Ruth Bader Ginsburg and the Conflict of Laws

by Tobias Lutzi, University of Cologne

Since the sad news of her passing, lawyers all around the world have mourned the loss of one of the most iconic and influential members of the legal profession and a true champion of gender equality. Through her work as a scholar and a justice, just as much as through her personal struggles and achievements, Ruth Bader Ginsburg has inspired generations of lawyers.

On top of being a global icon of women's rights and a highly influential voice on a wide range of issues, Ginsburg has also expressed her views on questions relating to the interaction between different legal systems, both within the US and internationally, on several occasions. In fact, two of her early law-review articles focus entirely on two perennial problems of private international law.

Accordingly, readers of this blog may enjoy to go through some of her writings in this area, both judicial and extra-judicial, in an attempt to pay tribute to her work.

Jurisdiction

In one of Ginsburg's earliest publications, *The Competent Court in Private International Law: Some Observations on Current Views in the United States* (20 (1965) Rutgers Law Review 89), she retraces the approach to the adjudication of persons outside the forum state in US law by reference to both the common law and continental European approaches. She argues that

> *[t]he law in the United States has […] moved closer to the continental approach to the extent that a relationship between the defendant or the particular*

> *litigation and the forum, rather than personal service, may function as the basis of the court's adjudicatory authority.*

Ginsburg points out, though, that each approach includes 'exorbitant' bases of judicial competence, which 'provide for adjudication resulting in a personal judgment in cases in which there may be no connection of substance between the litigation and the forum state.'

> *Bases of judicial competence found in the internal laws of certain continental states, but generally considered undesirable in the international sphere, include competence founded exclusively on the nationality of the plaintiff – for example, Article 14 of the French Civil Code – and competence (to render a personal judgment) based on the mere presence of an asset of the defendant when the claim has no connection with that asset-a basis found in the procedural codes of Germany, Austria, and the Scandinavian countries. Equally undesirable in the view of continental jurists is the traditional Anglo-American rule that personal service within the territory of the forum confers adjudicatory authority upon a court even in the case of a defendant having no contact with the forum other than transience*

The 'most promising currently feasible remedy' for improper use of these 'internationally undesirable' bases of jurisdiction, she argues, is the doctrine of *forum non conveniens*.

> *At the least, a plaintiff who chooses such a forum should be required to show some reasonable justification for his institution of the action in the forum state rather than in a state with which the defendant or the res, act or event in suit is more significantly connected.*

Applicable Law

As a Supreme Court justice, Ginsburg also had numerous opportunities to rule on conflicts between federal and state law.

In *Honda Motor Co v Oberg* (512 U.S. 415 (1994)), for instance, Ginsburg dissented from the Court's decision that an amendment to the Oregon Constitution that prevented review of a punitive-damage award violated the Due

Process Clause of the federal Constitution, referring to other protections against excessive punitive-damage awards in Oregon law. In *BMW of North America, Inc v Gore* (517 US 559 (1996)), she dissented from another decision reviewing an allegedly excessive punitive-damages award and argued that the Court should 'resist unnecessary intrusion into an area dominantly of state concern.'

According to Paul Schiff Berman (who provided a much more complete account of Ginsburg's relevant writings than this post can offer in *Ruth Bader Ginsburg and the Interaction of Legal Systems* (in Dodson (ed), *The Legacy of Ruth Bader Ginsburg* (CUP 2015) 151)), her 'willingness to defer to state prerogatives in interpreting state law […] may surprise those who focus on Justice Ginsburg's Fourteenth Amendment jurisprudence in gender-related cases.'

The same deference can also be found in some of her writings on the interplay between US law and other legal systems, though. In a speech to the International Academy of Comparative Law, she argued in favour of taking foreign and international experiences into account when interpreting US law and concluded:

> *Recognizing that forecasts are risky, I nonetheless believe the US Supreme Court will continue to accord "a decent Respect to the Opinions of [Human]kind" as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being […] require trust and cooperation of nations the world over. And humility because, in Justice O'Connor's words: "Other legal systems continue to innovate, to experiment, and to find . . . solutions to the new legal problems that arise each day, [solutions] from which we can learn and benefit."*

Recognition of Judgments

Going back to another one of Ginsburg's early publications, in *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments* (82 (1969) Harvard Law Review 798), Ginsburg discussed the problem of the hierarchy between conflicting judgments from different states and made a case for 'the unifying function of the full faith and credit clause'. As to whether anti-suit injunctions should also the clause, she expressed a more nuanced view, though, explaining that

> *[t]he current state of the law, permitting the injunction to issue but not*

> *compelling any deference outside the rendering state, may be the most reasonable compromise […].*
>
> *The thesis of this article, that the national full faith and credit policy should override the local interest of the enjoining state, would leave to the injunction a limited office. It would operate simply to notify the state in which litigation has been instituted of the enjoining state's appraisal of forum conveniens. That appraisal, if sound, might induce respect for the injunction as a matter of comity.*

Ginsburg had an opportunity to revisit a similar question about thirty years later, when delivering the opinion of the Court in *Baker v General Motor Corp* (522 US 222 (1998)). Although the Full Faith and Credit Clause was not subject to a public-policy exception (as held by the District Court), an injunction stipulated in settlement of a case in front of a Michigan court could not prevent a Missouri court from hearing a witness in completely unrelated proceedings:

> *Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth.*
>
> *This conclusion creates no general exception to the full faith and credit command, and surely does not permit a State to refuse to honor a sister state judgment based on the forum's choice of law or policy preferences. Rather, we simply recognize that, just as the mechanisms for enforcing a judgment do not travel with the judgment itself for purposes of Full Faith and Credit […] and just as one State's judgment cannot automatically transfer title to land in another State […] similarly the Michigan decree cannot determine evidentiary issues in a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court.*

According to Berman, this line of reasoning is testimony to Ginsburg's judicial vision of 'a system in which courts respect each other's authority and judgments.'

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The above selection has been created rather spontaneously and is evidently far from complete; please feel free to use the comment section to highlight other *interesting* parts of Justice Ginsburg's work.

The Bee That's Buzzing in Our Bonnets. Some Thoughts about Characterisation after the Advocate General's Wikingerhof Opinion

Last week, AG Saugmandsgaard Øe rendered his Opinion on Case C-59/19 Wikingerhof, which we first reported in this post by Krzysztof Pacula. The following post has been written by Michiel Poesen, PhD Candidate at KU Leuven, who has been so kind as to share with us some further thoughts on the underlying problem of characterisation.

Characterisation is not just a bee that has been buzzing in conflicts scholars' bonnets, as Forsyth observed in his 1998 LQR article. Given its central role in how we have been thinking about conflicts for over a century, it has pride of place in jurisprudence and literature. The *Wikingerhof v Booking.com* case (C-59/19) is the latest addition to a long string of European cases concerning the characterisation of actions as 'matters relating to a contract' under Article 7(1) of the Brussels Ia Regulation n° 1215/2012.

Earlier this week, Krzysztof Pacula surveyed Advocate General Saugmandsgaard Øe's opinion in the *Wikingerhof* case on this blog (Geert Van Calster also wrote about the opinion on his blog). Readers can rely on their excellent analyses of the facts and the AG's legal analysis. This post has a different focus, though. The *Wikingerhof* case is indicative of a broader struggle with characterising claims

that are in the grey area surrounding a contract. In this post, I would like to map briefly the meandering approaches to characterisation under the contract jurisdiction. Then I would like to sketch a conceptual framework that captures the key elements of characterisation.

1. Not All 'Matters Relating to a Contract' Are Created Equal

There are around 30 CJEU decisions concerning the phrase 'matters relating to a contract'. Three tests for characterisation are discernible in those decisions. In the first approach, characterisation depends on the nature of the legal basis relied on by the claimant. If a claim is based on an obligation freely assumed, then the claim is a matter relating to a contract to which the contract jurisdiction applies. Statutory, fiduciary, or tortious obligations arising due to the conclusion of a contract are also contractual obligations for private international law purposes. I will call this approach the 'cause of action test', because it centres on the nature of the cause of action pleaded by the claimant. In recent decisions, for example, the cause of action test has been used to characterise claims between third parties as contractual matters (C-337/17 *Feniks*, blogged here; C-772/17 *Reitbauer*, blogged here; joined cases C-274/16, C-447/16 and C-448/16 *flightright*).

The second approach to characterisation is to focus on the relationship between the litigants. From this standpoint, only claims between litigants who are bound by a contract can be characterised as 'matters relating to a contract'. This approach has for example been used in the *Handte* and *Réunion européenne* decisions. We will call it the 'privity test'. Sometimes scholars relied on this test to argue that all claims between contracting parties are to be characterised as matters relating to a contract.

The third and final approach emphasises the nature of the facts underlying the claim brought by the claimant. This approach was first developed in the *Brogsitter* decision (C-548/12). However, it is predated by AG Jacob's opinions in the *Kalfelis* (C-189/87) and *Shearson Lehmann Hutton* (C-89/91) cases (which since have been eagerly picked up by the *Bundesgerichtshof* of Germany). The *Brogsitter* decision provided that a claim is a contractual matter if the defendant's allegedly wrongful behaviour can reasonably be regarded to be a breach of contract, which will be the case if the interpretation of the contract is indispensable to judge. I will dub this approach the 'factual breach test', since it

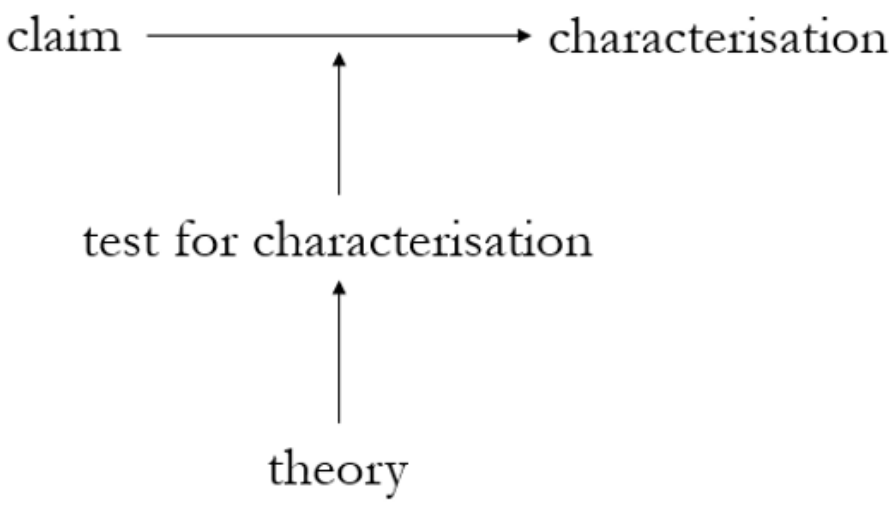
directs attention to factual elements such as the defendant's behaviour and the indispensability to interpret the contract. It is plain to see that this is by far the most complicated of the three approaches to characterisation we discussed here (among other things because of the unclear relation between the different layers of which the test is composed, an issue that AG Saugmandsgaard Øe entertained in *Wikingerhof*, [69]–[70], and C-603/17 *Bosworth v Arcadia*).

The use in practice and literature of the three approaches laid out above demonstrates a tale of casuistry. Similar claims have been subjected to different approaches, and approaches developed in a specific setting have been applied to entirely different contexts. For example, a few CJEU decisions characterised claims between litigants who are not privy to consensual obligations as non-contractual in nature under the privity test. Other decisions characterised such claims as contractual in nature, applying the cause of action test. A similar dichotomy underlies the characterisation of claims between contracting parties. Initially, the CJEU jurisprudence applied the cause of action test, focussing on the nature of the legal basis relied on (see C-9/87 *Arcado v Haviland*). Later, the *Brogsitter* decision adopted the factual breach test, which shifted the focus to the nature of the facts underlying the claim.

It is difficult to understand why these divergences have occurred. How can they be explained?

2. The Theories Underlying Characterisation

A good way to start is to conceptualise characterisation further along the lines of this scheme:



Seen from the perspective of this scheme, the previous section described three 'tests for characterisation'. A 'test for characterisation' refers to the interpretational exercise that lays down the conditions under which a claim can be characterised as a matter relating to a contract. Each test elevates different elements of a 'claim' as relevant for the purpose of characterisation and disregards others. Those elements are the identity of the litigants, the claim's legal basis, or the dispute underlying the claim. As such, it concretises an idea about the broader purpose the contract jurisdiction should serve, which is called a 'theory'. The divergences among the tests for characterisation outlined above is explained by the reliance on different theories.

The AG's considerations about *Brogsitter* in the *Wikingerhof* opinion illustrate the scheme. The AG observed that the factual breach test is informed by what I will dub the 'natural forum theory'. According to that theory, the contract jurisdiction offers the most appropriate and hence natural forum for all claims that are remotely linked to a contract (for the sake of proximity and avoiding multiple jurisdictional openings over claims relating to the same contract). This theory explains why the factual breach test provides such a broad, hypothetical test for characterisation that captures all claims that could have been pleaded as a breach of contract. Opining against the use of the factual breach test and underlying natural forum theory, the AG suggested that the cause of action test be applied. He then integrated the indispensability to interpret the contract (originally a part of the factual breach test) into the cause of action test as a tool for determining whether a claim is based on contract ([90] et seq). Essentially, his approach was informed by what I will call the 'ring-fencing theory'. In contrast to the natural

forum theory, this theory presumes that the contract jurisdiction should be delineated strictly for two reasons. First, the contract jurisdiction is a special jurisdiction regime that cannot fulfil a broad role as a natural *forum contractus* ([84]–[85]). Second, a strict delineation promotes legal certainty and efficiency, since it does not require judges to engage in a broad, hypothetical analysis to determine whether a claim is contractual or not ([76]–[77]). The scheme was applied succinctly here, but the analysis could be fleshed out for example by integrating the role of the parallelism between the Brussels Ia and Rome I/II Regulations.

The scheme can be used to understand and evaluate the CJEU's eventual judgment in *Wikingerhof*. I hope that the decision will be a treasure trove that furthers our understanding of the mechanics of characterisation in EU private international law.

Facebook's further attempts to resist the jurisdiction of the Federal Court of Australia futile

Earlier in the year, Associate Professor Jeanne Huang reported on the Australian Information Commission's action against Facebook Inc in the Federal Court of Australia. In particular, Huang covered *Australian Information Commission v Facebook Inc* [2020] FCA 531, which concerned an ex parte application for service outside of the jurisdiction and an application for substituted service.

In April, Thawley J granted the Commission leave to serve the first respondent (Facebook Inc) in the United States, and the second respondent (Facebook Ireland Ltd) in the Republic of Ireland. Through orders for substituted service, the Commission was also granted leave to serve the relevant documents by email (with respect to Facebook Inc) and by mail (with respect to Facebook Ireland Ltd).

Facebook Inc applied to set aside the orders for its service in the United States, among other things. Facebook Ireland appeared at the hearing of Facebook Inc's application seeking equivalent orders, although it did not make submissions.

On 14 September, Thawley J refused that application: *Australian Information Commissioner v Facebook Inc (No 2)* [2020] FCA 1307. The foreign manifestations of Facebook are subject to the Federal Court's long-arm jurisdiction.

The decision involves an orthodox application of Australian procedure and private international law. The policy represented by the decision is best understood by brief consideration of the context for this litigation.

Background

The Australian Information Commission is Australia's 'independent national regulator for privacy and freedom of information', which promotes and upholds Australians' rights to access government-held information and to have their personal information protected.

Those legal rights are not as extensive as equivalent rights enjoyed in other places, like the European Union. Australian law offers minimal constitutional or statutory human rights protection at a federal level. Unlike other common law jurisdictions, Australian courts have been reluctant to recognise a right to privacy. Australians' 'privacy rights', in a positivist sense, exist within a rough patchwork of various domestic sources of law.

One of the few clear protections is the *Privacy Act 1988* (Cth), (*'Privacy Act'*), which (among other things) requires large-ish companies to deal with personal information in certain careful ways, consistent with the 'Australian Privacy Principles'.

In recent years, attitudes towards privacy and data protection seem to have changed within Australian society. To oversimplify: in some quarters at least, sympathies are becoming less American (ie, less concerned with 'free speech' above all else), and more European (ie, more concerned about privacy et al). If that description has any merit, then it would be due to events like the notorious Cambridge Analytica scandal, which is the focus of this litigation.

Various manifestations of Australian governments have responded to changing societal attitudes by initiating law reform inquiries. Notably, in 2019, the Australian Competition and Consumer Commission ('ACCC') delivered its final report on its *Digital Platforms Inquiry*, recommending that Australian law be reformed to better address 'the implications and consequences of the business models of digital platforms for competition, consumers, and society'. The broad-ranging inquiry considered overlapping issues in data protection, competition and consumer protection—including reform of the *Privacy Act*. The Australian Government agreed with the ACCC that Australian privacy laws ought to be strengthened 'to ensure they are fit for purpose in the digital age'. A theme of this report is that the foreign companies behind platforms like Facebook should be better regulated to serve the interests of Australian society.

Another important part of the context for this Facebook case is Australia's media environment. Australia's 'traditional' media companies—those that produce newspapers and television—are having a hard time. Their business models have been undercut by 'digital platforms' like Facebook and Google. Many such traditional media companies are owned by News Corp, the conglomerate driven by sometime-Australian Rupert Murdoch (who is responsible for Fox News. On behalf of Australia: sorry everyone). These companies enjoy tremendous power in the Australian political system. They have successfully lobbied the Australian government to force the foreign companies behind digital platforms like Google to pay Australian companies for news.

All of this is to say: now more than ever, there is regulatory appetite and political will in Australia to hold Facebook et al accountable.

Procedural history

Against that backdrop, in March 2020, the Commission commenced proceedings against each of the respondents in the Federal Court, alleging 'that the personal information of Australian Facebook users was disclosed to the *This is Your Digital Life* app for a purpose other than the purpose for which the information was collected, in breach of the *Privacy Act*'.

The Commissioner alleges that:

1. Facebook disclosed the users' personal information for a purpose other

than that for which it was collected, in breach Australian Privacy Principle ('APP') 6;
2. Facebook failed to take reasonable steps to protect the users' personal information from unauthorised disclosure in breach of APP 11.1(b); and
3. these breaches amounted to serious and/or repeated interferences with the privacy of the users, in contravention of s 13G of the *Privacy Act*.

In April, the service orders reported by Huang were made. Facebook Inc and Facebook Ireland were then served outside of the jurisdiction.

Facebook's challenge to the orders for service outside of the jurisdiction: 'no prima facie case'

Facebook Inc contended that service should be set aside because the Court should not be satisfied that there was a prima facie case for the relief claimed by the Commissioner as required by r 10.43(4)(c) of the *Federal Court Rules 2011* (Cth).

The Court summarised the principles applicable to setting aside an order as to service as follows (at [23]):

- An application for an order discharging an earlier order granting leave to serve out of the jurisdiction, or for an order setting aside such service, is in the nature of a review by way of rehearing of the original decision to grant leave to serve out of the jurisdiction.
- It is open to the party who sought and obtained an order for service out of the jurisdiction to adduce additional evidence, and make additional submissions.
- The onus remains on the applicant in the proceedings to satisfy the Court in light of the material relied upon, including any additional material relied upon, that leave ought to have been granted.

Facebook Inc accepted that although demonstrating a prima facie case is 'not particularly onerous', the Commissioner had failed to establish an arguable case; she had merely posited 'inferences' which did not reasonably arise from the material tendered: [28]-[29].

As noted above, the underlying 'case' that was the subject of that argument is in relation to the Cambridge Analytica scandal and alleged breaches of the *Privacy Act*.

The case thus turns on application of an Australian statute to seemingly cross-border circumstances. Rather than having regard to forum choice-of-law rules, the parties seemingly accepted that the case turns on statutory interpretation. The extra-territorial application of the *Privacy Act* depends on an organisation having an 'Australian Link'. Section 5B(3) relevantly provides:

> *(3) An organisation or small business operator also has an Australian link if all of the following apply: …*
>
> *(b) the organisation or operator carries on business in Australia or an external Territory;*
>
> *(c) the personal information was collected or held by the organisation or operator in Australia or an external Territory, either before or at the time of the act or practice.*

Facebook Inc argued that the Commissioner failed to establish a prima facie case that, at the relevant time, Facebook Inc:

- carried on business in Australia within the meaning of s 5B(3)(b) of the *Privacy Act*; or
- collected or held personal information in Australia within the meaning of s 5B(3)(c) of the *Privacy Act*.

Facebook Inc carries on business in Australia

In *Tiger Yacht Management Ltd v Morris* (2019) 268 FCR 548 (noted here), the Full Court of the Federal Court of Australia 'observed that the expression "carrying on business" may have a different meaning in different contexts and that, where used to ensure jurisdictional nexus, the meaning will be informed by the requirement for there to be sufficient connection with the country asserting jurisdiction': [40].

The Court considered the statutory context of the Commissioner's case, being the application of Australian privacy laws to foreign entities. The Court had regard to the objects of the *Privacy Act*, which include promotion of the protection of privacy of individuals and responsible and transparent handling of personal information by entities: *Privacy Act* s 2A(b), (d). Whether Facebook Inc 'carries on business in Australia' for the purposes of the *Privacy Act* is a factual inquiry that should be determined with reference to those broader statutory purposes.

The Commissioner advanced several arguments in support of the proposition that Facebook Inc carries on business in Australia.

One argument advanced by the Commissioner was that Facebook Inc had financial control of foreign subsidiaries carrying on business in Australia, suggesting that the parent company was carrying on business in Australia. (Cf *Tiger Yacht*, above.) That argument was rejected: [155].

Another argument turned on agency more explicitly. Essentially, the Commissioner sought to pierce the corporate veil by arguing Facebook is 'a single worldwide business operated by multiple entities': [75]. Those entities contract with one another so that different aspects of the worldwide business are attributed to different entities, but the court ought to pierce the jurisdictional veil. The Commissioner submitted that 'the performance pursuant to the contractual arrangements by Facebook Inc of functions necessary for Facebook Ireland to provide the Facebook service…, including in Australia, indicated that Facebook Ireland was a convenient entity through which Facebook Inc carried on business in Australia during the relevant period': [115].

Facebook Inc appealed to cases like *Adams v Cape Industries* [1990] 1 Ch 433, where the English Court of Appeal explained that, typically, a company would not be considered to be carrying on business within the forum unless: '(a) it has a fixed place of business of its own in this country from which it has carried on business through servants or agents, or (b) it has had a representative here who has had the power to bind it by contract and who has carried on business at or from a fixed place of business in this country' (at 529). (See also *Lucasfilm Ltd v Ainsworth* [2008] EWHC 1878 (Ch).)

Ultimately, the Court was not satisfied that Facebook Inc carried on business within Australia on the basis that Facebook Ireland conducted Facebook Inc's

business in Australia: [117]. More accurately, the Commissioner had not established a prima facie case to that effect.

But the Commissioner *had* established a prima facie case that Facebook Inc *directly* carried on business within Australia.

Facebook Inc is responsible for various 'processing operations' in relation to the Facebook platform, which includes responsibility for installing, operating and removing cookies on the devices of Australian users. Facebook Inc appealed to case authority to argue that this activity did not amount to carrying on business in Australia. The Court thus considered cases like *Dow Jones v Gutnick* (2002) 210 CLR 575 and *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, which each addressed the territorial aspects of businesses that depend on communication on the internet.

The Court rejected Facebook Inc's argument that 'installing' cookies is to be regarding as equivalent to uploading and downloading a document (cf *Gutnick*). At the interlocutory stage of the proceeding, there was not enough evidence to accept Facebook Inc's claim; but there was enough to draw the inference that the installation and operation of cookies within Australia involves activity in Australia.

The Court concluded: 'the Commissioner has discharged her onus of establishing that it is arguable, and the inference is open to be drawn, that some of the data processing activities carried on by Facebook Inc can be regarded as having occurred in Australia, notwithstanding that the evidence did not establish that any employee of Facebook Inc was physically located in Australia': [137]. It was thus concluded that the Commissioner had established a prima facie case that Facebook Inc carried on business within Australia: [156]. (Cf the reasoning of Canadian courts that led to *Google Inc v Equustek Solutions Inc* [2017] 1 SCR 824, noted here.)

Facebook Inc collected or held personal information in Australia

The Court was assisted by responses provided by Facebook Inc to questions of the Commissioner made pursuant to her statutory powers of investigation. One question concerned the location and ownership of servers used to provide the

Facebook service. Although Facebook Inc's answer was somewhat equivocal, it suggested that the platform depends on servers located in Australia (including network equipment and caching servers) to improve connection and delivery time. This was enough for the Court to make the relevant inference as to collection and holding of personal information within Australia: [170].

The Court had regard to the purposes manifested by the Explanatory Memorandum to the *Privacy Act* in concluding that 'the fact that the personal information is uploaded in Australia and stored on Australian users' devices and browser caches and on caching servers arguably owned or operated by Facebook Inc in Australia, it is arguable that Facebook Inc collected the personal information in Australia': [185].

Combined with the findings as to carrying on business, this was enough to establish a prima facie case that the extra-territorial application of the *Privacy Act* was engaged. The Court's orders as to service were not disturbed.

Concluding remarks

The interlocutory character of this decision should be emphasised. The Court's findings on the territorial aspects of 'carrying on business' and data collection were each subject to the 'prima facie case' qualification. These are issues of fact; the Court may find differently after a thorough ventilation of evidence yet to be adduced.

This decision is not anomalous. The assertion of long-arm jurisdiction over Facebook Inc indicates Australian courts' increasing willingness to pierce the jurisdictional veil for pragmatic ends. In my experience, most Australian lawyers do not really care about the multilateralist ideals of many private international law enthusiasts. The text of the Australian statutes that engage the case before them is paramount. Lawyers are directed to consider the text of the statute in light of its context and purpose: *Australian Securities and Investments Commission v King* (2020) 94 ALJR 293, [23]; *Acts Interpretation Act 1901* (Cth) s 15AA. Essentially, in the case of a forum statute with putative extraterritorial operation, a form of interest analysis is mandated.

I am OK with this. If the policy of the *Privacy Act* is to have any chance of success, it depends on its application to internet intermediaries comprised of corporate

groups with operations outside of Australia. As an island continent in a technologically interconnected world, the policy of Australian substantive law will increasingly determine the policy of Australian private international law.

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US Federal Rules of Civil Procedure, the US Supreme Court and the Hague Service Convention: is reform necessary?

Written by Danilo Ruggero Di Bella,
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The USA is a Contracting Party to the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the "Hague Service Convention", which it ratified in 1967. The Hague Service Convention is a multilateral treaty whose purpose is to simplify, standardize, and generally expedite the process of serving documents abroad, thus it plays a central role in international litigation. The Hague Service Convention specifies several allowed methods of service to provide due notice of a proceeding in one Contracting State to a party in another.
The primary method (and main alternative to service through diplomatic channels) — laid out in Articles 2 to 7 of the Convention — is via a designated Central Authority in each Contracting State. When a Central Authority receives a request for service, it must serve the documents or arrange for their service. This method is usually faster than service through diplomatic and consular agents (which remain available under Article 8 of the Convention), along with the possibility that two or more Contracting States may agree to permit channels of

transmission of judicial documents other than those provided for in the Convention.

Further, at Article 19 the Convention clarifies that it does not preempt any internal laws of its Contracting States that permit service from abroad via methods not otherwise allowed by the Convention. Thus, it could be argued that a sort of favor summonitio (borrowed by the principle of favor contractus) permeates the entire instrument, in that the Convention strikes a fair balance between the formal notice of a proceeding and the validity of an effective summon in favor of the latter, to allow for swift international litigations. Indeed, another fast method of service expressly approved by the Convention is through postal channels, unless the receiving State objects by making a reservation to Article 10(a) of the Convention. This is considered the majority view shared by multiple jurisdictions. However, in the United States different interpretations existed on this point, because Article 10(a) of the Convention does not expressly refer to "service" of judicial documents (it instead uses the term "send"). Consequently, it was an unsettled question whether Article 10(a) encompassed sending documents by postal channels abroad for the purpose of service, until the US Supreme Court has been called to interpret this instrument.

US Supreme Court's interpretation of Article 10(a) of the Hague Service Convention

The USA did not make any reservation objecting to service by mail under Article 10 of the Convention. In Water Splash, Inc. v. Menon, 581 U.S. ___ (2017), the US Supreme Court pronounced itself on Article 10(a) of the Hague Service Convention to resolve these conflicting views, according to some of which the Convention was to be read as prohibiting service by mail.

After a detailed contextual treaty interpretation and also a comparison of the text with the French version (equally authentic), the US Supreme Court found that that Article 10(a) unmistakably allows for service by mail. The Supreme Court further clarified that "this does not mean that the Convention affirmatively authorizes service by mail." It held that "in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law." This means that it is not The Hague Service Convention to authorize service by mail, but it must be the lex fori to do so (the Convention simply permits service by mail). So, where the Convention applies, it is not enough to make sure that a summon effectuated abroad is valid under the Convention just because that foreign jurisdiction allows for service by

international registered mail. It further must be ascertained that the jurisdiction in which the case is pending authorizes service by mail requiring a signed receipt. However, by a simple reading of the US Federal Rules of Civil Procedure, it is possible to note how this set of rules misunderstood the scope of The Hague Service Convention.

The US Federal Rules of Civil Procedure and the Hague Service Convention

In cases pending before a US federal court where the Hague Convention applies and where the foreign jurisdiction (in which the defendant resides or is registered) allows for service by mail, the plaintiff – who serves the defendant abroad – should further wonder whether US Federal law authorizes serving the defendant in a foreign country by mail.

Rule 4 of the Federal Rules of Civil Procedure (FRCP), dealing with summons, answers this question. In particular, Rule 4(h)(2) FRCP deals with serving a corporation abroad by remanding to Rule 4(f) FRCP, which in turn deals with serving an individual. So, the same rule applies to serving either an individual or a corporation abroad. Rule 4(f)(1) FRCP makes express reference to the Hague Service Convention:

"(f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;"

However, as stated by the US Supreme Court in Water Splash, Inc. v. Menon, the fact that Article 10(a) of the Hague Service Convention encompasses service by mail does not mean that it affirmatively authorizes such service. Rather, service by mail is permissible if the receiving State has not objected to service by mail and if such service is authorized under otherwise-applicable law.

Probably, the words "[…]as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;" in Rule 4(f)(1) FRCP should be more correctly rephrased with "[…]as those allowed by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;" in order to be in line with the jurisprudence of the US Supreme Court.

So, as Rule 4(f)(1) FRCP does not provide the final answer, the plaintiff needs to look at Rule 4(f)(2)(C)(ii) FRCP, which expressly authorizes the use of any form of

mail that requires a signed receipt.
Hence, in cases pending before a federal US court where the Hague Service Convention applies and the receiving states permits service by mail, a plaintiff may serve a company or an individual abroad by means of international registered mail by virtue of Rule 4(f)(2)(C)(ii) FRCP (rather than Rule 4(f)(1) FRCP remanding to The Hague Service Convention). Consequently, the FRCP should be amended to avoid further misunderstandings as to the scope of application of the Hague Service Convention by replacing the word authorized with the term allowed at Rule 4(f)(1).

Ethiopia's Ratification of Convention on the Recognition and Enforcement of Foreign Arbitral Awards: A reflection

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Ethiopia, located in east Africa, is the second most populous country in the continent. The Ethiopian parliament has recently ratified, through proclamation No 1184/2020[1], the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" which is commonly known as "New York Convention" (here after referred as "the Convention"). This short piece aims to reflect some points in reaction to this ratification proclamation, specifically changes that this will bring to the approach to arbitration in Ethiopia.

As stated in the Convention, state parties are obliged to recognize and give effect to arbitral agreements including an arbitral clause; and ordinary courts are precluded from exercising their jurisdiction on the merits of the case.[2] In addition, unless in exceptional circumstances recognized under the convention,

foreign arbitral awards shall be enforced just like domestic arbitral awards.[3]

By ratifying the Convention, Ethiopia undertakes to perform the above-mentioned and other obligations of the Convention. As a result, some of the hitherto debatable issues are addressed by the terms of the Convention. For instance, the Ethiopian Supreme Court cassation bench had previously passed a decision that rejects the parties' agreement that makes the outcome of the arbitration to be final.[4] In its decision, the cassation bench contends that its mandate given by the Ethiopian constitution as well as the "Federal Courts Proclamation re-amendment Proclamation No 454/1997" cannot be limited by an arbitration finality clause. But now, this power of cassation can be taken to have ceased at least in relation to cases falling under the scope of application of the Convention.

The declarations and reservation that Ethiopia has entered while ratifying the Convention should not be forgotten though. As such, Ethiopia will apply the Convention only in relation to arbitral awards made in the territory of another contracting state.[5] In the Civil Procedure Code of Ethiopia, Art 458 and Art 461(1) (a), the law that had been in force before the ratification of the Convention, reciprocity was one of the requirements that need to be fulfilled before recognizing and giving effect to the terms of foreign judgments as well as foreign arbitral awards.

Ethiopian courts require the existence of a reciprocity treaty signed between Ethiopia and the forum state whose judgment is sought to be recognized or enforced.[6] It is fair to assume that Ethiopian courts would have the same stand in relation to foreign arbitral awards. And Art 2(1) has fulfilled this requirement because the arbitral award has been given in the member state to the Convention by itself warrants the recognition and enforcement of the award in Ethiopia.

Moreover, Ethiopia also declares that "the convention will apply on differences arising out of legal relationships, whether contractual or not, which are considered commercial under the National Law of Ethiopia."[7] But here, a national law that provides a comprehensive list or definition of commercial activities hardly exists. As a result, while giving effect to the terms of the Convention, Ethiopian courts are expected to answer what sort of activities shall be deemed to be commercial activities according to Ethiopian law.

The definition contained under Art 2(6) of the "Trade Competition and Consumers

Protection Proclamation" will provide some help in identifying "commercial activities" in Ethiopia. Accordingly, "Commercial activities are activities performed by a business person as defined under sub-Art 5 of this article."[8] And Art 2(5) defines a business person as "any person who professionally and for gain carries on any of the activities specified under Art 5 of the Commercial Code, or who dispenses services or who carries those commercial activities designed as such by law". [9] Moreover, it is to be noted that the "Commercial Registration and Licensing Proclamation (Proclamation No. 980/2016)" also provides the same kind of definition for commercial activities.[10]

From the combined reading of the above provisions, commercial activities are those activities listed under Art 5 of the Commercial Code, when they are performed by a person professionally and for gain. However, this cannot be a comprehensive answer to the question, as there can be areas other than those listed under Art 5 of the Commercial Code that can be characterized as commercial activities. In addition, there are numerous service deliveries that can be considered as commercial activities. In such cases, Ethiopian courts will have to consult other domestic laws and decide whether the activity in question can be considered as commercial or not.

Last but not least, even if ratified treaties are declared to be an integral part of the law of Ethiopia[11], the domestic application of treaties whose contents have not been published in domestic law gazette has been a debatable issue for long. As there are points that are not incorporated under the ratification proclamation, the same problem may probably arise in relation to the New York Convention. To avoid this challenge, the Ethiopian parliament should have published the provisions of the Convention together with the ratification proclamation.[12] As per its responsibility under Art 5 of the ratification proclamation the Federal Attorney General, should at least have the Convention translated to Ethiopian working languages**.**

[1] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation, Proclamation No 1184/2020, Federal *Negarit* Gazette, 26th year No 1, Addis Ababa, 13th March 2020.

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Art. II(1),(2),(3)

[3] *Id*.Art I and V

[4] National Mineral Corporation Plc. vs. Danni Drilling plc., Federal Supreme Court, cassation bench

[5] Ratification Proclamation, *supra* note 1, Art 2(1)

[6] See *paulos papassinus* case, Federal Supreme court File no 1769/88; *Yosera Abdulmuen* et al. vs. *Abdulkeni Abdulmuen*, Federal Supreme Court of Ethiopia, Cassation Bench , Fed Sup. Court File No 78206

[7] Ratification Proclamation, *supra* note 1, Art 2(2)

[8] Trade Competition and Consumers Protection Proclamation, Proclamation No 813/2013, Federal *Negarit* Gazette, 20th year No 28, Addis Ababa, 21st March 2013, Art 2(6)

[9] *Id*. Art. 2(5)

[10] The Commercial Registration and Licensing Proclamation, Proclamation No 980/2016, Federal *Negarit* Gazette, 22nd year No. 101, Addis Ababa, 5th August 2016, Art 2(2)&(3)

[11] Constitution of Federal Democratic Republic of Ethiopia, Proclamation No 1/1995, Federal *Negarit* Gazette, 1st year No.1 , Addis Ababa, 21st August 1995, Art 9(4)

[12] International Agreements Making and Ratification Procedure (Proclamation No 1024/2017) states that "The House of Peoples' Representatives may decide to publish the provisions of the international agreements with the ratification proclamation."(Art. 11)

Mutual Trust: Judiciaries under Scrutiny – Recent reactions and preliminary references to the CJEU from the Netherlands and Germany

I. Introduction: Foundations of Mutual Trust

A crucial element element for running a system of judicial cooperation on the basis of mutual trust is sufficient trust in the participating judiciaries. EU primary law refers to this element in a more general way in that it considers itself to be based on „the rule of law" and also „justice". Article 2 TEU tells us: „The Union is founded on the values of (…) the rule of law (…). These values are common to the Member States in a society in which „(…) justice (…) prevail." Subparagraph 2 of the Preamble of the EU Charter of Fundamental Rights, recognized by the EU as integral part of the Union's foundational principles in Article 6 (1) TEU, confirms: „Conscious of its spiritual and moral heritage, the Union (…) is based on (…) the rule of law. It places the individual at the heart of its activities, by (…) by creating an area of freedom, security and justice". Article 47 of the EU Charter of Fundamental Rights guarantees the right to an effective remedy and to a fair trial when EU law is „implemented" in the sense of Article 51 of the Charter, as does Article 6(1) European Convention on Human Rights generally.

The Area of Freedom, Security and Justice has indeed become a primary objective of the EU. According to Article 3 (1) TEU, „[t]he Union's aim is to promote peace, its values and the well-being of its peoples." Article 3 (2) TEU further spells out these objectives: „The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". Only in the following subparagraph, in Article 3 (2) Sentence 1 TEU, the original objective of the EU is listed: „The Union shall establish an internal market".

II. No „blind trust“ anymore

Based on these fundaments, the CJEU, in its Opinion Opinion 2/13 of 18 December 2014, paras 191 and 192, against the EU's accession to the European Convention on Human Rights, explained: "[t]he principle of mutual trust between the Member States is of fundamental importance in EU law (…). That principle requires (…) to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (…). Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU". Hence, the Court concluded, at para. 194, that "[i]n so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law". This is why (inter alia) the CJEU held that the accession of the EU to the ECHR would be inadmissible – based on the promise in Article 19(1) Sentences 2 and 3 TEU: „[The CJEU] shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.“ When it comes to judicial cooperation, these Member States are primarily the Member States of origin, rather than the Member States of destination, unless „systemtic deficiencies“ in the Member States of origin occur.

It did not come as a surprise that the European Court of Human Rights rejected the claim made by the European Court of Justice that mutual trust trumps human rights: In *Avoti?š v. Latvia* (ECtHR, judgment of 23 May 2016, Application no. 17502/07), the applicant was defendant in civil default proceedings in Cyprus. The successful claimant sought to get this judgment recognized and enforced in Latvia against the applicant under the Brussels I Regulation. The applicant

argued that he had not been properly served with process in the proceedings in Cyprus and hence argued that recognition must be denied according to Article 34 no. 2 Brussels I Regulation. The Latvian courts nevertheless granted recognition and enforcement. Thereupon, the applicant lodged a complaint against Latvia for violating Article 6 (1) ECHR. The ECHR observed, at paras. 113 and 114:

„[T]he Brussels I Regulation is based in part on mutual-recognition mechanisms which themselves are founded on the principle of mutual trust between the member States of the European Union. (…). The Court is mindful of the importance of the mutual-recognition mechanisms for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require. (…). Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms (…)".

The Court further held, in direct response to Opinion 2/13 of the ECJ that „[l]imiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient".

Thus, a court must, under all circumstances, even within the scope of the „Bosphorus presumption" (European Court of Human Rights, judgment of 30 June 2005 – *Bosphorus Hava Yollar? Turizm ve Ticaret Anonim ?irketi v. Ireland* [GC], no. 45036/98, paras. 160-65, ECHR 2005?VI), „[v]erify that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights – which, the CJEU has also stressed, must be observed in this context. In this spirit, where the courts of a State which is both a Contracting Party to the Convention and a member State of the European Union are called upon to apply a mutual-recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that

complaint on the sole ground that they are applying EU law“. To cut it short: mutual trust does not (fully) trump human rights – “no blind trust” (Koen Lenaerts, La vie après l’avis: Exploring the principle of mutual (yet not blind) trust, Common Market Law Review 54 (2017), pp. 805 et seq.).

III. What does this mean, if a Member State (Poland) undermines the independence of its judiciary?

This question has been on the table ever since Poland started “reforming” its judiciary, first by changing the maximum age of the judges at the Polish Supreme Court and other courts during running appointments, thereby violating against the principle of irremovability of judges. The Polish law („Artyku?i 37 i 111 ust?p 1 of the Ustawa o S?dzie Najwy?szym [Law on the Supreme Court] of 8 December 2017 [Dz. U. of 2018, heading 5]) entered into force on 3 April 2018, underwent a number of amendments (e.g. Dz. U. of 2018, heading 848 and heading 1045), before it was ultimately set aside (Dz. U. of 2018, heading 2507). The CJEU declared it to infringe Article 19 (1) TEU in its judgment of 24 June 2019, C- 619/18 – *Commission v. Poland*. The Court rightly observed, in paras. 42 et seq.: “[t]he European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them, EU law being based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values. That premiss both entails and justifies the existence of mutual trust between the Member States and, in particular, their courts that those values upon which the European Union is founded, including the rule of law, will be recognised, and therefore that the EU law that implements those values will be respected“. Indeed, the principle of irremovability is one central aspect of judicial independence; see e.g. Matthias Weller, Europäische Mindeststandards für Spruchkörper: Zur richterlichen Unabhängigkeit, in Christoph Althammer/Matthias Weller, Europäische Mindeststandards für Spruchkörper, Tübingen 2017, pp. 3 et seq.). Later, and perhaps even more worrying, further steps of the justice “reform” subjected judgments to a disciplinary control by political government authorities, see CJEU, Ordonnance de la Cour (grande chambre), 8 avril 2020, C?791/19 R (not yet available in English; for an English summary see the Press Release of the Court). The European Court of Human Rights is currently stepping in – late, but may be not yet too late. The first

communications about filings of cases concerning the independence of Poland's judiciary came up only in 2019. For an overview of these cases and comments see e.g. Adam Bodnar, Commissioner for Human Rights of the Republic of Poland and Professor at the University of the Social Sciences and Humanities in Warsaw, Strasbourg Steps in, Verfassungsblog, 7 July 2020.

IV. What are the other Member States doing?

1. The Netherlands: Suspending cooperation

One of the latest reactions comes from the Netherlands in the context of judicial cooperation in criminal matters, namely in respect to the execution of a European Arrest Warrant under **Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.** In two rulings of 24 March and one of 26 March 2020 (ECLI:NL:RBAMS:2020:1896, 24 March 2020; ECLI:NL:RBAMS:2020:1931, 24 March 2020; ECLI:NL:RBAMS:2020:2008, 26 March 2020) the *Rechtbank* Amsterdam stopped judicial cooperation under this instrument and ordered the prosecutor and the defence to take the entering into force of the latest judicial reforms in Poland into account before deciding to transfer a person to Poland. For a comment on this case line see Petra Bárd, John Morijn, Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part II). Marta Requejo Isidro, on the EAPIL's blog yesterday, rightly asked the question what a decision to reject judicial cooperation in criminal matters would mean in relation to civil matters. For myself, the answer is clear: if the fundaments for mutual trust are substantially put into question (see above on the ongoing actions by the Commission and the proceedings before the CJEU since 2016 – for a summary see here), the Member States may and must react themselves, e.g. by broadening the scope and lowering the standards of proof for public policy violations, see Matthias Weller, Mutual Trust: In search of the future of European Private International Law, Journal of Private International Law 2015, pp. 65, at pp. 99 et seq.).

2. Germany: Pushing standards beyond reasonable degrees

Against these dramatic developments, the decision of the Regional Court of Erfurt, Germany, of 15 June 2020, Case C-276/20, for a preliminary reference

about the independence of German judges appears somewhat suprising. After referring a question of interpretation of EU law in relation to the VW Diesel scandal, the referring court added the further, and unrelated question: „Is the referring court an independent and impartial court or tribunal for the purpose of Article 267 TFEU, read in conjunction with the third sentence of Article 19(1) TEU and Article 47(2) of the Charter of Fundamental Rights of the European Union?“ The referring court criticizes blurring lines between the executive and the judiciary – which is the very issue in Poland. It explained:

„The referring court, a civil court in the Thuringia region of Germany, shares the concerns and doubts of the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany) as to the institutional independence of the German courts and their right of reference pursuant to Article 267 TFEU … . The court refers to the question referred by the Administrative Court, Wiesbaden, on 28 March 2019 and the proceedings pending before the Court of Justice of the European Union (… C-272/19 …). (…). According to the [CJEU's] settled case-law, a court must be able to exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever (see judgment of 16 February 2017, C-503/15, paragraph 36 et seq.). Only then are judges protected from external intervention or pressure liable to jeopardise their independence and influence their decisions. Only that can dispel any reasonable doubt in the mind of an individual seeking justice as to the imperviousness of the courts to external factors and their neutrality with respect to the conflicting interests before them.

The national constitutional situation in Germany and in Thuringia does not meet those standards (see, with regard to the lack of independence of the German prosecution service, judgment of 27 May 2019, C-508/18). It only recognises a functional judicial independence in the key area of judicial activity, which is a personal independence. However, that is not sufficient to protect judges from all forms of external influence. The additional institutional independence of the courts required for that is by no means guaranteed. However, the independence of individual judges is guaranteed by the independence of the judiciary as a whole.

In Thuringia, as in every other federal state in Germany, the executive is responsible for the organisation and administration of the courts and manages their staff and resources. The Ministries of Justice decide on the permanent posts

and the number of judges in a court and on the resources of the courts. In addition, judges are appointed and promoted by the Ministers for Justice. The underlying assessment of judges is the responsibility of the ministries and presiding judges who, aside from any judicial activity of their own, must be regarded as part of the executive. The Ministers for Justice and the presiding judges who rank below them administratively and are bound by their instructions act in practice as gatekeepers. In addition, the presiding judges exercise administrative supervision over all judges.

The formal and informal blurring of numerous functions and staff exchanges between the judiciary and the executive are also typical of Germany and Thuringia. For example, judges may be entrusted with acts of administration of the judiciary. The traditional practice of seconding judges to regional or federal ministries is one particular cause for concern. Seconded judges are often integrated into the ministerial hierarchy for years. It is also not unusual for them to switch back and forth between ministries and courts and even between the status of judge and the status of civil servant.

The judge sitting alone who referred the question has personally been seconded three times (twice to the Thuringia Ministry of Justice and once to the Thuringia State Chancellery).

This exchange of staff between the executive and the judiciary infringes both EU law and the Bangalore Principles of Judicial Conduct applied worldwide (see Commentary on the Bangalore Principles of Judicial Conduct, www.unodc.org, p. 36: '*The movement back and forth between high-level executive and legislative positions and the judiciary promotes the very kind of blurring of functions that the concept of separation of powers intends to avoid.*').

Most importantly, these informal practices sometimes appear to be arbitrary. While the courts guarantee the absence of arbitrariness outwardly, informal practices may expose judges to the threat of arbitrariness and administrative decisionism. Inasmuch as 'expression-of-interest' procedures have been initiated recently, including in Thuringia, as awareness of the problem increases, for example on secondments and trial periods in higher courts or on the management of working groups for trainee lawyers, there is still no justiciability (enforceability).

All this gives the executive the facility to exert undue influence on the judiciary, including indirect, subtle and psychological influence. There is a real risk of 'reward' or 'penalty' for certain decision-making behaviours (see Bundesverfassungsgericht (Federal Constitutional Court, Germany) order of 22 March 2018, 2 BvR 780/16, … , paragraphs 57 and 59)."

The close interlock in Germany between the judiciary and the executive and the hierarchical structure and institutional dependence of the judiciary are rooted in the authoritarian state of 19th century Germany and in the Nazi principle of the 'führer'. In terms of administrative supervision, the entire German judiciary is based on the president model (which under National Socialism was perverted and abused by applying the principle of the 'führer' to the courts …)."

These submissions appear to go way over the top: mechanisms to incentivise (which inenvitably contain an aspect of indirect sanction) are well-justified in a judiciary supposed to function within reasonable time limits; comparing the voluntary (!) temporary placement of judges in justice ministries or other positions of the government (or, as is regularly the case, in EU institutions), while keeping a life-time tenure under all circumstances (!) can hardly be compared or put into context with methods of the Nazi regime at the time, whereas cutting down currently running periods of judges and disciplinary sanctions in relation to the contents and results of judgments evidently and clearly violate firmly established principles of judicial independence, as well as a direct influence of the government on who is called to which bench. Yet, the German reference illustrates how sensitive the matter of judicial independence is being taken in some Member States – and how far apart the positions within the Member States are. It will be a delicate task of the EU to come to terms with these fundamentally different approaches within the operation of its systems of mutual recognition based on mutual trust. Clear guidance is needed by the CJEU in the judicial dialogue between Luxemburg and the national courts. One recommendation put on the table is to re-include the Member States in its trust management, i.e. the control of compliance with the fundaments of judicial cooperation accordingly; concretely: to re-allow second and additional reviews by the courts of the receiving Member States in respect to judicial acts of a Member State against which the EU has started proceedings for violation of the rule of law in respect to the independence of its judiciary.

A few thoughts on the HCCH Guide to Good Practice on the grave-risk exception (Art. 13(1)(b)) under the Child Abduction Convention, through the lens of human rights (Part II)

Written by Mayela Celis – The comments below are based on the author's doctoral thesis entitled "The Child Abduction Convention – four decades of evolutive interpretation" at UNED (forthcoming)

As indicated in a previous post, the comments on the HCCH Guide to Good Practice on the grave-risk exception (Art. 13(1)(b)) under the Child Abduction Convention (subsequently, Guide to Good Practice or Guide) will be divided into two posts. In a previous post, I analysed the Guide exclusively through the lens of human rights. In the present post, I will comment on some specific legal issues of the Guide but will also touch upon on some aspects of human rights law.

Please refer to Part I. All the caveats mentioned in that post also apply here.

The Guide to Good Practice is available here.

I would like to touch upon three topics in this post: 1) the examples of assertions that can be raised under Article 13(1)(b) and their categorisation; 2) measures of protection and 3) domestic violence.

1) One of the great accomplishments of the Guide to Good Practice is the categorisation of the ***examples of assertions that can be raised under Article 13(1)(b) of the Child Abduction Convention***. While at first sight the categorisation may appear to be too simplistic, it is very well thought through and

encompasses a wide range of scenarios.

I include below the assertions as stated in the Guide:

Examples of assertions that can be raised under Article 13(1)(b)
a. Domestic violence against the child and / or the taking parent
b. Economic or developmental disadvantages to the child upon return
c. Risks associated with circumstances in the State of habitual residence
d. Risks associated with the child's health
e. The child's separation from the taking parent, where the taking parent would be unable or unwilling to return to the State of habitual residence of the child
i. Criminal prosecution against the taking parent in the State of habitual residence of the child due to wrongful removal or retention
ii. Immigration issues faced by the taking parent
iii. Lack of effective access to justice in the State of habitual residence
iv. Medical or family reasons concerning the taking parent
v. Unequivocal refusal to return
f. Separation from the child's sibling(s)

Nevertheless, while this categorisation is very comprehensive, there are a few matters that are mentioned only very briefly in the Guide and could have benefited from a more in-depth discussion. One of them is the extensive case law on what constitutes "***zone of war***" ***or a place where there is conflict***. See footnotes 88 and 89 of the Guide under the heading *c. Risks associated with circumstances in the State of habitual residence*.

Perhaps due to political sensitivities, it would be hard to pinpoint in the Guide jurisdictions that have been discussed by the courts as possibly being a "zone of war". Among these are Israel (most of the case law), Monterrey (Mexico – during the war on drugs) and Venezuela. See for example: Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003) [INCADAT reference: HC/E/USf 530] (United States); Kilah v. Director-General, Department of Community Services [2008] FamCAFC 81 [INCADAT reference: HC/E/AU 995] (Australia) and other references in footnotes 88 and 89 of the Guide.

Some of course may argue that "zone of war" is a gloss on the Convention and that as such it should not be analysed. However, one may also describe such situations without labelling them as "zone of war", such as a State where there is

conflict, be it military, social, political, etc. Perhaps this could have been expanded under the heading *c. Risks associated with circumstances in the State of habitual residence* of the Guide referred to above.

While the "zone of war" exception has hardly been successful, it would have been beneficial to discuss some of the arguments set forth by the parties such as: the fluctuation of violence throughout the years, terrorist attacks, a negative travel advice by a government concerning the State of habitual residence of the child, the specific place where the family lives and the risks of terrorism, the violence of drug cartels, and the fact of being a political refugee in the State where the child was abducted. The negative travel advice is particularly apposite to our times of Covid-19 as that would have given some guidance to the courts.

Another assertion made under Article 13(1)(b) of the Child Abduction Convention that could have been analysed in more depth by the Guide – perhaps under *a. Domestic violence against the child and/or the taking parent* – is the ***sexual abuse of children***. The Guide includes very brief references to sexual abuse in the glossary, paragraphs 38 and 57, and footnote 76.

Undoubtedly, sexual abuse is a terrible and unbearable experience for children but it is still a taboo to single out this topic, let alone explain the current trends existing in the case law when this issue has been raised. Nevertheless, from my research there seems to be a very clear distinction in the case law: when the sexual abuse has been raised in the State of habitual residence and no action or insufficient action was taken by such authorities, and there is evidence of sexual abuse, the State where the child has been abducted tends to reject the return of the child to his or her State of habitual residence. In cases where this is not the case, the child is ordered back to the State of habitual residence, often with measures of protection. See for example: the multiple-layered decisions in the case of *Danaipour v. McLarey*, see for example the decision Danaipour v. McLarey, 386 F.3d 289 (1st Cir. 2004) [INCADAT reference: HC/E/USf 597] (United States). This brings us to:

2) The second topic of this post: ***measures of protection*** (also referred to as protective measures). The paragraphs dedicated to this topic in the Guide are 43-48. The Guide is absolutely at the forefront of the latest developments and social research on the effectiveness of measures of protection. It has answered the call of many professors/scholars and practitioners, who have cautioned about

the indiscriminate use of measures of protection, in particular of undertakings, when the person causing the violence is known to infringe orders and not to heed the warnings of the courts. The Guide is to be commended for this great step forward.

The Guide defines undertakings as follows: "an undertaking is a voluntary promise, commitment or assurance given by a natural person – in general, the left-behind parent – to a court to do, or not to do, certain things. Courts in certain jurisdictions will accept, or even require, undertakings from the left-behind parent in relation to the return of a child. An undertaking formally given to a court in the requested jurisdiction in the context of return proceedings may or may not be enforceable in the State to which the child will be returned." Because undertakings are a voluntary promise, their enforcement is fraught with problems, especially if the left-behind parent refuses to comply once the child has been returned. Where the primary carer (usually the mother) returns with the child to a "domestic violence" situation and it is not possible to enforce undertakings, both the mother and the child may be subject to a grave risk of harm. For more information, see Taryn Lindhorst, Jeffrey L. Edleson. *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention* (Boston: Northeastern University Press, 2012). This leads us to:

3) The third topic of this post: ***domestic violence***. Many claim that domestic violence is a human rights violation. In a wider context, there is indeed a correlation between domestic violence and human rights and this has been recognised by resolutions of the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) and the judgment of the European Court of Human Rights. See for example *AT (Ms) v. Hungary, (Decision) CEDAW Committee* and *Opuz v. Turkey (Application No. 33401/02)*, respectively.

While the issue of domestic violence in the context of Article 13(1)(b) of the Child Abduction Convention was the one topic that sparked concern among the Contracting States to the Child Abduction Convention, as well as judges and the legal profession alike, the Guide only dedicates a few paragraphs to it. See paragraphs 57-59 of the Guide. It also arrives at a conclusion, which raises some doubts.

In particular, the Guide states that "***Evidence of the existence of a situation of***

domestic violence, in and of itself, is therefore not sufficient to establish the existence of a grave risk to the child." There are a few problems with such a statement. Domestic violence comes in different shapes and sizes and the level of violence can be high or low. This statement is a "one-size-fits-all" and thus is necessarily flawed. In addition, it does not say what it means by "in and of itself", does it mean *prima facie*? Also, it does not elaborate on what is necessary to invoke and substantiate domestic violence in order for this assertion to be considered sufficient. It also appears to set a standard of proof when it says that it "is not sufficient", which might perhaps not be appropriate for a soft law instrument, such as a Guide to Good Practice, to do.

Some scholars have analysed and criticised this statement of the Guide. In particular, Rhona Schuz and Merle H. Weiner in the following article "A Small Change That Matters: The Article 13(1)(b) Guide to Good Practice" (Family Law LexisNexis©, January 2020) I refer to their arguments and prefer not to replicate them in this post.

Despite the weakness mentioned above and in Part I of this post, I believe that this Guide would be of great benefit to the legal profession.

Having all the above in mind, I would like to conclude with some words of the renowned American judge Richard Posner: "[t]here is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as in domestic relations." (Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005) [INCADAT reference: HC/E/USf 812] (United States)).

Same Region, Two Different Rulings on Fake News at the

Internet

Fernando Pedro Meinero

Recently, two criminal court decisions investigating the spread of fake news show the difficulty of determining the scope of national court jurisdiction over the internet.

In Argentina, Google was successful in reversing a decision that determined the deindexation of a person's name from search engines hosted outside the country. In this case, the searcher associated a person's name with crimes of possession of drugs and weapons, something that proved to be false. But in Brazil, Twitter and Facebook were forced to globally block the access of investigated people to their respective accounts. These people are investigated for participating in the dissemination of defamatory publications through these internet platforms against members of the Legislative and Judiciary.

Although these are decisions taken in the context of criminal cases, the issues raised by them reflect difficulties that also arise in civil cases. Both decisions were taken against companies that have branches in the countries where the courts exercise their jurisdiction – Argentina and Brazil, but they see differently the scope of that jurisdiction for the fulfillment of an order outside the territory.

On the one hand, the idea that the imposition of removing content or access implies an obligation to do so outside the national territory. Therefore, this decision, in order to produce effects outside the territory, should pass through the control mechanisms of international cooperation, since otherwise there would be an invasion of foreign jurisdictions. Not to mention the issues that arise from the point of view of the applicable law, according to what each State considers as a defamatory act and what is the limit of freedom of speech.

On the other hand, the understanding that this obligation to comply, imposed on a company with legal personality in the country, based on national legislation, must be fulfilled by that company, regardless of where and how it will become effective. In this way, speculations about an eventual violation of foreign sovereignty are eliminated, as well as with regard to laws that may eventually consider such publications to be non-defamatory and just an exercise of freedom of speech.

This divergence exposes, in essence, issues related to international jurisdiction, applicable law and international legal cooperation, the three traditional pillars of Private International Law, and the challenges that the ubiquity of internet impose to this field of study.

Case no. CPF 8553/2015/4 / CA3 "C., E. – provisional measure – 1st Panel of the Federal Criminal and Correctional Chamber – Argentina

Last June 16, 1st Panel of the Federal Criminal and Correctional Chamber – Argentina – Appeal in Case no. CPF 8553/2015/4 / CA3 "C., E. – provisional measure", decided in favor of Google Inc. in a case concerning fake news.

The giant of the internet appealed a decision that extended a provisional measure determining the removal of the indexation of a content in the search engine. The content – proved to be fake – referred to an alleged arrest of Enrique Santos Carrió in Mexico for drugs and weapons possession. He is the son of Elisa Carrió, an important figure in Argentine politics, currently serving as National Deputy.

The questioned order extended the restriction to domains hosted outside the national territory, namely: www.google.com, www.google.com.es and www.google.mx.

In its allegations, Google argued that, by virtue of the principle of state sovereignty, the implementation of that measure would represent a violation of the sovereignty of other states, which would affect services subject to foreign law. The company understood that the restrictive measure should be directed at the sites that published the fake news, and not at the search engine that, according to the company, is a mere intermediary between the users and the publishers.

Also, according to Google, the removal of the contents of www.google.com would require the deletion of them on global servers, which would represent that an Argentine judge could decide about the information that can be accessed worldwide. In turn, it believes that this type of measure constitutes a serious threat to freedom of expression and the right to seek, receive and disseminate information freely.

The Court, granting the appeal, understood that the categorization of the news as fake is typical of the activity of the intervening court. However, these

categorizations cannot be imposed on foreign jurisdictions, except through judicial cooperation mechanisms that do not violate their legal order. In its understanding "the core of this controversy concerns the principle of the territoriality of the law, which prevents the possibility of taking for itself the prerogative to prohibit the global dissemination of certain contents published by the press, whose disclosure would be prohibited under the local regulatory framework, but its circulation may be authorized in the context of another territory, according to the legal provisions and the categorization that this content could be granted "(in free translation).

By this basis, the Chamber decided to leave the proposed precautionary measure ineffective, understanding that, if it so wishes, the judge *a quo* may request measures of judicial cooperation from foreign authorities and thus limit the dissemination of such news.

The full text of the decision can be found here (in Spanish).

Criminal Investigation no. 4781 from Distrito Federal – Brazil. Justice Alexandre de Moraes (Monocratic Decision), Supreme Federal Court, Brazil.

On the other hand, we find in Brazil a decision that went in a very opposite direction if compared to the previous one.

In the context of the Criminal Investigation no. 4781 from Distrito Federal – Brazil, the Supreme Federal Court investigates the existence of organized use of accounts on social networks to create, publish and disseminate false information (commonly known as fake news). On May 26, 2020, Alexandre de Moraes, Minister of the Supreme Federal Court, ordered the blocking of Facebook, Twitter and Instagram accounts belonging to a group of allies of Jair Bolsonaro, current President of Brazil. Such profiles would be used to commit crimes against honor in concurrence with criminal association (typified in the Penal Code in arts. 138, 139, 140 and 288) and crimes against national security (typified in Act 7.170/1983, in arts. 18, 22, 23 and 26). Specifically, the investigation refers to attacks to the Supreme Federal Court and the National Congress.

Some of those investigated, however, evaded the order, changing the location settings on the sites, as if they were publishing from other countries. Therefore, on 07/28/2020, the said magistrate provided that the aforementioned social

networks must block for access from any IP (Internet Protocol), from Brazil or abroad. To guarantee compliance, he imposed a daily fine of R $ 20,000.00 for each unblocked profile.

Twitter announced that it would comply with that decision, though it would appeal.

Differently, Facebook Serviços Online do Brasil Ltda. stated that it would refuse to comply with that decision, alleging its illegality. Thus, it would maintain the access of those investigated and the possibility of posting by accessing to the accounts abroad, allowing the viewing of content in the national territory. Facebook argued: "We respect the laws of the countries in which we operate. We are appealing to the Supreme Federal Court against the decision to block the accounts globally, considering that Brazilian law recognizes limits to its jurisdiction and the legitimacy of other jurisdictions".

In view of this declaration, Minister Alexandre de Moraes issued a new decision, which raised the daily fine to R $ 100,000.00 for unblocked profile.

In his reasons, the Magistrate understood that "like any private entity that carries out its economic activity in the national territory, the social network Facebook must respect and effectively comply with direct commands issued by the Judiciary regarding facts that have occurred or with their persistent effects within the national territory; it is incumbent upon him, if deemed necessary, to demonstrate its non-conformity by means of the resources permitted by Brazilian law". Then, he understood that "the blocking of social network accounts determined in this case, therefore, is based on the necessity to stop the continuity of the disclosure of criminal manifestations, which, in particular, materialize the criminal offenses found in this investigation and which continue to have its illicit effects within the national territory, including the use of subterfuge permitted by the social network Facebook". Finally, he argued that "the issue of national jurisdiction over what is posted and viewed abroad is not discussed, but the dissemination of criminal facts in the national territory, through news and commentary by accounts banned.".

After this decision, Facebook informed the observance of the global blocking of the investigated accounts.

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Portugal joins the CISG

This post is authored by Ana Coimbra Trigo (Associate Lawyer at PLMJ Law Firm; PhD Candidate at NOVA Lisbon Univ.; LL.M. China-EU School of Law (China Univ. Political Science and Law, conferred by Univ. Hamburg); Law Degree from Univ. Coimbra), with contributions from Gustavo Moser.

Today, on 7 August 2020, Decree 5/2020 of the Council of Ministers approved the **United Nations Convention on Contracts for the International Sale of Goods** (CISG or Convention), making Portugal its newest signatory state (link to the official publication here). The Convention will enter into force, in respect of Portugal, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of approval.

Portugal joins the Convention alongside two historic moments. First, this is the year that marks the 40th anniversary of the Convention, and second, the current Secretary General of the UN, António Guterres, is a Portuguese national.

Portugal was in fact active in the preparatory works at UNCITRAL and present at the diplomatic conference that adopted the CISG in 11 April 1980. Although "arriving late to the party", it is foreseen that the CISG will be **advantageous** for Portugal, both at the legal and commercial level.

First, as is well known, the CISG provides a **uniform and neutral regime** for cross-border transactions regarding carriage of goods, and related dispute settlement. The text is based on a common set of remedies inspired by the principle of *favor contractus*and structured to maximize economic benefits of the contract.

Second, the CISG provides for overall **legal certainty**, especially in cases where there is and there is not a (valid) choice of law. It is drafted in plain language and this is particularly advantageous for small and medium-sized companies.

Third, scholars highlight the balanced system of solutions included in the Convention that allows**efficiencies in transaction costs** and thus more competitive prices for imported and exported goods. This is beneficial for overall trade, but from a Portuguese viewpoint, will also allow Portuguese final users to get more value for their money, and Portuguese exporters to sell their products at lower prices in global markets.

Fourth, the above benefits are emphasized when one considers that the CISG has been ratified already by**93 states**. This includes 24 of 27 EU Member-States (excluding UK, Ireland, Malta and not for long Portugal) and also the United States of America, Canada, Brazil, China, Japan and South Korea. Some of these countries are relevant trade partners of Portugal.

Lastly, Portugal will now benefit from **40 years** of scholarly writings and decisions for guidance, including in the Portuguese language, since Brazil recently became the first Lusophone country to adopt the CISG.

The increased availability of materials on the CISG in Portuguese may boost capacity building and contribute to the affirmation of the CISG in other Lusophone countries.

Scholars and diplomats have clamoured about this potential accession over the years, so we anticipate that this will be viewed positively by the local and international legal community.

Moreover, this can be seen as strategic boost for Portugal in international trade in

this demanding international context.

Jurisdiction in relation to hostile trust litigation

In *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] SGCA 62, the Singapore Court of Appeal considered a number of issues: (1) whether a plaintiff could amend its Statement of Claim at the appellate stage to tilt the balance of connecting factors towards Singapore; (2) whether a clause in the trust deed identifying Singapore as the "forum of administration" of the trust was a jurisdiction clause, and if so; (3) whether the clause covered hostile litigation in relation to the trust; and depending on the answers to the previous questions, (4) whether the Singapore proceedings ought to be stayed.

The case concerned Mr Ivanishvili, the former Georgian prime minister, who was a French and Georgian dual national. Mr Ivanishvili had set up the Mandalay Trust which was domiciled in Singapore. The trustee of the Mandalay Trust was Credit Suisse Trust Ltd, a Singapore trust company ("the Trustee"). The trustee's asset management powers were delegated to the Geneva branch of Credit Suisse AG ("the Bank"). The Mandalay Trust suffered losses purportedly due to the actions of one the Bank's employees (Mr Lescaudron) who was the portfolio manager of the Mandalay Trust. Mr Lescaudron was convicted in Swiss criminal proceedings for various forms of misconduct in relation to the Mandalay Trust. At first instance, Mr Ivanishvili and his wife and children, who were the beneficiaries of the Mandalay Trust, sued both the Trustee and the Bank alleging, *inter alia*, breaches of duties of care and skill and misrepresentation. A stay was granted by the court below on the grounds that Switzerland was a more appropriate forum for the action. At the Court of Appeal, Mr Ivanishvili *et al* strategically chose to discontinue proceedings against the Bank to strengthen their argument that Singapore was the appropriate forum for trial of the action and sought to amend their Statement of Claim to this effect. This also entailed reformulating some of the claims against the Trustee to remove references to the Bank. This was

allowed by the Court of Appeal on the basis that absent bad faith, the appellants had the freedom of choice to choose its cause of action and to sue the party it wishes to sue.

On the second issue, the relevant clause provided that:

"2. (a) This Declaration is established under the laws of the Republic of Singapore and subject to any change in the Proper Law duly made according to the powers and provisions hereinafter declared the Proper Law shall be the law of the said Republic of Singapore and the Courts of the Republic of Singapore shall be the forum for the administration hereof."

Clause 2(b) granted the Trustee the power to change the proper law and provided that if so, the courts of the jurisdiction of the new proper law would become the "forum for the administration" of the trust. Contrasting clause 2 with the equivalent clause in *Crociani v Crociani* (17 ITELR 624) where the relevant clauses referred to a *country* being the "forum for the administration", the Court of Appeal noted that the references to "forum for the administration" in clause 2 was tied up with a reference to the *courts*. It therefore held that clause 2(a) was a jurisdiction clause. As a point of interest, it should be noted that, generally speaking, it is immaterial whether a jurisdiction clause naming Singapore as a forum is exclusive or non-exclusive in nature after the Court of Appeal's decision in *Shanghai Turbo v Liu Ming* [2019] 1 SLR 779 (previously noted here); as Singapore is a named forum, the "strong cause" test would apply to cases falling within the scope of the jurisdiction clause.

The question which had to be considered next was whether clause 2(a) covered hostile litigation concerning breach of trust issues (such as in the present case) or was confined to litigation over administrative matters. On this, the Court engaged in an extensive review of case law in other off-shore trust jurisdictions. While tentatively observing that "there is no legal rule limiting the meaning of the phrase 'forum for [the] administration' to an administration action in the traditional sense"(at [75]), the Court ultimately followed the reasoning of the Privy Council in *Crociani* and other cases in its wake and held that that the phrase "is intended to refer to the court or jurisdiction which would settle questions arising in the day to day administration of the trust, and to denote the supervisory and authorising court for actions the trustee might need to take which were not specifically by the trust deed or where its terms were ambiguous"(at [76]). Such

clauses did not cover hostile litigation between trustees and beneficiaries. The Court observed that: “The trust deed is not a contract between two parties with obligations on both sides – rather, it is a unilateral undertaking by the trustee, and in our view this difference must play a part when we consider whether the intention of the drafters was to impose a mandatory jurisdiction clause for the resolution of contentious disputes regarding allegations of breach of trust”(at [78]). This suggests that the “strong cause” test, which has as its starting point the upholding of the parties’ contractual bargain, is not appropriate in hostile litigation involving beneficiaries to a trust.

In any event, the Court’s conclusion on the scope of clause 2(a) meant that whether a stay ought to be granted was to be determined under the *Spiliada* test on *forum non conveniens* rather than the “strong cause” test. On this point, the Court split. A majority of the Court (Menon CJ and Prakash JA), held that the balance of connecting factors pointed towards Singapore and allowed the appeal against the stay. The appellants argued that with the amended claim, the focus was on the Trustee’s breaches of trust, all of which occurred in Singapore. The Court was unconvinced of the respondents’ argument that most of the relevant witnesses, such as Mr Lescaudron, were located in Switzerland and not compellable to appear before the Singapore court. The location of witnesses was but a weak factor pointing in favour of Switzerland being *forum conveniens* relative to Singapore. The respondents had also argued that Swiss banking secrecy laws meant that disclosure of certain documents could only be ordered by the Swiss court but the Court gave little weight to this, holding that it was not clear that the Trustee could not obtain the requisite documents from the Bank itself. In contrast, the shape of litigation post the re-framing of the actions by the appellants meant that the trust relationship, rather than the banking relationship, was at the forefront of the claims. This pointed towards Singapore being the centre of gravity of the action. Further, Singapore law was the governing law of the Mandalay Trust and the rights of all parties under the Trust Deed: “There is no doubt that the Singapore courts are the most well-placed to decide issues of Singapore trust law, and the Swiss courts, operating in a civil law jurisdiction with no substantive doctrine of trusts, would be far less familiar with these issues”(at [110]). This comment may be to understate the competence of the Swiss courts in this regard, as internal Swiss trusts which are governed by a foreign law are not an uncommon wealth management tool in Switzerland. The Court was also not persuaded by the Trustee’s argument that there was a risk of

conflicting findings of fact due to related proceedings elsewhere, holding that this was not a "sufficiently real possibility" (at [114]). Thus, a majority of the Court held that, on an overall assessment of the connecting factors, Singapore would be the more appropriate forum vis-à-vis Switzerland.

There was a strong dissent by Chao SJ on the application of the *Spiliada* test. His Honour was of the view that whether the Trustee would be prejudiced by having to defend itself in Singapore formed the crux of the stay issue. In relation to this, His Honour observed that Mr Ivanishvili was a hands-on investor who corresponded directly with the Bank officers. The Trustee was not always copied into Mr Ivanishvili's instructions to the Bank. The alleged losses occurred in Switzerland and the acts and omissions of the Bank and its officers and the role of Mr Ivanishvili himself remained relevant in determining the Trustee's liability. In contrast, the Trustee played a passive role and the operative events in Singapore were merely secondary in nature (at [153]). This belied the appellants' insistence that the Bank's alleged wrongdoing was no longer relevant in the Singapore proceedings given the amended claim. His Honour was concerned about the respondents' ability to defend itself properly in Singapore given that the evidence and witnesses central to defending the claims were mainly located in Switzerland. Chao SJ was therefore of the view that the action had a greater connection with Switzerland than with Singapore "by a significant margin" (at [154]). His Honour went on to say that if he was wrong on stage one of the *Spiliada* test, stage two would also point towards Switzerland. On stage two, Chao SJ agreed with the High Court that the ends of justice would best be met by the Swiss court applying Singapore trust law. This is as the trustee's conduct may only be properly understood against the backdrop of Mr Ivanishvili's relationship with the Bank and the Bank's conduct in relation to its asset management duties (at [154]).

A pdf of the judgment can be downloaded here.