A centralized court for the EAPO Regulation in the Czech Republic?

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Introduction

On 22 January 2021, the Czech Chamber of Deputies approved "the government act amending Act No. 6/2002 Coll., on courts, judges, lay judges and the state administration of courts and amending certain other acts (the Courts and Judges Act), the wording of later regulations, and other related laws, according to the Chamber of Deputies 630 as amended by the Chamber of Deputies". The reform is now pending before the Czech Senate.

The first legislative implementation of the EAPO Regulation in the Czech national law

This act introduces the very first amendment of the Czech domestic legislation regarding Regulation No 655/2014, establishing a European Account Preservation Order ("EAPO Regulation").

The act foresees the concentration of all the applications for EAPOs in one single court, and namely the Prague 1 District Court (*Obvodní soud pro Prahu 1*). Nowadays, based on the information available in the *e-justice* portal, the competent court corresponds to the territorially competent court in the debtor's domicile. However, if the debtor lives outside the Czech Republic, the competent court is the one of the district where the debtor is domiciled.

The upcoming reform envisaged with the act will also affect the application mechanism to gather information on the bank accounts established in Article 14 of the EAPO Regulation. Creditors can also request to investigate if debtors hold bank accounts in the other Member States. Each Member State has an information authority which is charge of searching for the information on the bank accounts. Member States had to notify the Commission with the names of

the information authorities by 16 July 2016.

Currently, there is no central information authority in the Czech Republic. Any district court with territorial competence over the debtor's domicile is an information authority for the purposes of the EAPO Regulation. When the debtor is not domiciled in the Czech Republic, the information authority is the competent court in the district where the bank, which holds the accounts, is located. This can result in challenges for the courts of other Member States searching the information. In case the creditor even ignores the name of the debtor's bank, how can the competent authority to provide the information on the bank accounts be identified? One Luxemburgish judge has experienced this very dilemma.

The information on the bank accounts is obtained directly from the banks. Czech courts submit a request to "all banks in its territory to disclose, upon request by the information authority, whether the debtor holds an account with them" (Article 14(5)(b) of the EAPO Regulation).

Eventually, if the reform is approved by the Czech Senate, the information authority will also be centralized in the Prague 1 District Court.

The reasons behind the implementation

According to Dr. Katerina Valachová, the member of the Czech Chamber of Deputies who sponsored the amendments concerning the EAPO Regulation, the reform is due to "the complexity of the legislation on the EAPO, as well as the short deadlines set by the EAPO Regulation". Having a single court for all the EAPO applications will help in terms of specialization. Furthermore, since most of the headquarters of the banks that operate in the Czech Republic are located within the area of the Prague 1 District Court when the court acts as an information mechanism, it can obtain the information on the bank accounts from the banks faster.

The Czech reform in the European context

Establishing a central authority to gather information on the bank accounts is the most common solution followed among those Member States in which the EAPO Regulation applies. Only four out of the twenty-six Member States (France, Finland, Latvia, and the Netherlands), have opted for a complete decentralized information authority. Two other Member States, Austria, and Italy adopted a

hybrid approach: they have a central authority when the debtor is domiciled abroad and a decentralized authority when the debtor is domiciled in the country.

However, establishing a centralized court to handle all EAPO applications is a less common choice among other Member States. Only three countries have appointed centralized courts to issue EAPOs: Austria, Slovakia, and Finland.

The Czech Republic's two neighbouring Member States, Slovakia and Austria, introduced a partial centralization of the EAPOs applications. In Slovakia, the Banská Bystrica District Court (*Okresný súd Banská Bystrica*) handles all the EAPO applications when the debtor's "general territorial affiliation cannot be determined" within the Slovakian territory. In Austria, the Vienna Inner City District Court (*Bezirksgericht Innere Stadt Wien*) is responsible for issuing all the EAPOs when requested before initiation of the proceedings on the merits and before the enforcement of the judgment on the merits of the claim.

Finland has gone a step further than Austria and Slovakia. Similarly, to the ongoing Czech reform, it appointed one sole court – the district court of Helsinki – responsible for issuing all EAPOs.

Outside the EAPO Regulation scheme, we can also find examples of domestic "centralized courts" responsible for other European civil proceedings. For instance, in Germany the European Payment Order ("EPO") was centralized in the Local Court in Wedding, Berlin. In 2019, France the French legislator approved the creation of a centralized court, which will handle all the EPO applications.

A more efficient application of the EAPO Regulation

Establishing a centralized court for the EAPO Regulation in Czechia is very welcome among those of us who want the EAPO Regulation to become a successful instrument. The future central court will become specialized with the EAPO Regulation, an instrument that can result too complex and requires a certain amount time for its adequate understanding. The centralization will also assure a coherent and uniform application of the EAPO Regulation at the Czech national level. Moreover, in case an issue on the interpretation of the text of that Regulation arises, that centralized court might be more willing to make a preliminary reference to the European Court of Justice ("ECJ") than regular judges who might not encounter many applications for EAPOs. The ECJ has itself expressly acknowledged the benefits of the centralization in the context of the

Maintenance Regulation. In fact, in C-400/13, *Sanders and Huber*, the ECJ affirmed that "a centralization of jurisdiction, such as that at issue in the main proceedings, promotes the development of specific expertise, of such a kind as to improve the effectiveness of recovery of maintenance claims, while ensuring the proper administration of justice and serving the interests of the parties to the dispute" (C-400/13, *Sanders and Huber*, 18 December 2014, ECLI:EU:C:2014:2461, para. 45).

Hopefully, in the future more Member States will follow the example of Czechia or Finland and will concentrate the application of the EAPO in a sole court in their territories.

Review of the AJIL Unbound symposium: Global Labs of International Commercial Dispute Resolution

By Magdalena Lagiewska, University of Gdansk

This post reviews the symposium issue of the *American Journal of International Law* Unbound on "Global Labs of International Commercial Dispute Resolution". This issue includes an introduction and six essays explaining the current changes and developments in the global landscape for settling international commercial disputes. The multifarious perspectives have been discussed to show tendencies and challenges ahead.

Overall, the *AJIL Unbound* special issue is, without doubt, one of the most impactful contributions on changes in international commercial dispute resolution landscape. It is a successful attempt and a fascinating analysis of recent

developments in this field. This is certainly a must-read for anyone interested in reshaping the landscape of dispute resolution worldwide. Beyond the theoretical context, it includes many practical aspects and provides new insight into the prospects of its development and potential challenges for the future. I highly recommend it not only to the researchers on international commercial dispute resolution, but also to legal practitioners—lawyers, arbitrators, and mediators among others. Below, I have outlined each of the symposium's contributions.

As mentioned in the introduction by Anthea Roberts [1], instead of the previous bipolarity and centralization around New York and London, international commercial dispute resolution is facing a new process of decentralization and rebalancing. Today, we are all witnessing the adaptation to a new reality and the COVID-19 pandemic is speeding up the entire process. "New legal hubs" and "one-stop shops" for dispute resolution are springing up like mushrooms in Eurasia and beyond. Therefore, due to the competitiveness between the "old" and "new" dispute resolution institutions, these new bodies are more innovative and thus are expected to attract more and more interested parties.

The main aim of this symposium was to outline the new challenges of the international commercial dispute resolution mechanism around the world. New dispute resolution centres not only influence on the current landscape, but also they offer "fresh insight" in this field.

The first essay by Pamela K. Bookman and Matthew S. Erie, entitled "Experimenting with International Commercial Dispute Resolution" [2], pays attention to the new phenomena on emerging "new legal hubs" (NLHs), international commercial courts and arbitral courts worldwide. This new tendency has recently appeared in China, Singapore, Dubai, Kazakhstan and Hong Kong. All of these initiatives affect the international commercial dispute settlement landscape and increase the competitiveness among these centres. Those centres bravely take advantage of "lawtech" and challenge themselves. As a result, they are experimenting with legal reforms and some institutional design to attract more interested parties and to become well-known platforms providing high-quality dispute resolution services. The Authors set forth the challenges and threats that may exist in this respect. They also provide an insightful analysis of the impact of these new initiatives on the international commercial dispute resolution, international commercial law, and the geopolitics of disputes.

Further, Giesela Rühl's contribution focuses on "The Resolution of International Commercial Disputes – What Role (if any) for Continental Europe?" [3]. The author pays attention to the Netherlands, which took the initiative to establish a new court exclusively devoted to international cases, and Germany and France, which took more skeptical efforts to establish international commercial chambers both before and after the Brexit referendum in 2016. Rühl believes that the far-reaching reform should be implemented at the European level. Therefore, she advocates the establishment of a common European Commercial Court. This seems to be an interesting approach that would certainly strengthen Europe's position in the global dispute resolution landscape.

Julien Chaisse and Xu Qian outline the importance and key features of the recently established China International Commercial Court (CICC) [4]. Given its foundation, this court should operate as a "one-stop shop" combining litigation, arbitration, and mediation. It is dedicated to solving Belt and Road Initiative (BRI) related disputes. The Authors point out that this court is much more akin to a national court than a genuine international court. Therefore, they challenge its importance with respect to BRI-related disputes and attempt to determine whether the Court will play a significant role in the international dispute settlement landscape. These considerations are especially important given the primary sources in Chinese which bring the reader closer to Chinese legislation.

The following essay, by Wang Guiguo and Rajesh Sharma, addresses the International Commercial Dispute Prevention and Settlement Organization (ICDPASO) established in 2019 [5]. It is another global legal hub that offers "one-stop" services in China. At first glance, the ICDPASO seems to be an interesting body with an Asian flavour, however, the Authors shine a spotlight on some practical challenges ahead and its limited jurisdiction. This body differs significantly from the aforementioned CICC. Whether the ICDPASO will be a game-changer in the BRI-related disputes and will influence importantly on international dispute resolution landscape seems to be a melody of the future. It is ultimately too soon to answer those questions now, but it is certainly worthwhile to watch this institution.

Further, S.I. Strong brings attention to the actual changes in international commercial courts in the US and Australia [6]. Although Continental Europe, the Middle East, and Asia try to reshape the current international dispute resolution landscape, common law jurisdictions, such as the United States and Australia, are

less inclined to changes in establishing international courts specialized in cross-border disputes. Compared to the US, Strong believes that Australia has made more advanced efforts to establish such courts. Nevertheless, aside from the traditional international commercial courts, the newly emerging international commercial mediation services are gaining popularity, most notably due to the entry into force of the UN Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention).

Last but not least, Victoria Sahani contribution's outlines third-party funding regulation [7]. While third-party funding remains a controversial issue in litigation or arbitration, whether domestic or international, it is becoming much more popular globally. There are already over sixty countries experimenting with regulatory questions about third-party funding. In this case, we also deal with some "laboratories" that try out different methods of regulation.

The entire symposium is available here.

Can China's New "Blocking Statute" Combat Foreign Sanctions?

by Jingru Wang, Wuhan University Institute of International Law

1. **Background**

A blocking statute is adopted by a country to hinder the extraterritorial application of foreign legislation.[1] For example, the EU adopted Council Regulation No 2271/96 (hereinafter "EU Blocking Statute") in 1996 to protest the US's extraterritorial sanctions legislation concerning Cuba, Iran and Libya.[2] Since Donald Trump became the US president, the US government officially defined China as its competitor.[3] Consequently, China has been increasingly targeted by US sanctions. For example, in 2018, the US imposed broad sanctions

on China's Equipment Development Department (EDD), the branch of the military responsible for weapons procurement and its director for violating the US law on sanctions against Russia.[4] In 2020, the US announced new sanctions on Chinese firms for aiding North Korea's nuclear weapons program.[5] A number of "Belt and Road" countries are targeted by US primary sanctions, which means that Chinese entities may face a high risk of secondary sanctions for trading with these countries. In these contexts, Chinese scholars and policy makers explore the feasibility to enact blocking law to counter foreign sanctions.[6] On 9 January 2021, China's Ministry of Commerce (hereinafter "MOFCOM") issued "Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures" (hereinafter "Chinese Blocking Rules"), which entered into force on the date of the promulgation.[7]

2. **Analysis of the Main Content**

Competent Authority: Chinese government will establish a "Working Mechanism" led by the MOFCOM and composed of relevant central departments, such as the National Development and Reform Commission. The Working Mechanism will take charge of counteracting unjustified extraterritorial application of foreign legislation and other measures (Art. 4).

Targeted extraterritorial measures: The Chinese Blocking Rules target foreign legislation and other measures unjustifiably prohibit or restrict Chinese parties from engaging in normal economic, trade and related activities with third state's parties (Art. 2), which is the so-called "secondary sanction". Namely, if China considers sanctions unilaterally imposed by the US against a third country unjustified and violating international law, it may nullify such sanctions and allow Chinese companies to continue to transact with the third country. These Rules do not impact restrictions on business activities between China and the sanctioning country.

Unlike the EU Blocking Statute, the Chinese Blocking Rules do not provide an annex listing the legislation subject to the blocking but grant the Working Mechanism discretion. To determine whether foreign legislation or other measures fall within the application scope of the Chinese Blocking Rules, the Working Mechanism shall consider (1) the international law and fundamental

principle of international relations; (2) potential impact on China's national sovereignty, security and development interests; (3) potential impact on the legitimate interest of the Chinese party and (4) all other factors (Art. 6). On the one hand, the non-exhaustive list grants the Working Mechanism broad flexibility to analyse on a case-by-case basis. China has repeatedly become the target of US secondary sanctions. An exhaustive list of foreign legislation and other measures is insufficient to deal with the changing situations. On the other hand, China is prudent in confrontation with other countries. In a press conference, the MOFCOM spokesman stated that "the working mechanism will closely follow the inappropriate extraterritorial application of relevant national laws and measures."[8] Therefore, the response of other countries will influence the enforcement of the Chinese Blocking Rules.

It is noteworthy the Chinese Blocking Rules will not affect China's performance of its international obligations. These Rules shall not apply to such extraterritorial application of foreign legislation and measures as provided for in treaties or international agreements to which China is a party (Art. 15).

Information reporting system: A Chinese party prohibited or restricted by foreign legislation and other measures from engaging in normal economic, trade and related activities with a third state's party shall report such matters to the MOFCOM within 30 days (Art. 5). Otherwise, the Chinese party may be warned, ordered to rectify or fined (Art. 13). To encourage the information report, Art. 5 of the Chinese Blocking Rules also provides that the competent authority shall keep such report confidential at the request of the Chinese party. The staff of the competent authority may undertake administrative penalties if they fail with such obligation (Art. 14).

Concerning the Information reporting system, when the report obligation is triggered is unclear. Should the Chinese party report within 30 days after the foreign legislation is published or other measures are taken or after its actual operation is restricted? Moreover, since the Chinese Blocking Rules do not list targeted foreign legislation and other measures, the Chinese party should rely on their judgment to report. Finally, who should report on behalf of the legal person remains to be answered.

Prohibition order: Once the unjustified extraterritorial application of foreign legislation and other measures is confirmed, the Working Mechanism may decide

that the MOFCOM shall issue a prohibition order to ban the effect of relevant foreign legislation and other measures (Art. 7). A Chinese party that fails to observe the prohibition order will be punished (Art. 13). Therefore, Chinese parties are forced to comply with either Chinese or foreign laws. In other words, they will be punished by one or the other. To free the party from the dilemma, a Chinese party may apply for exemption from compliance with a prohibition order (Art. 8). China-based subsidiaries of foreign companies are formed under Chinese law. They are considered to be Chinese entities. Therefore, unless otherwise provided by law, they are subject to the prohibition order issued under the Chinese Blocking Rules and can apply for the exemption.

One major uncertainty is whether third state's parties are subject to the prohibition order. These Rules do not stipulate that foreign entities will be punished by violating the prohibition order or can apply for the exemption. However, it is suggested that the prohibition order may bind the third state's party for two reasons. Firstly, the US may issue secondary sanctions to prohibit Chinese parties from trading with third state's parties (Iran as an example), or to prohibit third state's parties (EU as an example) from trading with Chinese parties. According to Art. 2 of the Chinese Blocking Rules, both situations may obstruct the normal economic, trade and related activities between the Chinese party and the third state's party. If the prohibition order merely applies to the Chinese party, it cannot protect Chinese businesses from being prejudiced by the US secondary sanctions in the latter situation. Secondly, a Chinese party can bring a lawsuit before the People's Court against the party who infringes the legitimate interest of such Chinese party by complying with the foreign legislation and other measures covered by the prohibition order (Art. 9). This article does not limit the defendant to "a Chinese party." Thus it shall include the third state's party. If the prohibition order does not bind the third state's party, it is doubtful that such third state's party is liable for not complying with the prohibition order.

The prohibition order refrains relevant parties from complying with specific foreign legislation and other measures. A question is how should the prohibition order be observed. According to the European Commission's Guidance Note, the purpose of the EU Blocking Statute is to ensure that business decisions on trading with third States remain free. It does not oblige EU operators to do business with Iran or Cuba. Also, the Chinese Blocking Rules cannot and should not oblige the Chinese party and the third state's party to engage with each other. Therefore, it

raises the worry that these Rules may apply better for breach of existing contract but be more difficult to "force" someone to enter into a contract or in terms of the pre-contractual obligation.

Judicial Remedy: A Chinese party can bring a lawsuit before the People's Court of PRC against the party who infringes its legitimate interest by complying with the foreign legislation or measures covered by the prohibition order. A Chinese party may also suit the party who benefits from the judgment or ruling made under such foreign legislation or other measures before the People's Court (Art. 9). Problems may arise if the losing party has no asset in China seized for enforcement by the Chinese court. Other countries may be reluctant to recognize and enforce such judgment.

Government support: Members of the Working Mechanism shall provide guidance and service to Chinese parties to deal with unjustified extraterritorial application of foreign legislation and other measures (Art. 10). Suppose a Chinese party that observes the prohibition suffers significant losses resulting from non-compliance with the relevant foreign legislation and measures. In that case, relevant government departments may provide necessary support based on specific circumstances (Art. 11). Which government department is responsible for these matters? Does "Necessary support" include financial compensation or support on litigation in the sanctioning country? These questions remain to be answered.

3. **Impact of the Blocking Statute**

Considering that China has long suffered from secondary sanctions issued by the US government, promulgating the Chinese Blocking Rules is not a surprise. Overall, the Chinese Blocking Rules attempt to establish three core institutions anticipated by Chinese scholars: (1) blocking the effect and enforcement of specific foreign legislation in China; (2) prohibiting relevant parties from complying with specific foreign legislation and other measures; (3) enabling relevant parties to recover the damage from the party who complies with the foreign legislation and measures covered by the prohibition order. Therefore, a blocking statute serves as both shield and sword to fight against foreign sanctions.

But the function of blocking statute shall not be overemphasized. The same as the EU Blocking Statute, the Chinese Blocking Rules create a quandary for relevant parties.

For Chinese parties, if they comply with the Chinese prohibition order, they have to deal with US penalties. Chinese parties may invoke "foreign sovereign compulsion"[9] as a defence to insulate themselves from certain US sanctions penalties. In determining whether to buy such argument, US courts often consider whether foreign states actively enforce them.[10] The Chinese Blocking Rules can provide a legal basis for Chinese parties to exempt from the US sanctions by strategic enforcement actions. If so, Chinese parties will be relieved to transact with third state's parties. But the Chinese government may not be willing to provide the same exemption. Out of self-interest, Chinese parties may be more likely to comply with the Chinese Blocking Rules.

These Rules have not yet stipulated the legal result if third states' parties violate the Chinese prohibition order. In principle, prescriptive jurisdiction can be extraterritorial, but enforcement jurisdiction must be territorial. Therefore, China cannot always extend the effect of Blocking Rules to a third state's party even if it has the will. However, it is reasonable to assume that third state's parties may be added to the "unreliable entities list"[11] for disregarding the Chinese prohibition order. It may prompt third state's parties to observe the Chinese prohibition order voluntarily to preserve their assets and reputation in China. But even if third state's parties value the Chinese market, it is uneasy for them to choose China over the US.

China has become more active in exploring countermeasures against the US. On 19 September 2020, MOFCOM released provisions on establishing "unreliable entity list."[12] Promulgation of the Chinese Blocking Rules is another proactive attempt. However, both are departmental rules, which are at a relatively low-level in the Chinese legal system. Predictably, higher-level legislation concerning the extraterritorial effect of foreign legislation and other measures will be enacted in the future. It may prompt China and the US back to the negotiating table.

[1] Menno T. Kamminga, "Extraterritoriality", Max Planck Encyclopedia of Public International Law, November 2012, para. 26.

[2] COUNCIL REGULATION (EC) No 2271/96, available at:

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01996R2271-20140220.

[3] White House, National Security Strategy of the United States of America, December 2017.

[4] CAATSA – Russia-related Designations, available at: https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20180920_33. aspx.

[5] North Korea Designations, available at: https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20201208.

[6] Ye Yan, "On the EU Blocking Statute", Pacific Journal, Vol. 28, No. 3, Mar. 2020, pp. 50-66; Huo Zhengxin, "Extraterritoriality of Domestic Law: American Model, Jurisprudential Deconstruction and Chinese Approach", Tribune of Political Science and Law, Vol. 38, No. 2, Mar. 2020, pp. 173-191.

[7] Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures, available at: http://www.mofcom.gov.cn/article/i/jyjl/e/202101/20210103032421.shtml.

[8] The Head of the Department of Treaty of Law of Ministry of Commerce answers press on "Rules on Counteracting Unjustified Extraterritorial Application of Foreign Legislation and Other Measures", available at: http://www.mofcom.gov.cn/article/news/202101/20210103029779.shtml.

[9] "Foreign Sovereign Compulsion" means that if a party is obliged to do or not to do an act by a state, it may constitute a defence for not complying with the obligation specified by the US law before the US court. See American Law Institute, Restatement of the Law, Third, The Foreign Relations Law of the United States, American Law Institute Publishers, 1990, p. 341.

[10] M. J. Hoda, "The Aerospatiale Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It", California Law Review, Vol. 106, No. 1, 2018.

[11] The entity added to the list will be restricted on China-related trade, investment in China and travel or work permits. See “MOFCOM Order No. 4 of 2020 on Provisions on the Unreliable Entity List”, available at:

http://www.mofcom.gov.cn/article/b/fwzl/202009/20200903002593.shtml.

[12] Ibid.

Personal Injury and Article 4(3) of Rome II Regulation

This blog post is a follow up to my earlier announcement on the decision of Owen v Galgey [2020] EHWC 3546 (QB).

Introduction

Cross border relations is bound to generate non-contractual disputes such as personal injury cases. In such situations, the law that applies is very important in determining the rights and obligations of the parties. The difference between two or more potentially applicable laws is of considerable significance for the parties involved in the case. For example a particular law may easily hold one party liable and/or provide a higher quantum of damages compared to another law. Thus, a preliminary decision on the applicable law could easily facilitate the settlement of the dispute between the parties without even going to trial.

Rome II Regulation[1] governs matters of non-contractual obligations. Article 4 of Rome II applies to general torts/delicts such as personal injury cases. It provides that:

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in

which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

In the recent case of *Owen v Galgey & Ors.,*[2] the English High Court was faced with the issue of applying Article 4 of Rome II to a personal injury case. This comment disagrees with the conclusion reached by the High Court Judge in displacing English law under Article 4(2) of Rome II, and applying French law under Article 4(3) of Rome II.

Facts

The Claimant is a British citizen domiciled and habitually resident in England who brought a claim for damages for personal injury sustained by him as result of an accident in France on the night of April 3rd 2018, when he fell into an empty swimming pool which was undergoing works at a villa in France – a holiday home owned by the First Defendant, whose wife is the Second Defendant. The First and Second Defendants are also British citizens who are domiciled and habitually resident in England. The Third Defendant is a company domiciled in France, and the insurer of the First and Second Defendants in respect of any claims brought against them in connection with the Villa. The Fourth Defendant is a contractor which was carrying out renovation works on the swimming pool at the time of the accident, and the Fifth Defendant is the insurer of the Fourth Defendant. The Fourth and Fifth Defendants are both companies which are domiciled in France.

It was common ground between the parties that French law applied to the Claimant's claims against the Fourth and Fifth Defendants. But there was a dispute at to the applicable law in relation to his claims against the First to Third Defendants. These Defendants contended that, by operation of Article 4(2) of Rome II, English law applies because the Claimant and the First and Second Defendants are habitually resident in England. However, the Claimant contended that French law applied by operation of Article 4(3) the Rome II because, he says, it is clear that the tort in this case is manifestly more closely connected with France than it is with England.

It was common ground that French law applied under Article 4(1) of Rome II because the direct damage occurred in France in this case; and English law applied under Article 4(2) of Rome II because the Claimant and First and Second Defendants were all habitually resident in England. The legal issue to be resolved was therefore whether under Article 4(3) the tort/delict was manifestly more closely connected to France than it is with England.

Decision

In a nutshell, Linden J held that French law applied under Article 4(3) of Rome II. The Court considered Article 4 of Rome II as a whole and read it in conjunction with both the Explanatory Memorandum[3] and Recitals to Rome II.[4]

Linden J held that Article 4(2) created a special rule which automatically displaced Article 4(1), and Article 4(2) was intended to satisfy the legitimate expectation of the parties.[5] On this basis, he observed that Article 4(2) could only apply in two party cases (only one victim and one tortfeasor), and not multi-party situations.[6] Linden J explicitly disagreed with an earlier decision of Dingemans J in *Marshall v Motor Insurers' Bureau* & *Ors*[7] that held that Article 4(2) applied in multi-party situations.[8]

Linden J considered the relevant circumstances that could give rise to applying Article 4(3) in this case in the following chronological order:

1. the desire for a single law to govern the whole case involving the Claimant and the First to Fifth Defendants;[9]
2. the circumstances relating to all the parties in the case;[10]

3. the place of direct damage under Article 4(1);[11]
4. the habitual residences of the parties, including where any insurer defendants are registered at the time of the tortious incident and when the damage occurs;[12]
5. the habitual residence of the Claimant at the time of the consequences of the tort, including any consequential losses;[13]
6. the nationalities of the parties; [14] and
7. the fact that the parties have a pre-existing relationship in or with a particular country.[15]

Linden J held, following previous English decisions,[16] that the burden of proof was on the party that seeks to apply Article 4(3).[17] He held that Article 4(3) could only be applied as an exceptional remedy where a clear preponderance of factors supports its application.[18] However he observed that the facts of the case do not have to be unusual for Article 4(3) to apply, though Article 4(3) was intended to operate in a clear and obvious case.[19]

After considering the submission of the parties in the case, Linden J preferred the Claimant's submission that Article 4(3) applied in this case. In his words: "France is where the centre of gravity of the situation is located and the preponderance of factors clearly points to this conclusion. This conclusion also accords with the legitimate expectations of the parties."[20]

Linden J gave great weight to the place of direct damage. In his words:

"The tort/delict occurred in France, as I have noted. This is also where the injury or direct damage occurred. The dispute centres on a property in France and it concerns structural features of that property and how the First, Second and Fourth Defendants dealt with works on a swimming pool there. Although these defendants deny that there was fault on the part of any of them, the First and Second Defendants say that the Fourth Defendant was responsible if the pool presented a danger and the Fourth Defendant says that they were. The allegations of contributory negligence/fault also centre on the Claimant's conduct whilst at the Villa in France.

The First and Second Defendants also had a significant and long-standing connection to France, the accident occurred on their property…

…the situation in relation to the swimming pool which is said to have been the

cause of the accident was firmly rooted in France and it resulted from works which were being carried out by the Fourth Defendant as a result of it being contracted to do so by the First and Second Defendants. The liability of the First and Second Defendants, if any, will be affected by how they dealt with that situation, including by evidence about their dealings with the Fourth Defendant. That situation had no significant connections with England other than the nationality and habitual place of residence of the First and Second Defendants."[21]

Linden J also gave great weight to the desire to apply a single law to govern the whole case against the First to Fifth Defendants.[22] In his words:

"…the works were carried out by a French company pursuant to a contract with them which is governed by French law. Their insurer, the Third Defendant, is a French company and they are insured under a contract which is governed by French law… It is also common ground that the claim against the Fourth Defendant, and therefore against the Fifth Defendant, also a French company, is entirely governed by French law and will require the court to decide whether the Fourth Defendant or, at least by implication, the First and Second Defendants were "custodians" of the property for the purposes of French law."[23]

On the other hand Linden J did not give great weight to the common habitual residence, common nationalities and common domiciles of the Claimant and First and Second Defendants, and the place of consequential loss which pointed to England. Linden J did not consider the pre-existing relationship between the Claimant and First and Second Defendants to be a strong connecting factor in favour of English law applying in this case. He did not regard their relationship as contractual but one that appears to be "the agreement resulted from a casual conversation between social acquaintances in the context of mutual favours having been done in the past."[24] He considered that if there was a contract between the parties, he would have held that French law applied under Article 4(3) of Rome I Regulation[25] because the parties mutually performed their obligations in France.

In the final analysis, Linden J held as follows:

"To my mind the tort/delict in this case is much more closely connected to the state of the swimming pool which, as I have said, was part of a property in France

and resulted from the French law contract between the First and Second Defendants and the Fourth Defendant. If any of the Defendants is liable, that liability will be closely connected with this contract. This point, taken in combination with the other points to which I have referred, in my view clearly outweighs the existence of any contract with the Claimant relating to the Villa, even if I had found there to be a contractual relationship and even if it was governed by English law.

Similarly, although I have taken into account the nationality and habitual place of residence of the Claimant and the First and Second Defendants, these do not seem to me to alter the conclusion to which I have come. I have also taken into account the fact that the consequences of the accident have to a significant extent been suffered by the Claimant whilst he was in England, but in my view the other factors to which I have referred clearly outweigh this consideration.

I therefore propose to declare that the law applicable to the claims brought by the Claimant against the First, Second and Third Defendants is French law."[26]

Comment

Owen is the second English case to utilise Article 4(3) as a displacement tool.[27] Interestingly, *Owen* and *Marshall* are both cases where Article 4(3) was used to trump Article 4(2) in order to restore the application of Article 4(1). These judicial decisions put to rest any contrary view that Article 4(3) cannot be used to restore the application of Article 4(1), when Article 4(2) automatically displaces Article 4(1). In this connection, I agree with the judges' conclusion on the basis that Article 4(3) operates as an escape clause to both Article 4(1)&(2). Such an approach also honours the requirement of reconciling certainty and flexibility in Recital 14 to Rome II. A contrary approach will unduly circumscribe the application of Article 4(3) of Rome II.

I do not agree with Linden J that Article 4(2) of Rome II only applies in two party cases (one victim and one tortfeasor) and does not apply in multi-party cases. I prefer the contrary decision of Dingemans J in *Marshall*. Interpreting Article 4(2) as being only applicable to two party cases is a very narrow interpretation. Moreover, the fact that Article 4(2) is a strong exception to Article 4(1) does not mean that Article 4(2) should be unduly circumscribed. Article 4(2) should not be

applied mechanically or without thought. It must be given some common sense interpretation that suits the realities of cross-border relations in torts.

Moving to the crux of the case, I disagree with the conclusion reached by Linden J that French law applied in this case. Applying the test of Article 4(3), the tort was not *manifestly* more closely connected with France. In other words, it was not obvious that Article 4(3) outweighed the application of Article 4(2). To my mind, the arguments between the opposing parties were evenly balanced as to whether the tort was *manifestly* more closely connected with France. Article 4(2) in this case, which pointed to English law, was also corroborated by the common domiciles and common nationalities of the Claimant and First and Second Defendants which should have been regarded as a strong connecting factor in this case. In addition, the non-contractual pre-existing relationship between the Claimant and First and Second Defendants, and consequential loss pointed to England, though I concede that these factors are not very strong in this case.

It is important to stress that Article 4(2) of Rome II is a fixed rule and not a presumption of closest connection as it was under Article 4(2) of the Rome Convention.[28] Once Article 4(2) of Rome II applies, it automatically displaces Article 4(1), except Article 4(3) regards the place of damage as *manifestly* more closely connected with another country. Linden J appeared to give decisive weight to the place of damage and the desire to apply a single law to all the parties in the case, but did not pay due regard to the fixed rule in Article 4(2) and the fact that it was corroborated by other factors such as the common nationalities and domiciles of the Claimant and First and Second Defendants involved in the case.

Conclusion

Owen presents another interesting case on the application of Article 4 of Rome II to personal injury cases. It is the second case an English judge would be satisfied that Article 4(3) should be utilised as a displacement tool. The use of the escape clause is by no means an easy exercise. It involves a degree of evaluation and discretion on the part of the judge. Indeed, Article 4(3) is very fact dependent. In this case, Linden J preferred the argument of the Claimant that French law applied in this case under Article 4(3). From my reading of the case, I am not convinced that this was a case where Article 4(3) *manifestly* outweighed Article

4(2). It remains to be seen whether the First, Second and Third Defendants will appeal the case, proceed to trial or settle out of court.

[1]Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 ("Rome II"). It takes effect in courts of Member States only for events giving rise to damage occurring after 11 January 2009, as decided by the Court of Justice of the European Union (CJEU) in Case C-412/10 *Homawoo* EU:C:2011:747 [37].

[2] [2020] EWHC 3546 (QB)

[3]Explanatory memorandum from the Commission, accompanying the Proposal for Rome II, COM(2003) 427final (Explanatory Memorandum).

[4] *Ibid* [15] – [24].

[5] *Ibid* [26] – [27].

[6] *Ibid* [27] – [29], [35]. However, the argument as to whether Article 4(2) applied only in two party situations was not put forward before Linden J.

[7] [2015] EWHC 3421 (QB) [17].

[8] *Owen* (n 2) [35].

[9] *Ibid* [36] – [38]. In this connection, Linden J considered and followed the decision in of Dingemans J in *Marshall* (n 7) [18].

[10]*Owen* (n 2) [39] – [45]. In this connection, Linden J considered and followed the decision of Cranston J in *Pickard v Marshall* & *Ors* [2017] EWCA Civ 17 [14] – [15].

[11]*Owen* (n 2) [46]. Linden J followed *Winrow v Hemphhill* & *Anor.* [2014] EWHC 3164 [43], and Dingemans J in *Marshall* (n 7) [19].

[12] *Owen* (n 2) [48]

[13] *Ibid* [49]. Linden J followed *Winrow* (n 11) [39]&[43] and *Stylianou v Toyoshima* [2013] EWHC 2188 (QB). At paragraph 50 Linden J stated that less

weight was to be given to this factor.

[14] *Ibid* [51]. Linden J followed *Winrow* (n 11) [54]&[55] and *Marshall* (n 7) [22].

[15] *Ibid* [52] – [[56]

[16] *Winrow* (n 11) [16] and *Marshall* (n 7) [20].

[17] *Owen* (n 2) [57].

[18]*Ibid* [58]

[19] *Ibid* [61].

[20] *Ibid* [74].

[21]*Ibid* [75]-[77]

[22] Indeed, it was common ground in this case that the contract of insurance between the First, Second and Third Defendants was governed by French law; the contract between the First Defendant and the Fourth Defendant was governed by French law; the contract of insurance between the Fourth and Fifth Defendants was governed by French law; and the Claimant's claims against the Fourth and Fifth Defendants are governed by French law. *Ibid* [12]

[23]*Ibid* [76].

[24] *Ibid* [78].

[25]Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6 ("Rome I").

[26] *Ibid* [81] – [83].

[27] *Marshall* (n 7) was the first case to successfully utilise escape clause as a displacement tool.

[28][1980] OJ L266.

Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (II): The proposed Art. 6a; Art. 7 is dead, long live Article 7?

Eduardo Álvarez-Armas is Lecturer in Law at Brunel University London and Affiliated Researcher at the Université Catholique de Louvain. He has kindly provided us with his thoughts on recent proposals for amending the Rome II Regulation. This is the second part of his contribution; a first one on the law applicable to strategic lawsuits against public participation can be found here.

Over the last few months, the European Parliament´s draft report on corporate due diligence and corporate accountability (2020/2129(INL)) and the proposal for an EU Directive contained therein have gathered a substantial amount of attention (see, amongst others, blog entries by Geert Van Calster, Giesela Rühl, Jan von Hein, Bastian Brunk and Chris Thomale). As the debate is far from being exhausted, I would like to contribute my two cents thereto with some further (non-exhaustive and brief) considerations which will be limited to three selected aspects of the proposal´s choice-of-law dimension.

1. **A welcome but not unique initiative (Comparison with the UN draft Treaty)**

Neither Article 6a of Rome II nor the proposal for an EU Directive are isolated initiatives. A so-called draft Treaty on Business and Human Rights ("*Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*") is currently being prepared by an *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, established in 2014 by the United Nation´s Human Rights Council. Just like it is

the case with the EP´s proposal, the 2nd revised UN draft Treaty (dated 6th August 2020) (for comments on the applicable law aspects of the 1st revised draft, see Claire Bright´s note for the BIICL here) contains provisions on international jurisdiction (Article 9, "*Adjudicative Jurisdiction*") and choice of law (Article 11, "*Applicable law*").

Paragraph 1 of the latter establishes the *lex fori* as applicable for "*all matters of substance* […] *not specifically regulated*" by the instrument (as well as, quite naturally, for procedural issues). Then paragraph 2 establishes that "*all matters of substance regarding human rights law relevant to claims before the competent court may, upon the request of the victim of a business-related human rights abuse or its representatives, be governed by the law of another State where: a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or b) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled*".

In turn, the proposed Article 6a of Rome II establishes that: "[…] *the law applicable to a non-contractual obligation arising out of the damage sustained shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred or on the law of the country in which the parent company has its domicile or, where it does not have a domicile in a Member State, the law of the country where it operates.*" (The proposed text follows the suggestions made in pp. 112 ff of the 2019 Study requested by the DROI committee (European Parliament) on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries.)

Putting aside the fact that the material scopes of the EP's and the UN's draft instruments bear differences, the EP´s proposal features a more ambitious choice-of-law approach, which likely reflects the EU´s condition as a "Regional integration organization", and the (likely) bigger degree of private-international-law convergence possible within such framework. Whichever the reasons, the EP´s approach is to be welcomed in at least two senses.

The first sense regards the clarity of victim choice-of-law empowerment. While in the UN proposal the victim is allowed to "*request*" that a given law governs "*all*

matters of substance regarding human rights law relevant to claims before the competent court", in the EP´s proposal the choice of the applicable law unequivocally and explicitly belongs to the victim (the "*person seeking compensation for damage"*). A cynical reading of the UN proposal could lead to considering that the prerogative of establishing the applicable law remains with the relevant court, as the fact that the victim may request something does not necessarily mean that the request ought to be granted (Note that paragraph 1 uses "*shall*" while paragraph 2 uses "*may*"). Furthermore, the UN proposal contains a dangerous opening to *renvoi*, which would undermine the victim´s empowerment (and, to a certain degree, foreseeability). Therefore, if the goal of the UN´s provision is to provide for *favor laesi*, a much more explicit language in the sense of conferring the choice-of-law prerogative to the victim would be welcomed.

2. **A more ambitious initiative (The "domicile of the parent" connection, and larger victim choice)**

A second sense in which the EP´s choice-of-law approach is to be welcomed is its bold stance in trying to overcome some classic "business & human rights" conundrums by including an ambitious connecting factor, the domicile of the parent company, amongst the possibilities the victim can choose from. Indeed, I personally find this insertion in suggested Art. 6a Rome II very satisfying from a substantive justice (*favor laesi*) point of view: inserting that very connecting factor in Art. 7 Rome II (environmental torts) is one of the main *de lege ferenda* suggestions I considered in my PhD dissertation (*Private International Environmental Litigation before EU Courts: Choice of Law as a Tool of Environmental Global Governance*, Université Catholique de Louvain & Universidad de Granada, 2017. An edited and updated version will be published in 2021 in Hart´s "Studies in Private International Law"), in order to correct some of the shortcomings of the latter. While not being the ultimate solution for all the various hurdles victims may face in transnational human-rights or environmental litigation, in terms of content-orientedness this connecting factor is a great addition that addresses the core of the policy debate on "business & human rights". Consequently, I politely dissent with Chris Thomale´s assertion that this connecting factor "*has no convincing rationale*". Moreover, I equally dissent from the contention that a choice between the *lex loci damni* and the *lex loci delicti commissi* is already possible via "*a purposive reading of Art. 4 para 1 and 3 Rome*

II". For reasons I have explained elsewhere, I do not share this optimistic reading of Art. 4 as being capable of filling the transnational human-rights gap in Rome II. And even supposing that such interpretation was correct, as draft Art. 6a would make explicit what is contended that can be read into Art. 4, it would significantly increase legal certainty for victims and tortfeasors alike (as otherwise some courts could potentially interpret the latter Article as suggested, while others would not).

Precisely, avoiding a decrease in applicable-law foreseeability seems to be (amongst other concerns) one of the reasons behind Jan von Hein´s suggestion in this very blog that Art. 6a´s opening of victim´s choice to four different legal systems is excessive, and that not only it should be reduced to two, but that the domicile of the parent should be replaced by its "habitual residence". Possibly the latter is contended not only to respond to systemic coherence with the remainder of Rome II, but also to narrow down options: in Rome II the "habitual residence" of a legal person corresponds only with its "*place of central administration*"; in Brussels I bis its "domicile" corresponds with either "*statutory seat*", "*central administration*" or "*principal place of business*" at the claimant´s choice. Notwithstanding the merits in system-alignment terms of this proposal, arguably, substantive policy rationales (*favor laesi*) ought to take precedence over pure systemic private-international-law considerations. This makes all the more sense if one transposes, *mutatis mutandis*, a classic opinion by P.A. Nielsen on the three domiciles of a corporation under the "Brussels" regime to the choice-of-law realm: "*shopping possibilities are only available because the defendant has decided to organise its business in this way. It therefore seems reasonable to let that organisational structure have* […] *consequences*" (P. A. NIELSEN, "Behind and beyond Brussels I – An Insider´s View", *in* P. DEMARET, I. GOVAERE & D. HANF [eds.], *30 years of European Legal Studies at the College of Europe [Liber Professorum 1973-74 – 2003-04]*, Cahiers du Collège d´Europe Nº2, Brussels, P.I.E.-Peter Lang, 2005, pp. 241-243).

And even beyond this, at the risk of being overly simplistic, in many instances, complying with four different potentially applicable laws is, actually, in alleged overregulation terms, a "false conflict": it simply entails complying only with the most stringent/restrictive one amongst the four of them (compliance with X+30 entails compliance with X+20, X+10 and X). Without entering into further details, suffice it to say that, while ascertaining these questions *ex post facto* may be

difficult for victim´s counsel, it should be less difficult *ex ante* for corporate counsel, leading to prevention.

3. **A perfectible initiative (tension with Article 7 Rome II)**

Personally, the first point that immediately got my attention as soon as I heard about the content of the EP report´s (even before reading it) was the Article 6a *versus* Article 7 Rome II scope-delimitation problem already sketched by Geert Van Calster: when is an environmental tort a human-rights violation too, and when is it not? Should the insertion of Art. 6a crystallize, and Art. 7 remain unchanged, this question is likely to become very contentious, if anything due to the wider range of choices given by the draft Art. 6a, and could potentially end before the CJEU.

What distinguishes say *Mines de Potasse* (which would generally be thought of as "common" environmental-tort situation) from say *Milieudefensie v. Shell* 2008 (which would typically fall within the "Business & Human Rights" realm and not to be confused with the 2019 *Milieudefensie v. Shell* climate-change litigation) or *Lluiya v. RWE* (as climate-change litigation finds itself increasingly connected to human-rights considerations)? Is it the geographical location of tortious result either inside or outside the EU? (When environmental torts arise outside the EU from the actions of EU corporations there tends to be little hesitation to assert that we are facing a human-rights tort). Or should we split apart situations involving environmental damage *stricto sensu* (pure ecological damage) from those involving environmental damage *lato sensu* (damage to human life, health and property), considering only the former as coming within Art. 7 and only the latter as coming within Art. 6a? Should we, alternatively, introduce a *ratione personae* distinction, considering that environmental torts caused by corporations of a certain size or operating over a certain geographical scope come within Art. 6a, while environmental torts caused by legal persons falling below the said threshold (or, rarely, by individuals) come within Art. 7?

Overall, how should we draw the boundaries between an environmental occurrence that qualifies as a human-rights violation and one that does not in order to distinguish Art. 6a situations from Art. 7 situations? The answer is simple: we should not. We should consider every single instance of environmental tort a human-rights-relevant scenario and amend Rome II accordingly.

While the discussion is too broad and complex to be treated in depth here, and certainly overflows the realm of private international law, suffice it to say that (putting aside the limited environmental relevance of the Charter of Fundamental Rights of the EU) outside the system of the European Convention of Human Rights (ECHR) there are clear developments towards the recognition of a human right to a healthy or "satisfactory" environment. This is already the case within the systems of the American Convention on Human Rights (Art. 11 of the Additional Protocol to the Convention in the area of Economic, Social and Cultural Rights) and the African Charter on Human and People´s Rights (Art. 24). It is equally the case as well in certain countries, where the recognition of a fundamental/constitutional right at a domestic level along the same lines is also present. And, moreover, even within the ECHR system, while no human right to a healthy environment exists as such, the case-law of the European Court of Human Rights has recognized environmental dimensions to other rights (Arts. 2 and 8 ECHR, notably). It may therefore be argued that, even under the current legal context, all environmental torts are, to a bigger or lesser extent, human-rights relevant and (save those rare instances where they may be caused by an individual) "business-related".

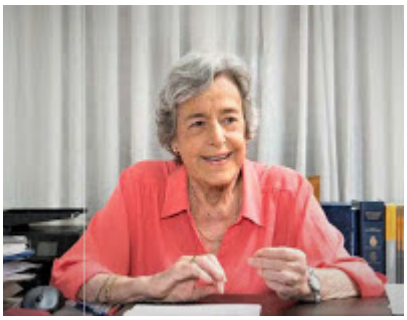
Ultimately, if any objection could exist nowadays, if/when the ECHR system does evolve towards a broader recognition of a right to a healthy environment, there would be absolutely no reason to maintain an Art. 6a *versus* Art. 7 distinction. Thus, in order to avoid opening a characterization can of worms, it would be appropriate to get "ahead of the curve" in legislative terms and, accordingly, use the proposed Art. 6a text as an all-encompassing new Art. 7.

There may be ways to try to (artificially) delineate the scopes of Articles 7 and 6a in order to preserve a certain *effet utile* to the current Art. 7, such as those suggested above (geographical location of the tortious result, size or nature of the tortfeasor, type of environmental damage involved), or even on the basis of whether situations at stake "trigger" any of the environmental dimensions of ECHR-enshrined rights. But, all in all, I would argue towards using the proposed text as a new Art. 7 which would comprise both non-environmentally-related human-rights torts and, comprehensively, all environmental torts.

Art. 7 is dead, long live Article 7.

In Memoriam – Alegría Borrás Rodríguez (1943-2020)

written by Cristina González Beilfuss and Marta Pertegás Sender



It is with deep sadness that we write these lines to honour the memory of our dear mentor Alegría Borrás. Alegría unexpectedly passed away at the end of last year and, although she had been battling cancer for a while, she continued working as always. For Alegría was a hardworking fighter who sought and found her notorious place in life with determination, courage and borderless efforts. We believe we speak here for so many of Alegría's alumni who miss her deeply and are determined to pay tribute to her memory with our work and memories.

We both had the great privilege of Alegría's support for years and decades, from the moment she taught us at the "barracones" of the Law Faculty of the University of Barcelona until the very last day of Alegría's life. Her death surprised us all on one of those typical "Alegría's days" of frantic activity and unconditional support to the projects and institutions she believed in.

With this homage, we by no means pretend to recap all her merits and achievements. We are thankful that, while still alive, Alegría received many distinctions and exceptional prizes for all she meant to the (international legal) community.

All those who once met Alegría may inevitably think of her characteristic high voice and strong presence while remembering her. To us, it is her unique insight, tireless professionalism and devoted expertise that made Alegría the exceptional mentor she was.

In every assignment Alegría carried out – regardless the size of the task or its specific context -, Alegría showed profound dedication and daily perseverance. Behind a *joie de vivre* – how can one by the name of Alegría otherwise come across? – there was an exemplary academic rigor and uncountable hours of day and night work.

Alegría will always be remembered as someone who transformed our discipline in recent years. She did so, from her Chair in Barcelona, where many of us first discovered private international law thanks to her teaching. Her classes were enriched by the many anecdotes of places (Brussels, The Hague…) and instances (the GEDIP, l'Institut, the Academy, …) that, back then, sounded like remote laboratories of private international law. Little did we know that we would marvel around the privilege of sharing missions and tasks with Alegría in such venues in the years to follow.

We have indeed witnessed how Alegría contributed, to the approximation of Spain to such poles of uniform private international law. For decades, Alegría wisely brought Spain to any negotiation table on private international law, and she proudly brought the results of such international work back home. We think it is fair to say that, without Alegría, international and European private international law might not have the right channels to permeate into the Spanish legal system. This is not a sporadic success; it requires titanic efforts and perseverance for decades. Actually, for Alegría, her international work was much more than the daily sessions at the Peace Palace or at the Council, the overnight work in committees and working groups or the taxi rides from and to the airport in rainy and grey weather. There was so much more… She made time for beautifully written and detailed reports to the relevant Ministries, for influential contacts with diplomatic posts and, not to forget, for raising awareness among the academic community. Her regular contributions to the *Revista Jurídica de Catalunya* , to the *Revista Española de derecho internacional* or to the *Anuario español de Derecho internacion*al privado guided Spanish lawyers eager to keep track on "what was going on in Brussels or The Hague". Alegría knew how the machinery of international relations works and used these insights brilliantly to

connect Spain to the international legal community, and vice versa.

The readers of Conflictsoflaws.net may associate the name of Alegría Borrás with significant milestones in the development of private international law over the past decades: Alegría was a key delegate of the Hague's Children Conventions, the Co-Rapporteur of the Child Support Convention, the Rapporteur of the Brussels II Convention, the author of influential work on conflicts of instruments (perhaps we should refer to the "Borrás clause" as shortcut for the "clauses de déconnection"). We are also aware that there is so much more, because, no matter how important her international projects were, Alegría remained truly anchored at home, in her city and her University as a member of the *Acadèmia de Legislació i Jurisprudència de Catalun*ya for example, where she joined efforts with her very good friend Encarna Roca Trias.

Home, for Alegría, was Barcelona, no matter how often her international work took her away from them. Her family was her greatest pride and her unconditional top priority. A loving wife, mother and grandmother and an example to so many of us who juggle balls in all these roles…

And the University of Barcelona was not only her academic home but also our meeting point. The private international community has lost a great scholar and a formidable person. Alegría, we thoroughly miss you and thank you so much for all you did for us and so many other alumni of yours. Together, we will persevere in our efforts the way you taught us. Rest in peace.

‘Legal identity’, statelessness, and private international law

Guest post by Bronwen Manby, Senior Policy Fellow and Guest Teacher, LSE Human Rights, London School of Economics.

In 2014, UNHCR launched a ten-year campaign to end statelessness by 2024. A ten-point global action plan called, among other things, for universal birth registration. One year later, in September 2015, the UN General Assembly adopted the Sustainable Development Goals (SDGs), an ambitious set of objectives for international development to replace and expand upon the 15-year-old Millennium Development Goals. Target 16.9 under Goal 16 requires that states shall, by 2030, ‘provide legal identity for all, including birth registration’. The SDG target reflects a recently consolidated consensus among development professionals on the importance of robust government identification systems.

Birth registration, the protection of identity, and the right to a nationality are already firmly established as rights in international human rights law – with most universal effect by the 1989 Convention on the Rights of the Child, to which every state in the world apart from the USA is a party. Universal birth registration, ‘the continuous, permanent, compulsory and universal recording within the civil registry of the occurrence and characteristics of birth, in accordance with the national legal requirements’, is already a long-standing objective of UNICEF and other agencies concerned with child welfare. There is extensive international guidance on the implementation of birth registration, within a broader framework of civil registration.

In a recent article published in the *Statelessness and Citizenship Review* I explore the potential impact of SDG ‘legal identity’ target on the resolution of statelessness. Like the UNHCR global action plan to end statelessness, the paper emphasises the important contribution that universal birth registration would make to ensuring respect for the right to a nationality. Although birth registration does not (usually) record nationality or legal status in a country, it is the most authoritative record of the information on the basis of which nationality, and many other rights based on family connections, may be claimed.

The paper also agrees with UNHCR that universal birth registration will not end statelessness without the minimum legal reforms to provide a right to nationality based on place of birth or descent. These will not be effective, however, unless there are simultaneous efforts to address the conflicts of law affecting recognition of civil status and nationality more generally. UNHCR and its allies in the global campaign must also master private international law.

In most legal systems, birth registration must be accompanied by registration of other life events – adoption, marriage, divorce, changes of name, death – for a person to be able to claim rights based on family connections, including nationality. This is the case in principle even in countries where birth registration reaches less than half of all births, and registration of marriages or deaths a small fraction of that number. Fulfilling these obligations for paperwork can be difficult enough even if they all take place in one country, and is fanciful in many states of the global South; but the difficulties are multiplied many times once these civil status events have to be recognised across borders.

Depending on the country, an assortment of official copies of parental birth, death or marriage certificates may be required to register a child's birth. If the child's birth is in a different country from the one where these documents were issued, the official copies must be obtained from the country of origin, presented in a form accepted by the host country and usually transcribed into its national records. Non-recognition of a foreign-registered civil status event means that it lacks legal effect, leaving (for example) marriages invalid in one country or the other, or still in place despite a registered divorce. If a person's civil status documents are not recognised in another jurisdiction, the rights that depend on these documents may also be unrecognised: the same child may therefore be born in wedlock for the authorities of one country and out-of-wedlock for another. On top of these challenges related to registration in the country of birth, consular registration and/or transcription into the records of the state of origin is in many cases necessary if the child's right to the nationality of one or both parents is to be recognised. It is also likely that the parents will need a valid identity document, and if neither is a national of the country where their child is born, a passport with visa showing legal presence in the country. A finding of an error at any stage in these processes can sometimes result in the retroactive loss of nationality apparently held legitimately over many years. Already exhausting for legal migrants in the formal sector, for refugees and irregular migrants of few

resources (financial or social) these games of paperchase make the recognition of legal identity and nationality ever more fragile.

These challenges of conflicts of law are greatest for refugees and irregular migrants, but have proved difficult to resolve even within the European Union, with the presumption of legal residence that follows from citizenship of another member state. The Hague Conference on Private International Law has a project to consider transnational recognition of parentage (filiation), especially in the context of surrogacy arrangements, but has hardly engaged with the broader issues.

The paper urges greater urgency in seeking harmonisation of civil registration practices, not only by The Hague Conference, but also by the UN as it develops its newly adopted 'Legal Identity Agenda', and by the UN human rights machinery. Finally, the paper highlights the danger that the SDG target will rather encourage short cuts that seek to bypass the often politically sensitive task of determining the nationality of those whose legal status is currently in doubt: new biometric technologies provide a powerful draw to the language of technological fix, as well as the strengthening of surveillance and control rather than empowerment and rights. These risks – and their mitigation – are further explored in a twinned article in *World Development*.

Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (I): The law applicable to SLAPPs

Eduardo Álvarez-Armas is Lecturer in Law at Brunel University London and Affiliated Researcher at the Université Catholique de Louvain. He has kindly

provided us with his thoughts on recent proposals for amending the Rome II Regulation. This is the first part of his contribution; a second one on corporate social responsibility will follow in the next days.

On December the 3rd, 2020, the EU commission published a call for applications, with a view to putting forward, by late 2021, a (legislative or non-legislative) initiative to curtail "*abusive litigation targeting journalists and civil society*". As defined in the call, strategic lawsuits against public participation (commonly abbreviated as SLAPPs) "*are groundless or exaggerated lawsuits, initiated by state organs, business corporations or powerful individuals against weaker parties who express, on a matter of public interest, criticism or communicate messages which are uncomfortable to the litigants*". As their core objective is to silence critical voices, SLAPPs are frequently grounded on defamation claims, but they may be articulated through other legal bases (as "*data protection, blasphemy, tax laws, copyright, trade secret breaches*", etc) (p. 1).

The stakes at play are major: beyond an immediate limitation or suppression of open debate and public awareness over matters that are of significant societal interest, the economic pressure arising from SLAPPs can "drown" defendants, whose financial resources are oftentimes very limited. Just to name but a few recent SLAPP examples (For further review of cases throughout the EU see: Greenpeace European Unit [O. Reyes, rapporteur], "Sued into silence – How the rich and powerful use legal tactics to shut critics up", Brussels, July 2020, p. 18ff): at the time of her murder in 2017, Maltese journalist Daphne Caruana Galizia was facing over 40 civil and criminal defamation lawsuits, including a 40-million US dollar lawsuit in Arizona filed by Pilatus Bank (Greenpeace European Unit [O. Reyes, rapporteur], pp. 9-12); in 2020, a one million euros lawsuit was introduced against Spanish activist Manuel García for stating in a TV program that the poor livestock waste management of meat-producing company "Coren" was the cause for the pollution of the As Conchas reservoir in the Galicia region.

In light of the situation, several European civil-society entities have put forward a model "*EU anti-SLAPP Directive*", identifying substantive protections they would expect from the European-level response announced in point 3.2 of the EU Commission´s "*European democracy action plan*". If it crystallized, an EU anti-SLAPP directive would follow anti-SLAPP legislation already enacted, for

instance, in Ontario, and certain parts of the US.

Despite being frequently conducted within national contexts, it is acknowledged that SLAPPs may be "*deliberately brought in another jurisdiction and enforced across borders*", or may "*exploit other aspects of national procedural and private international law*" in order to increase complexities which will render them "*more costly to defend*" (Call for applications, note 1, p. 1) Therefore, in addition to a substantive-law intervention, the involvement of private international law in SLAPPs is required. Amongst core private-international-law issues to be considered is the law applicable to SLAPPs.

De lege lata, due to the referred frequent resort to defamation, and the fact that this subject-matter was excluded from the material scope of application of the Rome II Regulation, domestic choice-of-law provisions on the former, as available, will become relevant. This entails a significant incentive for forum shopping (which may only be partially counteracted, at the jurisdictional level, by the "*Mosaic theory*").

De lege ferenda, while the risk of forum shopping would justify by itself the insertion of a choice-of-law rule on SLAPPs in Rome II, the EU Commission´s explicit objective of shielding journalists and NGOs against these practices moreover pleads for providing a content-oriented character to the rule. Specifically, the above-mentioned "gagging" purpose of SLAPPs and their interference with fundamental values as freedom of expression sufficiently justify departing from the neutral choice-of-law paradigm. Furthermore, as equally mentioned, SLAPP targets will generally have (relatively) modest financial means. This will frequently make them "weak parties" in asymmetric relationships with (allegedly) libeled claimants.

In the light of all of this, beyond conventional suggestions explored over the last 15 years in respect of a potential rule on defamation in Rome II (see, amongst other sources: Rome II and Defamation: Online Symposium), several thought-provoking options could be explored, amongst which the following two:

1st Option: Reverse mirroring Article 7 Rome II

A first creative approach to the law applicable to SLAPPs would be to introduce an Article 7-resembling rule, with an inverted structure. Article 7 Rome II on the

law applicable to non-contractual obligations arising from environmental damage embodies the so-called "theory of ubiquity" and confers the prerogative of the election of the applicable law to the "weaker" party (the environmental victim). In the suggested rule on SLAPPs, the choice should be "reversed", and be given to the defendant, provided they correspond with a carefully drafted set of criteria identifying appropriate recipients for anti-SLAPP protection.

However, this relatively straightforward adaptation of a choice-of-law configuration already present in the Rome II Regulation could be problematic in certain respects. Amongst others, for example, as regards the procedural moment for performing the choice-of-law operation in those domestic systems where procedural law establishes (somewhat) "succinct" proceedings (i.e. with limited amounts of submissions from the parties, and/or limited possibilities to amend them): where a claimant needs to fully argue their case on the merits from the very first written submission made, which starts the proceedings, how are they meant to do so before the defendant has chosen the applicable law? While, arguably, procedural adaptations could be enacted at EU-level to avoid a "catch-22" situation, other options may entail less legislative burden.

2nd option: a post-Brexit conceptual loan from English private international law = double actionability

A more extravagant (yet potentially very effective) approach for private-international-law protection would be to "borrow" the English choice-of-law rule on the law applicable to defamation: the so-called double actionability rule. As it is well-known, one of the core reasons why "*non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation*" were excluded from the material scope of the Rome II Regulation was the lobbying of publishing groups and press and media associations during the Rome II legislative process (see A. Warshaw, "Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims"). With that exclusion, specifically, the English media sector succeeded in retaining the application by English courts of the referred rule, which despite being "*an oddity*" in the history of English law (*Vid*. D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws,* 9th ed., Swett & Maxwell, 2016, p. 479), is highly protective for defendants of alleged libels and slanders. The double actionability rule, roughly century and a half old, (as it originated from *Philips v. Eyre* [*Philips v. Eyre* (1870) L.R. 6 Q.B. 1.] despite

being tempered by subsequent case law) is complex to interpret and does not resemble (structurally or linguistically) modern choice-of-law rules. It states that:

"*As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England … Secondly, the act must not have been justifiable by the law of the place where it was done*" (*Philips v. Eyre*, p. 28-29).

The first of the cumulative conditions contained in the excerpt is usually understood as the need to verify that the claim is viable under English law (*Lex fori*). The second condition is usually understood as the need to verify that the facts would give rise to liability also under foreign law. Various interpretations of the rule can be found in academia, ranging from considering that once the two cumulative requirements have been met English law applies (*Vid*. Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-111), to considering that only those rules that exist simultaneously in both laws (English and foreign) apply, or that exemptions from liability from either legal system free the alleged tortfeasor (*Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885. Similarly, Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-128). Insofar as it is restrictive, and protective of the defendant, double actionability is usually understood as a "*double hurdle*" (*Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885; D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws*, 9th ed., Swett & Maxwell, 2016, p. 479) to obtaining reparation by the victim, or, in other words, as having to win the case "*twice in order to win* [only] *once*" (*Vid*. A. Briggs, *The Conflict of Laws*, 4th ed., Clarendon Law Series, OUP, 2019, p. 274). Thus, the practical outcome is that the freedom of speech of the defendant is preserved.

A plethora of reasons make this choice-of-law approach controversial, complex to implement, and difficult to adopt at an EU level: from a continental perspective, it would be perceived as very difficult to grasp by private parties, as well as going against the fundamental dogma of EU private international law: foreseeability. This does not, nevertheless, undermine the fact that it would be the most effective protection that could be provided from a private-international-law perspective.

Even more so than the protection potentially provided by rules based on various "classic" connecting factors pointing towards the defendant´s "native" legal system/where they are established (as their domicile, habitual residence, etc).

Truth be told, whichever approach is chosen, a core element which will certainly become problematic will be the definition of the personal scope of application of the rule, i.e. how to precisely identify subjects deserving access to the protection provided by a content-oriented choice-of-law provision of the sort suggested (and/or by substantive anti-SLAPP legislation, for that matter). This is a very delicate issue in an era of "fake news".

Insights into ERA Seminar on Privacy and Data Protection with a Specific Focus on "Balance between Data Retention for Law Enforcement Purposes and Right to Privacy" (Conference Report)

This report has been prepared by Priyanka Jain*, a researcher at the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, and Ph.D. candidate at the University of Luxembourg.*

Introduction:

On 9-11 December 2020, ERA – the Academy of European Law – organized an online seminar on "Privacy and Data Protection: Recent ECtHR & CJEU Case Law". The core of the seminar was to provide an update on the case law

developed by the European Court of Human Rights (ECtHR) and by the Court of Justice of the European Union (CJEU) with relevance for privacy and data protection law since 2019. The key issues discussed were the distinction between the right to privacy and data protection in the jurisprudence of the ECtHR and CJEU, the impact of the jurisprudence on international data transfers, notions of 'essence of fundamental rights' 'personal data processing', 'valid consent' and so on.

Day 1: Personal Data Protection and right to privacy

Gloria González Fuster (Research Professor, Vrije Universiteit Brussel (VUB), Brussels) presented on the essence of the fundamental rights to privacy and data protection in the existing legal framework with a specific focus on the European Convention on Human Rights (Art. 8 of ECHR) and the Charter of Fundamental Rights of the EU (Art. 7, Art. 8)

Article 8 of the Convention (ECHR) guarantees the right to respect private and family life. In contrast, Art 52(1) EU Charter recognizes the respect for the essence of the rights and freedoms guaranteed by the Charter. Both are similar, but not identical. This can be validated from the following points:

- As per Art 8 (2) ECHR – there shall be no interference with the exercise of this right except such as in accordance with the law, whereas Art 52 (1) states that any limitation to the exercise of right and freedoms recognized by the Charter must be provided for by law.
- The Art 8 (2) ECHR stresses the necessity in a democratic society to exercise such an interference, whereas Art 52(1) of the EU Charter is subject to the principle of proportionality.
- Respect for the essence of rights and freedoms is mentioned in Art 52 (1) but not mentioned in Art 8 (2).
- Also, Art 8 (2) states that the interference to the right must be only

> allowed in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others. At the same time, Article 52 (1) states that any limitations to rights must meet objectives of general interest recognized by the Union or the need to protect others' rights and freedoms.

In the Joined Cases C?293/12 and C?594/12, *Digital Rights Ireland*; the Court addressed the interferences to the rights guaranteed under Articles 7 and 8 caused by the Data Retention Directive. An assessment was carried out as to whether the interferences to the Charter rights were justified as per Article 52(1) of the Charter. In order to be justified, three conditions under Article 52(1) must be fulfilled. The interference must be provided for by law, and there must be respect for the essence of the rights, and it must be subject to the principle of proportionality. Certain limitations to the exercise of such interference/ infringement must be genuinely necessary to meet objectives of general interest. The Directive does not permit the acquisition of data and requires the Member States to ensure that 'appropriate technical and organizational measures are adopted against accidental or unlawful destruction, accidental loss or alteration of data' and thus, respects the essence of the right to privacy and data protection. The Directive also satisfied the objective of general interest as the main aim of the Directive was to fight against serious crime, and it was also proportional to its aim of need for data retention to fight against serious crimes. However, even though the Directive satisfied these three criteria, it did not set out clear safeguards for protecting the retained data, and therefore it was held to be invalid.

It is pertinent to note here that the ECHR does not contain any express requirement to protect the 'essence' of fundamental rights, whereas the Charter does. However, with regard to Art 8 of the ECHR, it aims to prohibit interference or destruction of any rights or freedoms with respect for private and family life. This can be possibly interpreted so as to protect the essence of the fundamental right of private and family life. This is because a prohibition of the destruction of any right would mean affecting the core of the right or compromising the essence

of the right.

Gloria, also examined Article 7 of the Charter, which guarantees a right to respect for private and family life, home and communications, and Article 8, which not only distinguishes data protection from privacy but also lays down some specific guarantees in paragraphs 2 and 3, namely that personal data must be processed fairly for specified purposes. She analyzed these Charter provisions concerning the Regulation (EU) 2016/679 (GDPR). GDPR creates three-fold provisions by imposing obligations on the data controllers, providing rights to data subjects, and creating provision for supervision by data protection authorities.

She also addressed the balance between the right to privacy and the processing of personal data of an individual on one hand and the right to information of the public on the other. Concerning this, she highlighted the interesting decision in C-131/12, *Google Spain*, wherein it was stated that an interference with a right guaranteed under Article 7 and 8 of the Charter could be justified depending on the nature and sensitivity of the information at issue and with regard to the potential interest of the internet users in having access to that information. A fair balance must be sought between the two rights. This may also depend on the role played by the data subject in public.

It was also discussed in the judgments C-507/17, *Google v CNIL*; and Case C-136/17 that a data subject should have a "right to be forgotten" where the retention of such data infringes the Directive 95/46 and the GDPR. However, the further retention of the personal data shall only be lawful where it is necessary for exercising the right of freedom of expression and information. The ruling was on the geographical reach of a right to be forgotten. It was held that it is not applicable beyond the EU, meaning that Google or other search engine operators are not under an obligation to apply the 'right to be forgotten' globally.

In the next half of the day, Roland Klages, Legal Secretary, Chambers of First Advocate General Szpunar, Court of Justice of the European Union, Luxembourg, presented on the topic: "The concept of consent to the processing of personal data". He started with a brief introduction of GDPR and stated that there is no judgment on GDPR alone as it has been introduced and implemented recently, but

there are judgments based on the interpretation of Directive 95/46 and the GDPR simultaneously. He commented on the composition of the ECJ, which sits in the panel of 3,5, 15 (Grand Chamber), or 27 (Plenum) judges. The Grand Chamber comprises a President, vice-president, 3 presidents of a 5th chamber, rapporteur, another 9 judges, appointed based on re-established lists (see Article 27 ECJ RP).

He discussed the following cases in detail:

C – 673/17 (*Planet49*): Article 6(1) (a) GDPR states that the processing of data is lawful only if the data subject has given consent to the processing of personal data for one or more specific purposes. "Consent" of the data subject means any freely given, specific, informed, and unambiguous indication of the data subject's wishes by which he or she, by a statement or by clear affirmative action, signifies agreement to the processing of personal data relating to him or her.[1] This clearly indicates that consent is valid only if it comes from the active behavior of the user as it indicates the wishes of the data subjects. A consent given in the form of a pre-selected checkbox on a website does not amount to active behavior. It also does not fulfill the requirement of unambiguity. Another important aspect of the ruling was that it does not matter if the information stored or retrieved consists of personal data or not. Article 5(3) of Directive 2002/58/ EC (Directive on privacy and electronic communications)protects the user from interference with their private sphere, regardless of whether or not that interference involves personal or other data. Hence, in this case, the storage of cookies at issue amounts to the processing of personal data. Further, it is also important that the user is able to determine the consequence of the consent given and is well informed. However, in this case, the question of whether consent is deemed to be freely given if it is agreed to sell data as consideration for participation in a lottery is left unanswered.

Similarly, in case C -61/19 (Orange Romania), it was held that a data subject must, by active behavior, give his or her consent to the processing of his or her personal data, and it is upto the data controller, i.e., Orange România to prove this. The case concerns contracts containing a clause stating that the data subject

has been informed about the collection and storage of a copy of his or her identification document with the identification function and has consented thereto. He also discussed other cases such as case C-496/17, Deutsche Post, and C- 507/17, Google (discussed earlier), demonstrating that consent is a central concept to GDPR.

Day 2: "Retention of personal data for law enforcement purposes."

On the next day, Kirill Belogubets, Magister Juris (Oxford University), case lawyer at the Registry of the European Court of Human Rights (ECtHR), started with a presentation on the topic**:**

"Retention of personal data for combating crime."

Kirill Belogubets discussed the case of *PN v. Germany*. No. 74440/17 regarding the processing of personal identification of data in the context of criminal proceedings. In this case, a German citizen was suspected of buying a stolen bicycle. Authorities collected an extensive amount of data such as photographs, fingerprints, palm prints, and suspect descriptions. It must be noted here that with regard to the right to respect for private life under Article 8 of the ECHR, the interference must be justified and fulfill the test of proportionality, legitimacy, and necessity. The authorities expounded on the likelihood that the offender may offend again. Therefore, in the interest of national security, public security, and prevention of disorder and criminal offenses, it is essential to collect and store data to enable tracing of future offenses and protect the rights of future potential victims. Thus, the collection and storage of data in the present case struck a fair balance between the competing public and private interests and therefore fell within the respondent State's margin of appreciation.

With respect to margin of appreciation, the case of *Gaughran v. The United Kingdom*, no. 45245/15was also discussed. This case pertains to the period of retention of DNA profiles, fingerprints, and photographs for use in pending proceedings. The Court considered storing important data such as DNA samples only of those convicted of recordable offences, namely an offense that is punishable by a term of imprisonment. Having said that, there was a need for the State to ensure that certain safeguards were present and effective, especially in the nature of judicial review for the convicted person whose biometric data and photographs were retained indefinitely.

However, it has been highlighted that the legal framework on the retention of DNA material was not very precise. It does not specifically relate to data regarding DNA profiles and there is no specific time limit for the retention of DNA data. Similarly, the applicant has no avenue to seek deletion because of the absence of continued necessity, age, personality, or time elapsed. This has been laid down in the case of *Trajkovski and Chipovski v. North Macedonia*, nos. 53205/13 and 63320/13.

Mass Collection and Retention of Communications data

In the next half, Anna Buchta, Head of Unit "Policy & Consultation", European Data Protection Supervisor, Brussels brought the discussion on Article 7 and 8 of the Charter and Article 8 of the Convention along with the concept of 'essence' of fundamental rights, back to the table. With regard to this discussion, she described the case C-362/14 *Maximilian Schrems v DPC*, which highlights that 'any legislation permitting the public authorities to have access on a generalized basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter.' In this context, EU member states must recognize the confidentiality of communication as a distinct legal right. In this case, it was the first time where a Directive was invalidated due to non-confirmation with the ECHR. It was laid down that the safe harbor principles issued under the Commission Decision 2000/520, **pursuant to** Directive 95/46/EC does not comply with its Article 25(6), which ensures a level of

protection of fundamental rights essentially equivalent to that guaranteed in the EU legal order. The Decision 2000/520 does not state that the United States, infact, 'ensures' an adequate level of protection by reason of its domestic law or its international commitments.

Traffic and Location data

She also commented on the indefinite retention of data, which might lead to a feeling of constant surveillance leading to interference with freedom of expression in light of CJEU cases C-203/15 and C-698/15 *Sverige and Watson*. In these cases, the Court agreed that under Article 15(1) of the Directive 2002/58 / EC, data retention could be justified to combat serious crime, national security, protecting the constitutional, social, economic, or political situation of the country and preventing terrorism. However, this must only be done if it is limited to what is strictly necessary, regarding categories of data, means of communication affected, persons concerned, and retention period. Traffic data relating to subscribers and users processed and stored by the provider of a public communications network or publicly available electronic communications service must be erased or made anonymous when it is no longer needed for the transmission of a communication without prejudice to paragraphs 2, 3, and 5 of this Article 6 and Article 15(1) of the Directive. This was reiterated in C-623/17 *Privacy International.* It must be noted here that these data can be retained only if there is evidence that these data constitute an identifiable link, at least an indirect one, to criminal activities. Data with regard to the geographical location again requires objective factors. It must be retained if there exists a risk of criminal activities in such areas. These locations may correspond to places that are vulnerable to the commission of serious offenses, for instance, areas that receive a large number of people, such as airports, train stations, toll-booth areas, etc.

The Court differentiated between generalized and targeted retention of data. Real-time collection and indeterminate storage of **electronic communications surveillance involving** traffic and location data of specific individuals constitute targeted retention. In this context, the case of C?511/18, C?512/18 and C?520/18,

La Quadrature du Net and Others were also relied upon, with a focus on the following findings:

Targeted real-time collection of traffic and location data by electronic communication providers that concerns exclusively one or more persons constitutes a serious interference that is allowed where:

- Real-time collection of traffic and location data is limited to persons in respect of whom there is a valid reason to suspect that they are directly or indirectly involved in terrorist activities. With regard to persons falling outside of that category, they may only be the subject of non-real-time access.
- A court or an administrative authority must pass an order after prior review, allowing such real-time collection. This must be authorized only within the limits of what is strictly necessary. In cases of duly justified urgency, the review must take place within a short time.
- A decision authorizing the real-time collection of traffic and location data must be based on objective criteria provided for in the national legislation, which must clearly define the circumstances and conditions under which such collection may be authorized.
- The competent national authorities undertaking real-time collection of traffic and location data must notify the persons concerned, in accordance with the applicable national procedures.

Last but not least, the EU Commission as well as the CJEU have started looking at the national laws of data retention and specifically inclined to define national security in manner so as to increase their own role in the area. However, data retention schemes are divergent across the Member States. It is essential to create clearer and more precise rules at the European level to enable the Courts to develop the best ways to strike a balance between the interactions of privacy rights with the need to tackle serious crime. The different legal rules in the area of data retention restricted cooperation between competent authorities in cross-border cases and affected law enforcement efforts. For instance, some Member States have specified retention periods, whereas some do not, a fact from which

conflict-of-laws problems may arise. While some Member States for example Luxembourg precisely define 'access to data', there are Member States, which do not. This was pointed out by the EU Council in the conclusion of the data retention reflection process in May 2019, wherein it was emphasized that there is a need for a harmonised framework for data retention at EU level to remedy the fragmentation of national data retention practices.

Day 3: Data Protection in the Global Data Economy

The discussion of the third day started with a presentation by Professor Herwig Hofmann, Professor of European and Transnational Public Law, the University of Luxembourg on the well-known *Schrems*cases namely, C-362/14, *Schrems I*; C-498/16, *Schrems vs Facebook;* and C-311/18, *Schrems II;*which involves transatlantic data transfer and violation of Article 7 and 8 of the Charter. In the clash between the right to privacy of the EU and surveillance of the US, the CJEU was convinced that *any* privacy agreements could not keep the personal data of EU citizens safe from surveillance in the US, so long as it is processed in the US under the country's current laws. The guidelines in the US for mass surveillance did not fit in the EU. Therefore, privacy shield could not be maintained.

He also highlighted that international trade in today's times involves the operation of standard contractual terms created to transfer data from one point to another. Every company uses a cloud service for the storage of data, which amounts to its processing. It is inevitable to ensure transparency from cloud services. The companies using cloud services must require transparency from cloud services and confirm how the cloud service will use the data, where would the data be stored or transferred.

In the last panel of the seminar Jörg Wimmers, Partner at TaylorWessing, Hamburg, spoke about the balance between **Data protection and copyright.**

The case discussed in detail was C-264/19 *Constantin Film Verleih GmbH***,** which was about the prosecution of the user who unlawfully uploaded a film on

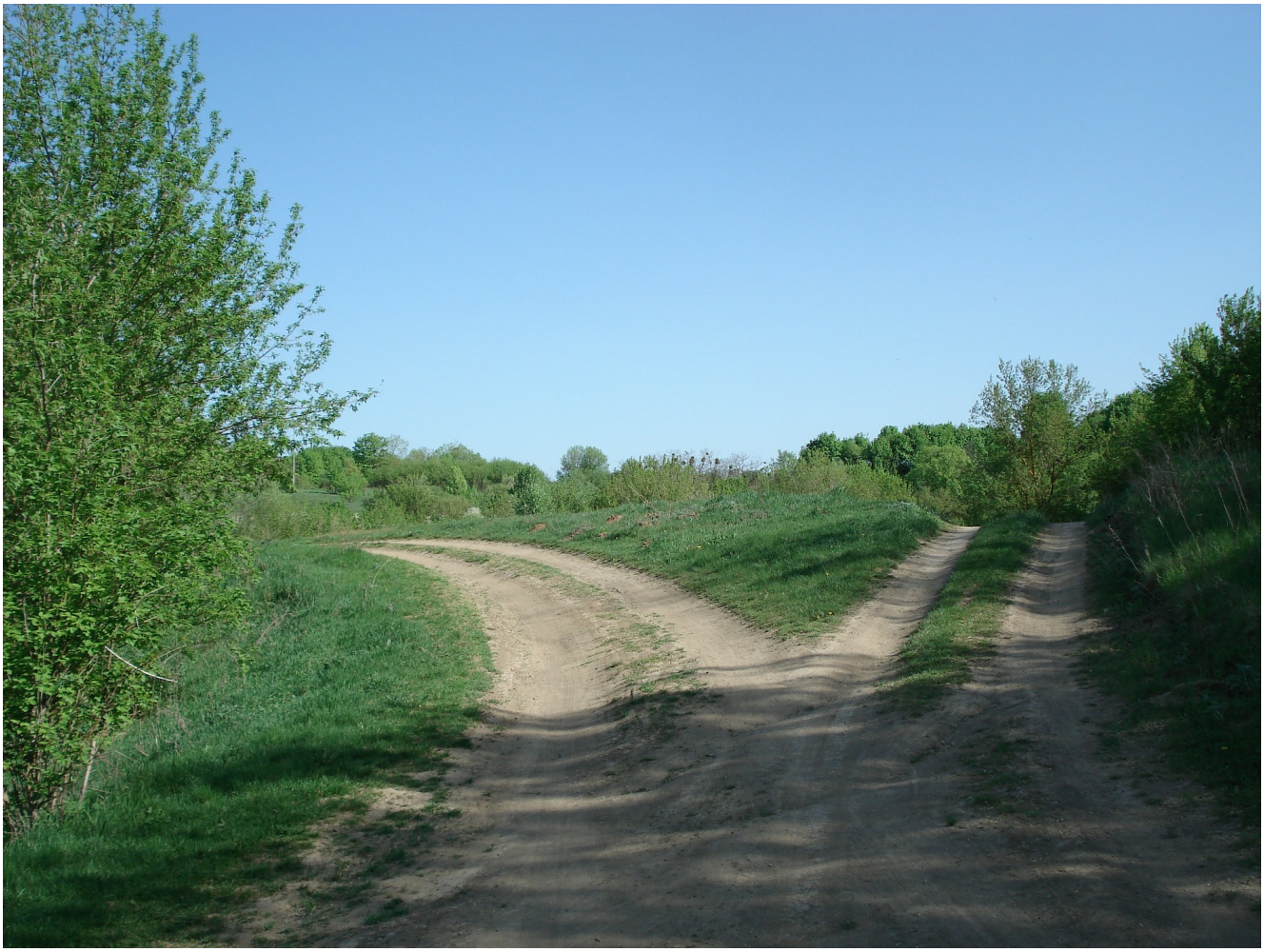
YouTube, i.e., without the copyright holder's permission. In this regard, it was held that the operator of the website is bound only to provide information about the postal address of the infringer and not the IP address, email addresses, and telephone numbers. The usual meaning of the term 'address' under the Directive 2004/48 (Directive on the enforcement of Intellectual Property rights) refers only to the postal address, i.e., the place of a given person's permanent address or habitual residence. In this context, he also commented on the extent of the right to information guaranteed under Article 8 of the said Directive 2004/48. This was done by highlighting various cases, namely, C-580/13, *Coty* and C-516/17, *Spiegel Online*, noting that Article 8 does not refer to that user's email address and phone number, or to the IP address used for uploading those files or that used when the user last accessed his account. However, Article 8 seeks to reconcile the right to information of the rightholder/ intellectual property holder and the user's right to privacy.

Conclusion:

To conclude, the online seminar was a total package with regard to providing a compilation of recent cases of the ECtHR and CJEU on data protection and the right to privacy. A plethora of subjects, such as the balance between data protection and intellectual property rights, privacy and data retention, and respect for the essence of fundamental rights to privacy, were discussed in detail. The data retention provision established by the new Directive on Privacy and Electronic Communications may be an exception to the general rule of data protection, but in the current world of Internet Service providers and telecommunication companies, it may not be easy to ensure that these companies store all data of their subscribers. Also, it is important to ensure that data retained for the purpose of crime prevention does not fall into the hands of cybercriminals, thereby making their jobs easier.

[1] Article 4 No.11 GDPR

Walking Solo – A New Path for the Conflict of Laws in England



Written by Andrew Dickinson (Fellow, St Catherine's College and Professor of Law, University of Oxford)

The belated conclusion of the UK-EU Trade and Cooperation Agreement did not dampen the impact of the UK's departure from the European Union on judicial co-operation in civil matters between the UK's three legal systems and those of the 27 remaining Members of the Union. At the turn of the year, the doors to the UK's participation in the Recast Brussels I Regulation and the 2007 Lugano Convention closed. With no signal that the EU-27 will support the UK's swift readmission to the latter, a new era for private international law in England and Wales, Scotland and Northern Ireland beckons.

The path that the United Kingdom has chosen to take allows it, and its constituent legal systems, to shape conflict of laws rules to serve the interests that they consider important and to form new international relationships, unfettered by the EU's legislative and treaty making competences. This liberty will need to be exercised wisely if the UK's legal systems are to maintain their positions in the global market for international dispute resolution, or at least mitigate any adverse impacts of the EU exit and the odour of uncertainty in the years following the 2016 referendum vote.

As the guidance recently issued by the Ministry of Justice makes clear, the UK's detachment from the Brussels-Lugano regime will magnify the significance of the rules of jurisdiction formerly applied in cases falling under Art 4 of the Regulation (Art 2 of the Convention), as well as the common law rules that apply to the recognition and enforcement of judgments in the absence of a treaty relationship.

This is a cause for concern, as those rules are untidy and ill-suited for the 21st century.

If the UK's legal systems are to prosper, it is vital that they should not erase the institutional memory of the three decades spent within the EU's area of justice. They should seek to capture and bottle that experience: to see the advantages of close international co-operation in promoting the effective resolution of disputes, and to identify and, where possible, replicate successful features of the EU's private international law framework, in particular under the Brussels-Lugano regime.

With these considerations in mind, I began the New Year by suggesting on my Twitter account (@Ruritanian) ten desirable steps towards establishing a more effective set of conflict of laws rules in England and Wales for civil and commercial matters. Ralf Michaels (@MichaelsRalf) invited me to write this up for ConflictofLaws.Net. What follows is an edited version of the original thread, with some further explanation and clarification of a kind not possible within the limits of the Twitter platform. This post does not specifically address the law of Scotland or of Northern Ireland, although many of the points made here take a broader, UK-wide view.

First, a stand-alone, freshly formulated set of rules of jurisdiction replacing the antiquated service based model. That model (Civil Procedure Rules 1998, rr

6.36-6.37 (**CPR**) to be read with Practice Direction 6B) dates back to the mid-19th century and has only been lightly patched up, albeit with significant *ad hoc* extensions, since then. The new rules should demand a significant connection between the parties or the subject matter of the claim and the forum of a kind that warrants the exercise of adjudicatory jurisdiction. In this regard, the Brussels-Lugano regime and the rules applied by the Scots courts (Civil Jurisdiction and Judgments Act 1982, Sch 8) provide more suitable starting points than the grounds currently set out in the Practice Direction.

Taking this step would allow the rules on service to focus on the procedural function of ensuring that the recipient of a claim form or other document is adequately informed of the matters raised against it. It would enable the cumbersome requirement to obtain permission to serve a claim form outside England and Wales to be abolished, and with it the complex and costly requirement that the claimant show that England and Wales is the 'proper place' (ie clearly the appropriate forum) for the trial of the action. Instead, the claimant would need to certify that the court has jurisdiction under the new set of rules (as has been the practice when the rules of the Brussels-Lugano apply) and the defendant would need to make an application under CPR, Part 11 if it considers that the English court does not have or should not exercise jurisdiction. The claimant would bear the burden of establishing jurisdiction, but the defendant would bear the burden of persuading the court that it should not be exercised. This brings us to the second point.

Secondly, stronger judicial (or legislative) control of the expensive and resource eating Goffian *forum conveniens* model. Senior judges have repeatedly noted the excesses of the *Spiliada* regime, in terms of the time, expense and judicial resource spent in litigating questions about the appropriate forum (see, most recently, Lord Briggs in *Vedanta Resources Plc v Lungowe* [2019] UKSC 20, [6]-[14]), yet they and the rule makers have done little or nothing about it. In many ways, the model is itself to blame with its wide ranging evaluative enquiry and micro-focus on the shape of the trial. Shifting the onus to the defendant in all cases (see above) and an emphasis on the requirement that another forum be 'clearly [ie manifestly] more appropriate' than England would be useful first steps to address the excesses, alongside more pro-active case management through (eg) strict costs capping, a limit in the number of pages of evidence and submissions for each side and a greater willingness to require the losing party to

pay costs on an indemnity basis.

Thirdly, a clipping of the overly active and invasive wings of the anti-suit injunction. English judges have become too willing to see the anti-suit injunction, once a rare beast, as a routine part of the judicial arsenal. They have succumbed to what I have termed the 'interference paradox' ((2020) 136 Law Quarterly Review 569): a willingness to grant anti-suit injunctions to counter interferences with their own exercise of jurisdiction coupled with an overly relaxed attitude to the interferences that their own orders wreak upon foreign legal systems and the exercise of constitutional rights within those systems. Moreover, the grounds for granting anti-suit injunctions are ill defined and confusing – in this regard, the law has travelled backwards rather than forwards in the past century (another Goffian project). Much to be done here.

Fourthly, steps to accede to the Hague Judgments Convention and to persuade others to accede to the Hague Choice of Court Convention. Although the gains from acceding to the Judgments Convention may be small, at least in the short term, it would send a strong signal as to the UK's wish to return to centre stage at the Hague Conference, and in the international community more generally, and may strengthen its hand in discussions for a future Judgments Convention. By contrast, the success of the Hague Choice of Court Convention is of fundamental importance for the UK, given that it wishes to encourage parties to choose its courts as the venue for dispute resolution and to have judgments given by those courts recognised and enforced elsewhere.

Fifthly, a review of the common law rules for the recognition and enforcement of judgments, which are in places both too broad and too narrow. These rules have been little changed since the end of the 19th century. They allow the enforcement of foreign default judgments based only on the defendant's temporary presence in the foreign jurisdiction at the time of service, while treating as irrelevant much more substantial factors such as the place of performance of a contractual obligation or place of commission of a tort (even in personal injury cases). Parliamentary intervention is likely to be needed here if a satisfactory set of rules is to emerge.

Sixthly, engagement with the EU's reviews of the Rome I and II Regulations to test if our choice of law rules require adjustment. The UK has wisely carried forward the rules of applicable law contained in the Rome Regulations. Although

not perfect, those rules are a significant improvement on the local rules that they replaced. The EU's own reviews of the Regulations (Rome II currently underway) will provide a useful trigger for the UK to re-assess its own rules with a view to making appropriate changes, whether keeping in step with or departing from the EU model.

Seventhly, statutory rules governing the law applicable to assignments (outside Rome I) and interests in securities. The UK had already chosen not to participate in the upcoming Regulation on the third party effects of assignments, but will need to keep a close eye on the outcome of discussions and on any future EU initiatives with respect to the law applicable to securities and should consider legislation to introduce a clear and workable set of choice of law rules with respect to these species of intangible property. These matters are too important to be left to the piecemeal solutions of the common law.

Eighthly, a measured response to the challenges presented by new technology, recognising that the existing (choice of law) toolkit is fit for purpose. In December 2020, the UK Law Commission launched a consultation on Smart Contracts with a specific section (ch 7) on conflict of laws issues. This is a welcome development. It is hoped that the Law Commission will seek to build upon existing solutions for offline and online contracts, rather than seeking to draw a sharp distinction between 'smart' and 'backward' contracts.

Ninthly, changes to the CPR to reduce the cost and inconvenience of introducing and ascertaining foreign law. The English civil procedure model treats foreign law with suspicion, and places a number of obstacles in the way of its effective deployment in legal proceedings. The parties and their legal teams are left in control of the presentation of the case, with little or no judicial oversight. This approach can lead to uncertainty at the time of trial, and to the taking of opportunistic points of pleading or evidence. A shift in approach towards more active judicial case management is needed, with a move away from (expensive and often unreliable) expert evidence towards allowing points of foreign law to be dealt with by submissions in the same way as points of English law, especially in less complex cases.

Tenthly, measures to enhance judicial co-operation between the UK's (separate) legal systems, creating a common judicial area. It is a notable feature of the Acts of Union that the UK's constituent legal systems stand apart. In some areas

(notably, the recognition and enforcement of judgments – Civil Jurisdiction and Judgments Act 1982, Sch 6 and 7), the rules operate in a way that allows the recognition of a single judicial area in which barriers to cross-border litigation have been removed. In other respects, however (for example, the service of documents, the taking of evidence and the ascertainment of foreign law), the UK's legal systems lack the tools that would facilitate closer co-operation and the more effective resolution of disputes. The UK's legal systems should consider what has worked for the EU, with its diverse range of legal systems, and for Commonwealth federal States such as Australia and work together to adopt comprehensive legislation on a Single UK Judicial Area.