Court of Piraeus (73/2020), regarding the binding nature of the parties' request for an oral presentation in the European Small Claims procedure, with a comment by Judge Ms. *K. Chronopoulou*. Finally, interesting issues of private international law on torts are also highlighted in the decisions of the Athens First Instance Court No 102/2019 and No 4608/2020, commented by Dr. *N. Zaprianos*.

Lex & Forum renews its scientific appointment with its readers for the next (eighth) issue, focusing on family disputes of a cross-border nature.

The French Project for a Private International Law Code – a Debate at the Comité Français

Comité Français
DE DROIT INTERNATIONAL PRIVE

ORDRE DES AVOCATS AU CONSEIL D'ÉTAT ET À LA COUR DE CASSATION

CHAMBRE DES NOTAIRES DE PARIS

LE PROJET DE CODE DE DROIT INTERNATIONAL PRIVE

VENDREDI 21 OCTOBRE 2022 14h – 18h30

Amphithéâtre de l'Institut de droit comparé

by *Ilaria Pretelli*

On Friday October 21 the Comité français de droit international privé held a special session devoted to the last and possibly final version of the project of code of private international law. As such, the project consists of 207 articles divided into 6 books: general rules, special rules, procedure, recognition and enforcement of foreign acts and judgments, provisional and protective measures, transitional provisions.

The session was held "à huis clos" with the discussion among members stimulated by foreign guests specially invited to have a perspective from abroad. Not surprisingly, due weight was given to Switzerland and Belgium, as the former is considered to have a model legislation on the discipline and the latter has the

"youngest" statute of continental Europe. Marc Fallon underlined the very different circumstances in which the Belgian legislation was constructed, since it came from a private initiative of Belgian academics, only at a later stage submitted to the Belgian legislator. The opposite path has led to the drafting of the French project, which stems directly from an initiative of the Ministry of Justice. In France, this project is the fourth in time after those by Niboyet (1950), Batiffol (1959) and Foyer (1967). If successful, it will bring to an end the essentially doctrinal and jurisprudential character of French private international law. These traditional characteristics of French private international law were recalled by Pierre Mayer in an already nostalgic note. Andrea Bonomi offered both a Swiss and European perspective, with laudatory remarks on the main innovations of the project: the codification of rules on procedure and on procedural measures, and the codification of the "méthode de la reconnaissance". Reference is thereby made to the renowned French theory which has developed Picone's observations on the opportunity of recognising the competence of a legal order (l'ordinamento competente) as a whole to decide a cross-border issue, instead of applying such a foreign order's rules to decide the same cross-border issue within the forum. This method (or methods, according to subsequent works of the author of the theory, Pierre Mayer), is gaining importance in contemporary practice. On the one hand, the increasing mobility of citizens raises the number of conflicts of laws and creates an appetite for hard and fast solutions. A method allowing to displace the discussion from substance to competence of the authority serves this need. In addition, it is particularly welcome in the EU, where it is coherent with the prevalence of the evaluations of the "country of origin".

Other rules applauded by the audience were those on public policy and fraude à la loi, although regret was expressed over the fact that these well-known denominations are not mentioned in the corresponding rules (Articles 11 and 12). The rule on public policy is among the many of the project that reveals a constant attention by the drafters to coordinate national rules with the European ones: it explicitly grants a role to the "European notion of public policy".

Possibly the most controversial rules are those on filiation resulting from IVF with a donor and on surrogacy (Articles 62 and 63). In this respect, the project breaks with French precedent and adopts a solution based on the respect of the legitimate expectations of donors, intended parents and the gestational mother: the *lex loci actus*.

According to the drafters, legal certainty for all parties involved points to the application of the law of the country in which assisted reproductive technology (ART) was performed or surrogacy was agreed by contract and implemented. These rules represent an exception to the general ones (Article 59), which point to the law of the child's citizenship at the moment of birth. Article 62 seems to be of limited utility, since it merely confirms that French clinics need to follow French law and vice versa. However, as regards the filiation of children born with the employment of a donor by means of an IVF performed in a foreign fertility clinics, the applicable law will depend on the place of birth. If the latter is in France, the presumptions of paternity of French domestic law will apply in the first place. The scope of application of the foreign law of the country in which the clinic is based will thus be limited to the aspects related to the right of the child to have access to information regarding the donor. In addition, the *lex loci actus* would open the French border to reproductive tourism and, in so doing, would create the conditions to prevent the need of further strategic litigation before the ECHR in order to decriminalise surrogacy. Some critical voices have observed that the present domestic and international context are too fragile for such a solution to be welcome. The inherent risk is that the advancement in a wider recognition of "a right to parenthood", including "parenthood for all" may increase existing divisions and undermine the credibility of the universal character of the principle of non-discrimination.

Divisions also exist as regards the timeliness of the code. Paul Lagarde raised his authoritative voice, in the columns of the last issue of the Revue critique, against the very idea of devoting energies to a national code of private international law. The engagement for the French code reveals, he argued, the availability of resources that could have been better employed to contribute to the drafting of a comprehensive code of European private international law based on the numerous existing regulations.

The four panels of the debate allowed a comprehensive analysis:

1. structure of the code, articulation of sources, general rules of choice of law (chaired by Marie-Laure Niboyet)
2. Procedure, Effect of foreign judgments and public acts (chaired by Jean-Pierre Rémery)
3. Roundtable on family law
4. Ccompany law – collective labor law (chaired by Etienne Pataut).

All distinguished participants engaged in the rich and deep discussion triggered by the analysis of the project are looking forward to future arenas where the debate can continue.

Second Issue of Journal of Private International Law for 2022

The second issue of *Journal of Private International Law* for 2022 was released today. It features the following interesting articles:

T Kruger *et. al.,* Current-day international child abduction: does Brussels IIb live up to the challenges?

Regulation 2019/1111 tries to tackle the new challenges arising from societal changes and legal developments in international child abduction. The result is a sophisticated set of rules centred on the child and aimed at enhancing their protection. The Regulation provides for the hearing of the child and for speedy and efficient proceedings. In it the EU acknowledges its role in the protection of human and children's rights and sets goals towards de-escalating family conflicts. The new EU child abduction regime is at the same time more flexible than its predecessor allowing consideration of the circumstances characterising each single case in the different stages of the child abduction procedure

O Vanin, Assisted suicide from the standpoint of EU private international law

The article discusses the conflict-of-laws issues raised by such compensatory claims as may be brought against health professionals and medical facilities involved in end-of-life procedures. The issues are addressed from the standpoint of EU private international law. The paper highlights the lack of international legal instruments on assisted-suicide procedures. It is argued that the European Convention on Human Rights requires that States provide a clear legal framework concerning those procedures. The author contends that the said obligation has an impact on the interpretation of the relevant conflict-of-laws provisions of the EU.

S Avraham-Giller, The court’s discretionary power to enforce valid jurisdiction clauses: time for a change?

The paper challenges the well-rooted principle in the Anglo-American legal tradition that courts have discretion whether they should enforce a valid jurisdiction clause. The paper highlights the ambiguity and uncertainty that accompany this discretionary power, which raises a serious analytical problem. The paper then analyses two factors that shaped this discretionary power – jurisdictional theories and the general principle of party autonomy in contracts. Based on the analysis, the paper argues that the time has come to end the courts’ discretionary power with respect to the limited context of the enforcement of valid jurisdiction clauses. The proposal relies on a number of foundations: contractual considerations that relate to autonomy and efficiency; jurisdictional and procedural considerations, including the consent of a party to the jurisdiction of the court by general appearance; the increasing power of parties to re-order procedure; the more appropriate expression of the forum’s public interests and institutional considerations through overriding mandatory provisions; and finally the legal position regarding arbitration agreements and the willingness of a common law legal system such as the United Kingdom to accede to the Hague Convention on Choice of Court Agreements.

TT Nguyen, Transnational corporations and environmental pollution in Vietnam – realising the potential of private international law in environmental protection

Many transnational corporations have been operating in Vietnam, contributing to economic and social development in this country. However, these actors have caused a number of high-profile environmental incidents in Vietnam through the activities of their local subsidiaries, injuring the local community and destroying the natural ecosystem. This paper discloses the causes of corporate environmental irresponsibility in Vietnam. Additionally, this paper argues that Vietnam’s private international law fails to combat pollution in this country. To promote environmental sustainability, Vietnam should improve ex-ante regulations to prevent and tackle ecological degradation effectively. Additionally, this paper suggests that Vietnam should remedy its national private international

law rules to facilitate transnational liability litigation as an ex-post measure to address the harmful conducts against the natural ecosystem of international business.

D Levina, Jurisdiction at the place of performance of a contract revisited: a case for the theory of characteristic performance in EU civil procedure

The article revisits jurisdiction in the courts for the place of performance of a contract under Article 7(1) of the Brussels Ia Regulation. It proposes a new framework for understanding jurisdiction in contractual matters by offering a comparative and historical analysis of both the place of performance as a ground for jurisdiction and its conceptual counterpart, the place of performance as a connecting factor in conflict of laws. The analysis reveals that jurisdiction in the courts for the place of performance is largely a repetition of the same problematic patterns previously associated with the place of performance as a connecting factor. The article asserts that the persisting problems with Article 7(1) of the Brussels Ia Regulation are due to the inadequacy of the place of performance as a ground for jurisdiction and advocates for the transition to the theory of characteristic performance in EU civil procedure.

T Bachmeier and M Freytag, Discretional elements in the Brussels Ia Regulation
Following continental European traditions, the Brussels Ia Regulation forms a rigid regime of mandatory heads of jurisdiction, generally not providing jurisdictional discretion. Nonetheless, to some limited extent, the Brussels regime includes discretional elements, in particular when it comes to lis pendens (see Articles 30, 33 and 34 of Brussels Ia). Reconsidering the strong scepticism towards forum non conveniens stipulated by the CJEU in its Owusu case, the fundamental question arises whether a substantial form of discretion concerning jurisdictional competence might be (in)compatible with the core principles of the Brussels regime.

P Mostowik and E Figura-Góralczyk, *Ordre public* and non-enforcement of judgments in intra-EU civil matters: remarks on some recent Polish-German cases
The article discusses the enforcement of foreign judgments within the European Union and the public policy (ordre public) exception. It is mainly focused on some recent judgments of Polish and German courts. On 22nd December 2016 and 23rd of March 2021 rulings in cases of infringement of personality rights were issued

by the Court of Appeal in Cracow (ordering an apology and correction). The enforcement of the former ruling was dismissed by the German Supreme Court (Bundesgerichtshof, BGH) (IX ZB 10/18) on 19th July 2018. The non-enforcement was justified by invoking German ordre public and "freedom of opinion" as a constitutional right stipulated in Article 5 of the German Constitution (Grundgesetz). A reference to the CJEU ruling of 17 June 2021 is also presented.

After presenting the issue of ordre public in the context of enforcement of foreign judgments within the EU, the authors evaluate as questionable the argumentation of the BGH in its 2018 judgment. The Polish ruling ordering the defendant to correct and apologise for the false statement was included by the BGH in the category of "opinion" (Meinung) protected by the German Constitution. Enforcement of the judgment of the Polish court in Germany was held to be contrary to this German constitutional right and the enforceability of the Polish judgment was denied as being manifestly contrary to German public policy.

The authors support the functioning of the ordre public clause in intra-EU relations. It is justified inter alia by the large differences in EU legal systems and future possible changes. However, the common standards of the ECHR should be particularly taken into consideration when applying the public policy clause, because they co-shape the EU legal systems.

Today the Russian Federation ceases to be a High Contracting Party to the European Convention on Human Rights

Today (16 September 2022) the Russian Federation has ceased to be a High Contracting Party to the European Convention on Human Rights (ECHR). This

means, *inter alia*, that applications against the Russian Federation will no longer be entertained by the European Court of Human Rights (ECtHR).

However, the Resolution of the ECtHR of 22 March 2022 clarified that "The Court remains competent to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention provided that they occurred until 16 September 2022." To view the full resolution, click here. The news item is available here.

The Russian Federation had ceased to be a member of the Council of Europe on 16 March 2022. See here.

We have previously reported on the increasing interaction between the ECHR and Private International Law. This is particularly so in surrogacy and international child abduction cases. See for example a judgment regarding international child abduction rendered by the ECtHR earlier this year, where no violation of article 8 of the ECHR was found against Russia: Case of P.D. v. Russia (Application no. 30560/19). But see Thompson v. Russia (Application no. 36048/17) where a violation of article 8 of the ECHR was indeed found.

For more information about this interaction, click here.

Undoubtedly, today is a sad day for human rights law.