AG Maciej Szpunar on the interpretation of the ESR in relation to cross-border declarations of waiver of succession and on substitution and characterisation, Opinion of 20 January 2022, C-617/20 – T.N. et al. ./. E.G.

Yesterday, AG Maciej Szpunar delivered an Opinion (a French version is available, a German as well, not yet, however, an English one) that is of high relevance both to the practical application of the European Succession Regulation (ESR) as well as to issues of European choice of law methodology in relation to substitution and characterisation.

The case emerged from a preliminary reference by the German Higher Regional Court (Oberlandesgericht) Bremen of 11 November 2020 and involved the following facts:

The deceased person, a Dutch national, died in Bremen (habitual residence) on 21 May 2018. He left behind his widow (E.G.) and two descendants (T.N. and N.N.) of his formerly deceased brother. His widow applied by notarial deed of 21 January 2019 for the issuance of a joint certificate of inheritance to the Local Court of Bremen, attributing to her ¾ of the estate and 1/8 to each of T.N. and N.N. The two descendants, however, having their habitual residence in the Netherlands, declared their waiver of succession before the Rechtbank Den Haag on 30 September 2019. In the proceedings before the Local Court of Bremen, T.N. and N.N. were heard, and by letter of 13 December 2019 in Dutch language they submitted copies of their declarations of waiver (as well in Dutch). The German court answered that it would not be able to take notice of these documents as

long as it would not receive a translation into German. The two descendants thereupon declared in German to the court by letter of 15 January 2020 that they had waived, properly registered with the Dutch court, and that under European law there would be no need for translation. By decision of 27 February 2020, the Local Court issued the certificate as applied for by the applicant, i.e. certifying T.N. and N.N. as co-heirs. The latters appealed against this decision and, on 30 June 2020 submitted colour copies of the deeds they had used in the Netherlands as well as German translations, on 17 August 2020 they submitted the original deeds. The Local Court referred the case to the Higher Regional Court Bremen and stated that it considers the time limit for waiver under section 1944 (1) German Civil Code of six weeks after gaining knowledge about the inheritance elapsed, as a declaration of waiver would have required timely submission of the original deeds.

Thereupon, the Higher Regional Court of Bremen, in essence, referred the question to the ECJ whether a waiver in the Member State of habitual residence of the heir other than the Member State of habitual residence of the deceased would be capable of replacing the waiver required by the applicable succession law by way of substitution or whether additional requirements exist, such as that the waiving heir informs, with a view to Recital 32 Sentence 2, the competent court in the Member State of habitual residence of the deceased and if so whether the official language of that court must be used and whether the original deeds must be used in order to comply with time limits under the applicable law.

AG Maciej Szpunar reframed this question (para. 34): According to his subtle analysis, the question should be whether Articles 13 and 28 ESR are, of course autonomously (see para. 50), to be interpreted to the effect that the requirement to declare a waiver before the competent court („*Nachlassgericht*“) must be characterised as a question of form rather than substance which would lead to the application of the law of the Member State of the waiving heirs on this point of form under Article 28 lit. b ESR. Whereas only if this question were to be characterised as a matter of substance, the question of substitution could at all be posed. It will not come as a surprise that with this point made, the result of the – careful and comprehensive – analysis of this issue of characterisation (paras. 45 – 69), including considerations on the effet utile of the ESR (para. 64), was that indeed the point must be considered as one of form. The consequence is that since the local form was complied with in the Netherlands, the waiver must be

held valid as of 30 September 2019 and as such still in time under the applicable succession law – a result that indeed facilitates cross-border succession cases in an important aspect as it is the overall objective of the ESR.

Remains the problem of how to ensure that the competent court takes notice of such a waiver (paras. 70 et seq.). This is the issue of Recital 32 Sentence 2: „Persons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession." However, as in the concrete case at hand the court definitively had knowledge about the waiver, the question was not relevant and thus remained expressly left open (para. 77). As it was expressly left open as irrelevant in the concrete case we may at least conclude that any kind of gaining knowledge must suffice. Then the only remaining question is what happens if the court did not gain any knowledge. From a practical point of view a party interested in bringing its waiver to the attention of the competent court, it seems that a letter (or even an email) to that court should suffice.

One last question. Could we not say: either it is "substance", then Article 13 refers to the lex causae (German law) or it is "form", then Article 28 refers to the same law (German law) under lit. a and then substitution comes up, or, alternatively, under lit. b, to the law for formal issues (Dutch law). And when further proceeding sub lit. a of Article 28, could not substitution provide for the same result, at least in this concrete case, than applying lit. b? If so, we might be tempted to add that two parallel avenues to the same result indicate quite reliably that the result must be the right one. It might have been for reasons of simplifying things that AG Maciej Szpunar did not fully map out these two avenues, all the more because substitution is a technique that is little explored on the level of the EU's PIL. However, if even the referring national court directly asks about substitution, the ECJ should take the opportunity to give us a bit more insights on this classical concept of the general part of any PIL from the perspective of the EU's conflicts of law methodology.

Let's hope that the ECJ takes up the ball and discusses the theoretical connotations of this case on methodical questions of characterisation and substitution as precisely and subtly as it was done in the Opinion. The CoL community will certainly await the judgment with excitement.

Relevant provisions of the ESR

Article 13: Acceptance or waiver of the succession, of a legacy or of a reserved share

In addition to the court having jurisdiction to rule on the succession pursuant to this Regulation, the courts of the Member State of the habitual residence of any person who, under the law applicable to the succession, may make, before a court, a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person concerned in respect of the liabilities under the succession, shall have jurisdiction to receive such declarations where, under the law of that Member State, such declarations may be made before a court.

Article 28: Validity as to form of a declaration concerning acceptance or waiver

A declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person making the declaration, shall be valid as to form where it meets the requirements of: (a) the law applicable to the succession pursuant to Article 21 or Article 22; or (b) the law of the State in which the person making the declaration has his habitual residence.

Recital 32:

In order to simplify the lives of heirs and legatees habitually resident in a Member State other than that in which the succession is being or will be dealt with, this Regulation should allow any person entitled under the law applicable to the succession to make declarations concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or concerning the limitation of his liability for the debts under the succession, to make such declarations in the form provided for by the law of the Member State of his habitual residence before the courts of that Member State. This should not preclude such declarations being made before other authorities in that Member State which are competent to receive declarations under national law. Persons choosing to avail themselves of the possibility to make declarations in the Member State of their habitual residence should themselves inform the court or authority which is or will be

dealing with the succession of the existence of such declarations within any time limit set by the law applicable to the succession

---

South African court issues interdict against Shell concerning seismic survey

The High Court of the Eastern Cape in Makhanda (Grahamstown), South Africa, on 28 December 2021 issued an interim interdict to stop Shell from commencing seismic activity off the south-eastern coast of South Africa. The full judgment is available on Saflii.

From a conflict-of-laws perspective, the interdict raises some points of interest.

First, it provides two examples of the application of non-State law. In considering whether Shell has adequately informed the local communities of its plans, the judge took into account not only the South African legislation, but also of the local communities' modes of communication and of seeking consensus. In this sense, even though Shell had published its intentions in newspapers, these have not reached the communities in which people were not necessarily able to read English and Afrikaans (the languages of the newspapers). The judge found that "the approach that was followed to consult was inconsistent with the communities' custom of seeking consensus." (para 25). The judgment implicitly recognise this custom as law. This approach is in line with the South African Constitution (sec. 211(3) states: *The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.*).

The next example of the application of non-State law is the Rio Declaration on Environment and Development (para 69 of the judgment) to find that where there

are threats of serious or irreversible damage, the precautionary approach shall be taken, even in the absence of full scientific certainty (Principle 15 of the Declaration).

The second interesting point is that the judge allowed this civil action even though there was a public law remedy available to the applications, namely an application to the Minister to cancel or suspend the right to explore that was granted. The judge found that the time-consuming nature of that remedy and the unlikeliness of its success made it an unsatisfactory remedy (paras 74-77).

Has the Battle Just Begun for Collective Action against Big Tech Companies?

*Julia Hörnle, Professor of Internet Law, CCLS, Queen Mary University of London****[1]***

It is now well known that internet users are widely tracked and profiled by a range of actors and the advancements in data science mean that such tracking and profiling is increasingly commercially profitable[2]. This raises difficult questions about how to balance the value of data with individual privacy. But since there is no point in having privacy (or data protection) rights if no redress can be found to vindicate them, it is even more important to investigate *how* internet users can obtain justice, if their privacy has been infringed. Given the power of Big Tech Companies, their enormous financial resources, cross-jurisdictional reach and their global impact on users' privacy, there are two main litigation challenges for successfully bringing a privacy claim against Big Tech. One is the jurisdictional challenge of finding a competent court in the same jurisdiction as the individual users.[3] Secondly, the challenge is how to finance mass claims, involving millions of affected users. In privacy claims it is likely that

there is significant user detriment, potentially with long-term and latent consequences, which are difficult to measure. This constellation provides a strong argument for facilitating collective redress, as otherwise individual users may not be able to obtain justice for privacy infringements before the courts. In privacy infringement claims these two challenges are intertwined and present a double-whammy for successful redress. Courts in a number of recent cases had to grapple with questions of jurisdiction in consumer collective redress cases in the face of existing provision on consumer jurisdiction and collective redress, which have not (yet) been fully adapted to deal with the privacy challenges stemming from Big Tech in the 21st century.

In Case C-498/16 *Max Schrems v Facebook Ireland****[4]*** the Court of Justice of the EU in 2018 denied the privilege of EU law for consumers to sue in their local court[5] to a representative (ie *Max Schrems*) in a representative privacy litigation against Facebook under Austrian law. By contrast, courts in California and Canada have found a contractual jurisdiction and applicable law clause invalid as a matter of public policy in order to allow a class action privacy claim to proceed against *Facebook*.[6] In England, the dual challenge of jurisdiction and collective actions in a mass privacy infringement claim has presented itself before the English Courts, first in *Vidal-Hall v Google* before the Court of Appeal in 2015[7] and in the Supreme Court judgment of *Google v Lloyd* in November 2021[8]. Both cases concerned preliminary proceedings on the question of whether the English courts had jurisdiction to hear the action, ie whether the claimant was able to serve Google with proceedings in the USA and have illustrated the limitations of English law for the feasibility of bringing a collective action in mass-privacy infringement claims.

The factual background to *Vidal- Hall* and *Lloyd* is the so-called "Safari workaround" which allowed Google for some time in 2011-2012 to bypass Apple privacy settings by placing DoubleClick Ad cookies on unsuspecting users of Apple devices, even though Safari was trying to block such third party cookies, used for extensive data collection and advertising. The claimants alleged that this enabled Google to collect personal data, including sensitive data, such as users' interests, political affiliations, race or ethnicity, social class, political and religious beliefs, health, sexual interests, age, gender, financial situation and location. Google additionally creates profiles from the aggregated information which it sells. The claim made was that Google as data controller had breached the

following data protection principles set out in the Data Protection Act 1998 Schedules 1 and 2: 1st (fair and lawful processing), 2nd (processing only for specified and lawful purposes) and 7th (technical and organizational security measures). In particular, it was alleged that Google had not notified Apple iPhone users of the purposes of processing in breach of Schedule 1, Part II, paragraph 2 and that the data was not processed fairly according to the conditions set out in Schedules 2 and 3.

Vidal-Hall[9] concerned the first challenge of jurisdiction and in particular whether the court should allow the serving of proceedings on the defendant outside the jurisdiction under the Civil Procedure Rules[10]. For privacy infringement, previous actions had been brought under the cause of action of breach of confidence[11], which is a claim in equity and, thus it was unclear whether for such actions jurisdiction lies at the place of where the damage occurs. The Court of Appeal held that misuse of private information and contravention of the statutory data protection requirements was a *tort* and therefore, if damage had been sustained within England, the English courts had jurisdiction and service to the USA (California) was allowed.

The second hurdle for allowing the case to proceed by serving outside the jurisdiction was the question of whether the claimant was limited to claiming financial loss or whether a claim for emotional distress could succeed. The Court of Appeal in *Vidal-Hall* decided that damages are available for distress, even in the absence of financial loss, to ensure the correct implementation of Article 23 of the (then) Data Protection Directive, and in order to comply with Articles 7 and 8 of the Charter of Fundamental Rights of the EU. The Court therefore found that there was a serious issue to be tried and allowed service abroad to proceed, at which point the case settled.

The more recent English Supreme Court judgment in *Lloyd* concerned the second challenge, collective redress. As pointed out by Lord Leggatt in the judgment, English procedural law provides for three different types of actions: Group Litigation Orders (CPR 19.11), common law representative actions, and statutory collective proceedings under the Competition Act 1998. Their differences are significant for the purposes of litigation financing in two respects: first the requirement to identify and “sign-up” claimants and secondly, the requirement for

individualized assessment of damages. Since both these requirements are expensive, they make collective redress in mass privacy infringement cases with large numbers of claimants impractical.

Group actions require all claimants to be identified and entered in a group register ("opt-in") and are therefore expensive to administer, which renders them commercially unviable if each individual claim is small and if the aim is to spread the cost of litigation across a large number of claimants.

English statutory law in the shape of the Competition Act 1998 provides for collective proceedings before the Competition Appeal Tribunal in competition law cases only.[12] Since the reforms by the Consumer Rights Act in 2015, they can be brought under an "opt-in" or "opt-out" mechanism. Opt-out means that a class can be established without the need for affirmative action by each and every member of the class individually. The significance of this is that it is notoriously difficult (and expensive) to motivate a large number of consumers to join a collective redress scheme. Human inertia frequently prevents a representative claimant from joining more than a tiny fraction of those affected. For example, 130 people (out of 1.2-1.5 million) opted into the price-fixing case against JJB Sports concerning replica football shirts.[13] Likewise, barely 10,000 out of about 100,000 of Morrison's employees joined the group action against the supermarket chain for unlawful disclosure of private data on the internet by another employee.[14] Furthermore, s.47C (2) of the Competition Act obviates the need for individual assessment of damages, but limits the requirement to prove damages to the class as a whole, as an aggregate award of damages, as held by Lord Briggs in *Merricks v Mastercard****[15]***. However no such advanced scheme of collective redress has yet been enacted in relation to mass privacy infringement claims.

While the Supreme Court held that Mr Lloyd's individual claim had real prospect of success, the same could not necessarily be said of everyone in the class he represented. This case was brought as a *representative action* where Mr Lloyd represented the interests of everyone in England and Wales who used an iPhone at the relevant time and who had third party cookies placed by Google on their device. One of the interesting features of representative actions is that they can proceed on an opt-out basis, like the collective actions under the Competition Law Act. *Common law* representative actions have been established for hundreds of years and have now been codified in CPR Rule 19.6: "Where more than one

person has the *same interest* in a claim by or against one or more of the persons who have the same interest as representatives of any other person who have that interest". Thus representative actions are based on the *commonality of interest* between claimants. The pivotal issue in *Lloyd* was the degree of commonality of that interest and in particular, whether this commonality must extend to the losses, which claimants have suffered, and proof of damages.

Lord Leggatt in *Lloyd* emphasized the spirit of flexibility of representative actions. Previous caselaw in the Court of Appeal had held that it was possible for claimants to obtain a declaration by representative action, which declares that they have rights which are common to all of them, even though the loss and amount of damages may vary between them.[16] He held that a bifurcated approach was permissible: a representative action can be brought seeking a declaration about the common interests of all claimants, which can then form the basis for individual claims for redress. Lord Leggatt held that, depending on the circumstances, a representative action could even be brought in respect of a claim for damages, if the *total amount of damages could be determined for the class as a whole*, even if the amount for each individual claimant varied, as this was a matter which could be settled between the claimants in a second step. He held that, therefore, a representative action can proceed even if a claim for damages was an element of the representative action, as in *Lloyd*.

Lord Leggatt found that the interpretation of what amounts to the "same interest" was key and that there needed to be (a) common issue(s) so that the "representative can be relied on to conduct the litigation in a way which will effectively promote and protect the interests of all the members of the represented class."[17] The problem in *Lloyd* was that the total damage done to privacy by the Safari workaround was unknown.

Lord Leggatt saw no reason why a representative action for a declaration that Google was in breach of the Data Protection Act 1998, and that each member was entitled to compensation for the damage suffered as a consequence of the breach, should fail. However, commercial litigation funding in practice cannot fund actions seeking a mere declaration, but need to be built on the recovery of damages, in order to finance costs. In order to avoid the need for individualised damages, the claim for damages was formulated as a claim for *uniform per capita* damages. The problem on the facts of this case was clearly that the Safari workaround did not affect all Apple users in the same manner, as their internet

usage, the nature and amount of data collected, as well as the effect of the data processing varied, all of which required individualised assessment of damages.

For this reason, the claimant argued that an infringement of the Data Protection Act 1998 leads to automatic entitlement to compensation without the need to show *specific* financial loss or emotional distress. This argument proved to be ultimately unsuccessful and therefore the claim failed. The Court examined Section 13 of the Data Protection Act 1998, entitling the defendant to compensation for damage, but the court held that each claimant had to prove such damage. The level of distress varied between different members of the represented class, meaning that individual assessment was necessary.

The claimant sought to apply the cases on the tort of misuse of private information by analogy. In this jurisprudence the courts have allowed for an award of damages for wrongful intrusion of privacy as such, without proof of distress in order to compensate for the "loss of control" over formerly private information.[18] Lord Leggatt pointed out that English common law now recognized the right to control access to one's private affairs and infringement of this right itself was a harm for which compensation is available.

However in this particular case the claim had not been framed as the tort of misuse of private information or privacy intrusion, but as a breach of statutory duty and Lord Leggatt held that the same principle, namely the availability of damages for "loss of control" did *not* apply to the statutory scheme. He pointed out that it may be difficult to frame a representative action for misuse of private information, as it may be difficult to prove reasonable expectations of privacy for the class as a whole. This may well be the reason that the claim in this case was based on breach of statutory duty in relation to the Data Protection Act. Essentially the argument that "damages" in Section 13 (1) included "loss of control" over private data was unsuccessful. Both Article 23 of the Data Protection Directive and Article 13 made a distinction between the unlawful act (breach of data protection requirements) and the damage resulting, and did not conceive the unlawful act itself as the damage. Furthermore, it was not intended by the Directive or the Act that each and every contravention led to an entitlement to damages. He held that "loss of control" of personal data was not the concept underlying the data protection regime, as processing can be justified by consent, but also other factors which made processing lawful, so the control over personal data is not absolute.

Furthermore, it did not follow from the fact that both the tort of misuse of private information and the data protection legislation shared the same purposes of protecting the right to privacy under Article 8 of the European Convention of Human Rights that the same rule in respect of damages should apply in respect of both. There was no reason "why the basis on which damages are awarded for an English domestic tort should be regarded as relevant to the proper interpretation of the term "damage" in a statutory provision intended to implement a European directive".[19] He concluded that a claim for damages under Section 13 required the proof of material damage or distress. He held that the claim had no real prospect of success and that therefore no permission should be given to serve proceedings outside the jurisdiction (on Google in the US).

This outcome of *Lloyd* raises the question in the title of this article, namely whether the cross-border battle on collective actions in mass privacy infringement cases against Big Tech has been lost, or whether on the contrary, it has just begun. One could argue that it has just began for the reason that the facts underlying this case occurred in 2011-2012, and therefore the judgment limited itself to the Data Protection Act 1998 (and the then Data Protection Directive 1995/46/EC). Since then the UK has left the EU, but has retained the General Data Protection Regulation[20] ("the UK GDPR") and implemented further provisions in the form of the Data Protection Act 2018, both of which contain express provisions on collective redress. The GDPR provides for *opt-in* collective redress performed by a not-for-profit body in the field of data protection established for public interest purposes.[21] This is narrow collective redress as far removed from commercial litigations funders as possible. Because of the challenge of financing cross-border mass-privacy infringements claims, this is unlikely to be a practical option. The GDPR makes it optional for Member States to provide that such public interest bodies are empowered to bring *opt-out* collective actions for compensation before the courts.[22] These provisions unfortunately do not add anything to common law representative actions or group actions under English law. As has been illustrated above, representative actions can be brought on an "opt-out" basis, but have a narrow ambit in that all parties must have the *same interest in the claim* and *Lloyd* has demonstrated that in the case of distress this communality of interest may well defeat a claim. For group actions the bar of communality is lower, as it may encompass "claims which give rise to common or related issues of fact or law"[23]. But clearly the downside of group actions is that they are *opt-in*. Therefore, while English law recognizes

collective redress, there are limitations to its effectiveness.

The Data Protection Act 2018 imposes an obligation on the Secretary of State to review the provision on collective redress, and in particular, consider the need for *opt-out* collective redress, and lay a report before Parliament. This may lead to Regulations setting out a statutory opt-out collective redress scheme for data protection in the future.[24] This Review is due in 2023.

Thus, the GDPR and the Data Protection Act 2018 have not yet added anything to the existing collective redress. It can only be hoped that the Secretary of State reviews the collective redress mechanisms in relation to data protection law and the review leads to a new statutory collective redress scheme, similar to that enacted in respect of Competition Law in 2015, thereby addressing the challenge of holding Big Tech to account for privacy infringement.[25]

However the new data protection law has improved the provision of *recoverable heads of damage*. This improvement raises the question, if the issues in *Lloyd* had been raised under the current law, whether the outcome would have been different. The Data Protection Act 2018 now explicitly clarifies that the right to compensation covers *both material and non-material damage* and that *non-material damage includes distress*.[26] Since non-material damage is now included in the Act, the question arises whether this new wording could be interpreted by a future court as including the privacy infringement itself (loss of control over one's data). Some of the arguments made by Lord Leggatt in *Lloyd* continue to be relevant under the new legislation, for example that the tort of statutory breach is different from the tort of misuse of private information and that not each and every (minor) infringement of a statute should give raise to an entitlement for damages. Nevertheless it is clear from the new Act that non-material damage is included and that non-material damage includes distress, but is wider than distress. This means that claimants should be able to obtain compensation for other heads of non-material damage, which may include the latent consequences of misuse of personal information and digital surveillance. There is much scope for arguing that some of the damage caused by profiling and tracking are the same for all claimants. A future representative action in an equivalent scenario may well be successful. Therefore, the battle for collective action against Big Tech companies' in privacy infringement cases may just have begun.

[1] J.hornle@qmul.ac.uk

[2] Shoshana Zuboff *The Age of Surveillance Capitalism* (2018)

[3] See further J. Hörnle, *Internet Jurisdiction Law & Practice* (OUP 2021)

[4] ECLI:EU:C:2018:37; discussed further in J. Hörnle fn 1 Chapter 8

[5] Ie the courts of the consumer's domicile, if the business directed their activities to that state, Art 17 and Art 18 (1) Brussels Regulation on Jurisdiction (EU) 1215/2021

[6] *In Re Facebook Biometric Information Privacy Litigation* 185 F.Supp.3d 1155 (US District Court N.D. California 2016) and *Douez v Facebook* [2017] SCC 33; discussed further in J. Hörnle fn 1 Chapter 8

[7] [2016] QB 1003

[8] [2021] 3 WLR 1268

[9] [2015] 3 WLR 409 (CA)

[10] CPR PD 6B para.3.1(9)

[11] *Campbell v MGN Ltd* [2004] 2 WLR 1232 (HL)

[12] Section 47B

[13] *The Consumers Association v JJB Sports Plc* [2009] CAT 2

[14] *Various Claimants v WM Morrisons Supermarkets Plc* [2017] EWHC 3113 (QB)

[15] [2021] Bus LR 25, para 76

[16] *David Jones v Cory Bros & Co Ltd* (1921) 56 LJ 302; 152 LT Jo 70

[17] Paras 71-74

[18] by Mann J affirmed in the Court of Appeal *Gulati v MGN Ltd* [2017] QB 149

[19] Para 124

[20] Regulation (EU) 2016/679, L119, 4 May 2016, p. 1–88

[21] Art 80 (1)

[22] Arts 79 and 80 (2) in relation to effective judicial remedies

[23] CPR Part 19- Group Litigation Orders, Rules 19.10, 19.11

[24] ss. 189-190

[25] The current government, however seems to march in the opposite direction, see Consultation on reform of data protection law https://www.gov.uk/government/consultations/data-a-new-direction

[26] S. 168 (1)

Court of Justice of the EU on the recognition of parentage

After the Coman judgment of 2018, the Grand Chamber of the Court of Justice of the European Union (CJEU) has again rendered a judgment in the field of free movement of citizens that is of importance for private international law. Like in Coman, the judgment in V.M.A. of 14 December 2021 concerned a non-traditional family of which the members sought to make use of their right to free movement in the EU under the Treaty on the Functioning of the European Union (TFEU) and Directive 2004/38. The Charter of Fundamental Rights of the EU (Charter) was also pertinent, particularly its Article 7 on respect for private and family life, Article 9 on the right to marry and the right to found a family, Article 24 on the rights of the child, and Article 45 on freedom of movement and of residence.

While Coman concerned the definition of “spouse” under Article 2 of the Directive, in V.M.A. the CJEU addressed the definition of “direct descendants” in the same provision.

Two women, V.M.A., a Bulgarian national, and K.D.K., a national of the United Kingdom, were married and lived in Spain. A daughter, S.D.K.A., was born in Spain. Her Spanish birth certificate indicated V.M.A. as "mother A" and K.D.K. as "mother". V.M.A. applied to the Sofia municipality for a birth certificate for S.D.K.A. in order to obtain a Bulgarian identity document for her. She submitted a legalised and certified translation into Bulgarian of the extract from the civil register of Barcelona.

The Sofia municipality refused this application, due to the lack of information on S.D.K.A.'s biological mother and because the reference to two mothers was contrary to Bulgarian public policy.

The Administrative Court of the City of Sofia, to which V.M.A. appealed the municipality's decision, posed four questions to the CJEU. It sought to know whether Articles 20 and 21 of the TFEU and Articles 7, 24 and 45 of the Charter oblige Bulgaria to recognise the Spanish birth certificate despite its mentioning two mothers and despite the fact that it was unclear who the biological mother of the child was. It also questioned EU Member States' discretion regarding rules for the establishment of parentage. A further relevant point was Brexit and the fact that the child would not be able to get EU citizenship through the other mother, who is a UK citizen.

The Grand Chamber ruled as follows:

Article 4(2) TEU, Articles 20 and 21 TFEU and Articles 7, 24 and 45 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 4(3) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, must be interpreted as meaning that, in the case of a child, being a minor, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged (i) to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and (ii) to recognise, as is any other Member State, the document from the host

Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States.

The CJEU thus obliges Bulgaria, through EU law, to recognise the Spanish birth certificate. The CJEU is not concerned with the issue of a birth certificate in Bulgaria, but rather with the identity document (the requirements under national law for the identity document cannot be used to refuse to issue such identity document – see para 45).

The parentage established lawfully in Spain has the result that the *parents of a Union citizen who is a minor and of whom they are the primary carers, be recognised by all Member States as having the right to accompany that child when her right to move and reside freely within the territory of the Member States is being exercised* (para 48)

The CJEU refers to the identity document as the document that permits free movement. This wording seems, on a first reading, to be broader than the ruling in Coman, where the CJEU ruled on the recognition of the same-sex marriage only for purposes of the right to residence. However, in para 57 the Court seems to include the Coman limitation: *Such an obligation does not require the Member State of which the child concerned is a national to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which that child derives from EU law, the parent-child relationship between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child's parents.*

But I'm sure much debate will follow about the extent of the obligation to recognise. As readers might be aware, the European Commission earlier this year set up an Expert Group on the Recognition of Parentage between Member States.

The Hidden Treasure Trove of Conflicts of Law: the Case Law of the Mixed Courts of the Colonial Era

Guest post by Willem Theus, PhD Researcher (KULeuven, cotutelle with UCLouvain)

The history of private international law (or 'conflict of laws') is incomplete. Private international law textbooks have always referred to the essentials of the history of our discipline.[1] However, these essentials are often solely based on the history of conflict of laws in the West and on the works of western authors such as Huber, Von Savigny and Story. It is undoubtedly true that these authors played an important role and that the "modern" conflict of laws finds it origin in 19th century Europe, when the split between private and public international law occurred.[2] This is however only one part of history.

Conflict of laws systems have been around much longer and are definitely not uniquely western. They were already present in the very first civilizations, with some rules of that ancient history still resembling our present-day rules.[3]Conflict of laws is "*the body of law that aims to resolve claims involving foreign elements*".[4] A state or international border is therefore not required to have a conflict of laws system,[5] only different jurisdictions and laws (i.e. legal pluralism[6]) are. A distinction could therefore be made between "external" (i.e. crossing an international State border) conflict of laws or private international law and "internal" conflict of laws (i.e. within one State).[7] Both the historical research and the contemporary study of our field should arguably reflect much more on precolonial and/or non-western conflict of laws systems and on the unique linkage between the national (or "internal") and international (or "external") spheres. This is especially so given that "external" conflict of laws rules seem to sometimes guide "internal" conflict of laws cases.[8] I offer one

historical example to highlight the new perspectives that such a widening of scope could offer.

In a not so distant and colonial past, there were multiple “internationalized” or mixed courts in various regions and nations. The last such mixed court only closed its doors in 1980.[9] In general, mixed courts were local courts that employed a mixed (read mostly Western) bench, bar and legal system to deal with legal conflicts that had a mixed or “foreign” element, i.e. conflicts not exclusively related to one local or foreign resident population.[10] Those exclusively local or intra-foreigner -of the same nationality- legal conflicts were often dealt with by various local or consular courts. The mixed or “foreign” element was however often widely interpreted and therefore quickly kicked in, leading to overlapping jurisdictions in many instances and therefore to a conflict of laws system.

An example of such a set-up is the Tangier International Zone (1923-1956), a treaty-based multinational run zone, which remained under the Sovereignty of the Sultan of Morocco. It had various multinational institutions with local involvement. In the Zone, five different legal systems co-existed, each with their own courts. These were the American Consular Court, the Special Tribunal of the State Bank of Morocco, the Moroccan Sharia courts, the Moroccan Rabbinical courts and the Mixed Court. The latter dealt with all cases that had a “foreign” element (except American as they went to the aforementioned American Consular Court).[11] Both “internal” and “external” conflict of law systems in fact overlap here. Indeed the Mixed Court and the two Moroccan courts were “local” courts with the judges being formally appointed by the Sultan, whereas the American Consular Court was in essence an ad hoc American court in Tangier. The Special Tribunal was some sort of early investment protection court with very limited jurisdiction.

Naturally, in such a set-up conflict of laws cases were frequent, as illustrated by the Toledano-case which came before the Mixed Court. In 1949 a dispute between the heirs of the large inheritance of a Tangerine Jew, Isaac Toledano, broke out. The key question concerned the nationality of Isaac – and as such the questions of jurisdiction and applicable law. During his lifetime Isaac had become a Spanish citizen by naturalization, yet he had seemingly always lived in Morocco. Had he somehow lost his Moroccan citizenship? If so, the mixed courts would have jurisdiction and Spanish law would apply, leading his inheritance to be divided under all his children, including his married daughters. If not, the rabbinical

courts of Tangier and rabbinical law would apply, leading to his inheritance to only go to his sons and unmarried daughters. On appeal the court overturned the judgment of first instance that held that he had retained his Moroccan nationality. He was deemed to be Spanish and therefore Spanish law was to be applied.[12]

Such jurisdictional caselaw is only a part of this conflict of laws treasure trove. The caselaw of the mixed courts seemingly encompasses all types of conflict of laws questions and many other legal questions. I have to say seemingly, as the caselaw of the mixed courts has in recent times barely been studied and their archives (if known at all) are scattered throughout the globe. A closer look could undoubtedly open up new perspectives to conflict of laws, and some of these mixed courts' experiences and case-law could perhaps help to guide ever-recurring questions of personal status matters regarding foreigners. The Emirate of Abu Dhabi has for example reintroduced special personal status provisions for non-Muslim foreigners as reported on conflictoflaws recently. The courts also offer new perspectives for public international law as certain mixed courts acted as "true" international courts when interpreting their treaties. An example is the Court of Appeal of Mixed Court of Tangier going against the International Court of Justice in 1954 when it held that it alone had the authority to provide authoritative interpretations of the Zone's constitutive treaties.[13] The Mixed Courts could even open new perspectives to EU-law as many early key EU lawyers and judges have ties to certain Mixed Courts.[14] Much work is therefore still to be done. This piece is a call to arms for just that.

[1] Hatzimihail, N.E. (2021) *Preclassical Conflict of Laws*. Cambridge University Press 51-52.

[2] For an overview of this period see: Banu, R. (2018). *Nineteenth Century Perspectives on Private International Law*. Oxford University Press

[3] Yntema, Hessel E. (1953). The Historic Bases of Private International Law. *The American Journal of Comparative Law*, vol. 2, no. 3, 301. Yntema refers to the following text found in a Fayoum Papyri: "*Contracts between Greeks-who had established colonies in Egypt (red.)-and Egyptians, if in Greek form, should be tried before the chrematists, the Greek courts; if in Egyptian form, before the laocrites, the native courts, in accordance with the laws of the country.*"

[4] Okoli, C.S.A. (2020). *Private International Law in Nigeria*. Hart, 3.

[5] Okoli, *Op.cit.*, 3-7; Yntema. *Op.cit.*, 299

[6] For a good overview of the different meanings of this term see: Benda-Beckmann, B. & Turner, B. (2018). Legal Pluralism, Social Theory, and the State. *Journal of Legal Pluralism and Unofficial Law*, *50*(3), 255–274

[7] This distinction is not new and is used in legislation. See for example: Non-application of This Regulation to Internal Conflicts of Laws. (2016). In A. Calvo Caravaca, A. Davì, & H. Mansel (Eds.), *The EU Succession Regulation: A Commentary* (pp. 521-529). Cambridge University Press.

[8] Okoli *Op.cit*, 3.

[9] Pacific Manuscripts Bureau, *Collection MS 1145: Judgements of the Joint Court of the New Hebrides*. Retrieved from <https://asiapacific.anu.edu.au/pambu/catalogue/index.php/judgements-of-joint-court-of-new-hebrides> accessed 13 December 2021. It was known as a 'Joint' Court and not 'Mixed' as there were only two powers involved: France and the UK. Although in French it was still referred to as a *Tribunal Mixte*. Mixed Courts mostly existed in countries that were not-directly colonized, yet still under heavy Western influence such as Siam, China and Egypt. They were mostly founded due to western distrust for the local legal systems and build forth on the principle of personal jurisdiction (and the connected later principle of extraterritoriality and the connected Capitulations and Unequal Treaties).

[10] Erpelding, M. (2020). Mixed Courts of the Colonial Era. In Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law*. Oxford University Press.

[11] Erpelding, M & Rherrousse, F. (2019) The Mixed Court of Tangier. In Héne Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law*. Oxford University Press, paras 22-24.

[12] de Radigues de Chenneviere, C. (5 April 1949). 'Procès Toledano'. Tangier, P 452/717, AF-12-A-3 (Diplomatic Archives of the Kingdom of Belgium)

[13] Grawitz, M. (1955). Arrêt du 13 août 1954. *Annuaire français de droit international*, *1*(1), 324–328

[14] Erpelding, M. (2020). International law and the European Court of Justice:

the Politics of Avoiding History, *Journal of the History of International Law*, 22(2-3), 446-471.

New civil procedure rules in Singapore

New civil procedure rules in Singapore

New civil procedure rules (Rules of Court 2021) for the General Division of the High Court (excluding the Singapore International Commercial Court ('SICC')) have been gazetted and will be implemented on 1 April 2022. The reform is intended to modernise the litigation process and improve efficiency.[1] New rules for the SICC have also been gazetted and will similarly come into operation on 1 April 2022.

This update focuses on the rules which apply to the General Division of the High Court (excluding the SICC). New rules which are of particular interest from a conflict of laws point of view include changes to the rules on service out. The new Order 8 rule 1 provides that:

'(1) An originating process or other court document may be served out of Singapore with the Court's approval if it can be shown that the Court has the jurisdiction or is the appropriate court to hear the action.

…

(3) The Court's approval is not required if service out of Singapore is allowed under a contract between the parties.

…'

The current rules on service out is to be found in Order 11 of the Rules of Court. This requires that the plaintiff ('claimant' under the new Rules) establish that (1) there is a good arguable case that the action fits within one of the heads of Order

11; (2) there is a serious issue to be tried on the merits; and (3) Singapore is *forum conveniens*.[2] The heads of Order 11 generally require a nexus to be shown between the parties or subject-matter of the action to Singapore and are based on the predecessor to the UK Civil Procedure Rules Practice Direction 6B paragraph 3.1. The wording of the new Order 8 rule 1(1) suggests a drastic departure from the current Order 11 framework; however, this is not the case.

There will be two alternative grounds of service out: either the Singapore court 'has the jurisdiction' to hear the action or 'is the appropriate court' to hear the action. The first ground of service out presumably covers situations such as where the Singapore court is the chosen court in accordance with the Choice of Court Agreements Act 2016,[3] which enacts the Hague Convention on Choice of Court Agreements into Singapore law. The second ground of service out i.e. that the Singapore court is the 'appropriate court' to hear the action could, on one view, be read to refer only to the requirement under the current framework that Singapore is *forum conveniens*. However, the Supreme Court Practice Directions 2021, which are to be read with the new Rules of Court, make it clear that the claimant still has to show:[4]

'(a) there is a good arguable case that there is sufficient nexus to Singapore;

(b) Singapore is the *forum conveniens*; and

(c) there is a serious question to be tried on the merits of the claim.'

The Practice Directions go on to give as examples of a sufficient nexus to Singapore factors which are substantively identical to the current Order 11 heads.[5] As these are non-exhaustive examples, the difference between the current rules and this new ground of service out is that the claimant may still succeed in obtaining leave to serve out even though the action does not fit within one of the heads of the current Order 11. This is helpful insofar as the scope of some of the heads are uncertain; for example, it is unclear whether an action for a declaration that a contract does not exist falls within the current contractual head of service out[6] as there is no equivalent to the UK CPR PD 6B paragraph 3.1(8).[7] Yet at the same time, the Court of Appeal had previously taken a wide interpretation of Order 11 rule 1(n), which reads: 'the claim is made under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A), the Terrorism (Suppression of Financing Act (Cap. 325) or any

other written law'.[8] The phrase 'any written law' was held not to be read *ejusdem generis*[9] and would include the court's powers, conferred by s 18 of the Supreme Court of Judicature Act read together with paragraph 14 of the First Schedule, to 'grant all reliefs and remedies at law and in equity, including damages in addition to, or in substitution for, an injunction or specific performance.'[10] This interpretation of Order 11 rule 1(n) arguably achieves much the same effect as the new 'appropriate court' ground of service out.

The new Order 8 rule 1(3) is to be welcomed. However, it is important to note that a choice of court agreement for the Singapore court which is unaccompanied by an agreement to permit service out of Singapore will still require an application for leave to serve out under the 'has jurisdiction' ground (if the Choice of Court Agreements Act is applicable) or the 'appropriate court' ground (if the Choice of Court Agreements Act is not applicable).

Other provisions in the new Rules of Court 2021 which are of interest deal with a challenge to the jurisdiction of the court. A defendant may challenge the jurisdiction of the court on the grounds that the court has no jurisdiction to hear the action or the court should not exercise jurisdiction to hear the action. A challenge on either ground 'is not treated as a submission to jurisdiction'.[11] This seemingly contradicts the established common law understanding that a jurisdictional challenge which attacks the existence of the court's jurisdiction (a setting aside application) does not amount to a submission to the court's jurisdiction, whereas a jurisdictional challenge which requests the court not to exercise the jurisdiction which it has (a stay application) amounts to a submission to the court's jurisdiction.[12] Further to that, the provisions which deal with challenges to the exercise of the court's jurisdiction are worded slightly differently depending on whether the action is commenced by way of an originating claim or an originating application. For the former, Order 6 rule 7(5) provides that 'The challenge to jurisdiction may be for the reason that – … (b) the Court should not exercise jurisdiction to hear the action.' For the latter, Order 6 rule 12(4) elaborates that 'The challenge to jurisdiction may be for the reason that – … (b) the Court should not exercise jurisdiction because it is not the appropriate Court to hear the action.' The difference in wording is puzzling because one assumes that the same types of challenges are possible regardless of whether the action is commenced by way of an originating claim or originating application – eg, challenges based on *forum non conveniens*, abuse of process or case

management reasons. Given use of the word ‘may’ in both provisions though, it ought to be the case that the different wording does not lead to any substantive difference on the types of challenges which are permissible.

[1] See media release here.

[2] *Zoom Communications v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 (CA).

[3] Cap 39A.

[4] Supreme Court Practice Directions 2021 (To be read with Rules of Court 2021), p 72.

[5] *Ibid*, pp 72-73.

[6] Rules of Court, Order 11 rule 1(d).

[7] ‘A claim is made for a declaration that no contract exists …’.

[8] *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 (CA).

[9] *Ibid*, [168]-[170].

[10] *Ibid*, [161].

[11] Rules of Court 2021, Order 6 rule 7(6) (originating claim); Order 6 rule 12(5) (originating application.

[12] *Zoom Communications v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 (CA).

CJEU Rules on the interplay

between Brussels IIA and Dublin III

This post was contributed by Dr. Vito Bumbaca, who is Assistant Lecturer at the University of Geneva

In a ruling of 2 August 2021 (*A v. B*, C-262/21 PPU), the Court of Justice of the European Union (CJEU) clarified that a child who is allegedly wrongfully removed, meaning without consent of the other parent, should not return to his/her habitual residence if such a removal took place as a consequence of the ordered transfer determining international responsibility based on the Dublin III Regulation. The judgment is not available in English and is the first ever emanating from this Court concerning the Brussels IIA-Dublin III interplay.

The Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIA Regulation) complements the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, and is applicable to 26 EU Member States, including Finland and Sweden. The Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III), is pertinent for asylum seekers' applications commenced at least in one of the 31 Dublin Member States (EU/EFTA), comprising Finland and Sweden, bound by this Regulation.

Questions for a CJEU urgent preliminary ruling:

The CJEU was referred five questions, but only addressed the first two.

'(1) Must Article 2(11) of [Regulation No 2201/2003], relating to the wrongful removal of a child, be interpreted as meaning that a situation in which one of the parents, without the other parent's consent, removes the child from his or her place of residence to another Member State, which is the Member State responsible under a transfer decision taken by an authority in application of Regulation [No 604/2013], must be classified as wrongful removal?

(2) If the answer to the first question is in the negative, must Article 2(11) [of Regulation No 2201/2003], relating to wrongful retention, be interpreted as meaning that a situation in which a court of the child's State of residence has annulled the decision taken by an authority to transfer examination of the file, and to take no further action since the mother and child have left the State of residence, but in which the child whose return is ordered, no longer has a currently valid residence document in his or her State of residence, or the right to enter or to remain in the State in question, must be classified as wrongful retention?'

Contents of the CJEU judgment:

In 2019, a married couple, third-State nationals (Iran), both with regard to Brussels IIA and Dublin III respective Member States, moved from Finland to settle in Sweden. Since 2016, the couple had lived in Finland for around three years. In 2019, a child was born in Sweden. The couple was exercising joint custody over the child in conformity with Swedish law. The mother was holding a family residency permit, in both Finland and Sweden, through the father's employment rights. The approved duration of the mother's residency right in Finland was around one year longer than in Sweden.

Two months after the child's birth, the latter and the mother were placed under Swedish residential care (hostel). Essentially, the Swedish administrative decision to uphold this *care protective measure* was the result of the father's violence against the mother, so to protect the child from the risks against his development and health, as well as to prevent his wrongful removal to Iran possibly envisaged by his father. Limited contact rights were granted to the father. A residency permit was requested, individually, by the father and the mother based on the *family lien* – request respectively filed on 21 November and 4 December 2019.

In August 2020, the mother submitted an asylum request, for the child and herself, before the Swedish authorities. The same month, the Finnish authorities declared themselves internationally responsible over the mother's and child's asylum request by virtue of article 12(3) of Dublin III – based on the longer duration of the residency permit previously delivered according to Finnish law. In October 2020, the Swedish authorities dismissed the father's and rejected the mother's respective residency and asylum requests, and ordered the transfer of the child and his mother to Finland. Taking into account the father's presence as

a threat against the child, the limited contacts established between them, and the father's residency right in Finland, the Swedish authorities concluded that the child's separation from his father was not against his best interests and that the transfer was not an obstacle to the exercise of the father's visitation right in Finland. In November 2020, the mother and the child moved to Finland pursuant to article 29(1) of Dublin III. In December 2020, the father filed an appeal against the Swedish court's decisions, which was upheld by the Swedish Immigration Tribunal ('*Migrationsdomstolen i Stockholm*'), although it resulted later to be dismissed by the Swedish Immigration Authorities, and then rejected by the Immigration Tribunal, due to the child's relocation to Finland (CJEU ruling, § 23-24).

In January 2021, the father filed a new request before the Swedish authorities for family residency permit on behalf of the child, which was *still ongoing at the time of this judgment* (CJEU ruling, § 25). During the same month, the mother deposited an asylum application before the Finnish authorities, which was *still ongoing at the time of this judgment – the mother's and child's residency permits were withdrawn by the Finnish authorities* (CJEU ruling, § 26). In April 2021, the Swedish Court ('*Västmanlands tingsrätt*'), notwithstanding the mother's objection to their jurisdiction, granted divorce, sole custody to the mother and refused visitation right to the father – upheld in appeal ('*Svea hovrätt*'). Prior to it, the father filed an application for child return before the Helsinki Court of Appeal ('*Helsingin hovioikeus*'), arguing that the mother had wrongfully removed the child to Finland, on the grounds of the 1980 Hague Convention. The return application was rejected. On the father's appeal, the Finnish authorities stayed proceedings and requested an urgent preliminary ruling from the CJEU, in line with article 107 of the Luxembourg Court's rules of procedure.

CJEU reasoning:

The Court reiterated that a removal or retention shall be wrongful when a child holds his habitual residence in the requesting State and that a custody right is attributed to, and effectively exercised by, the left-behind parent consistently with the law of that State (§ 45). The primary objectives of the Brussels IIA Regulation, particularly within its common judicial space aimed to ensure mutual recognition of judgments, and the 1980 Hague Convention are strictly related for abduction prevention and immediate obtainment of effective child return orders (§ 46).

The Court stated that, pursuant to articles 2 § 11 and 11 of the Brussels IIA Regulation, the child removal to a Member State other than the child's habitual residence, essentially performed by virtue of the mother's right of custody and effective care while executing a transfer decision based on article 29 § 1 of the Dublin III Regulation, should not be contemplated as wrongful (§ 48). In addition, the absence of 'take charge' request following the annulment of a transfer decision, namely for the purposes of article 29 § 3 of Dublin III, which was not implemented by the Swedish authorities, would lead the retention not to being regarded as unlawful (§ 50). Consequently, as maintained by the Court, the child's relocation was just a consequence of his *administrative situation* in Sweden (§ 51). A conclusion opposing the Court reasoning would be to the detriment of the Dublin III Regulation objectives.

Some insights from national precedents:

In the case ATF 5A_121/2018, involving a similar scenario (cf. FamPra.ch 1/2019), the Swiss Federal Court maintained that a child born in Greece, who had lived for more than a year with his mother in Switzerland, had to be returned to Greece (place of the left-behind parent's residence) based on the established child's habitual residence prior to the wrongful removal to Switzerland, notwithstanding his pending asylum application in the latter State. Indeed, the Greek authorities had been internationally responsible over the child's asylum request on the basis of his father's residence document. However also in that case it was alleged that the father had been violent against the mother and that a judgment ordering the child's return to Greece, *alone or without his mother* (§ 5.3), would not have caused harm to the child under the 1980 Hague Convention, art. 13.

In the case G v. G [2021] UKSC 9, involving a slightly different scenario in that no multiple asylum requests were submitted, the UKSC judged that a child, of eight years old born in South Africa, should not be returned – *stay of proceedings* – until an asylum decision, based on an asylum application filed in England, had been taken by the UK authorities. The UKSC considered that, although an asylum claim might be tactically submitted to frustrate child return to his/ her country of habitual residence prior to wrongful removal or retention, it is vital that an asylum claim over an applicant child, accompanied or not by his/ her primary carer, is brought forward while awaiting a final decision – in conformity with the 'non-refoulement' principle pursuant to article 33 of the 1951 Geneva Convention relating to the Status of Refugees.

Comment:

The CJEU ruling is momentous dictum in that it holds the *not any longer uncommon intersection* of private international law and vulnerable migration, especially with regard to children in need of international protection in accordance with both Brussels IIA and Dublin III Regulations (cf. Brussels IIA, § 9, and Dublin III, article 2 lit. b). The Luxembourg Court clarifies that a child who is allegedly wrongfully removed, meaning without consent of the other parent, should not return to his/ her habitual residence if such a removal took place as a consequence of the ordered transfer determining international responsibility based on the Dublin III Regulation. It is emphasised that, contrary to the Swiss judgment, the child in the instant case did not have any personal attachments with Finland at the time of the relocation – *neither by birth nor by entourage* – country of destination for the purposes of the Dublin III transfer. Moreover, the 'transfer of responsibility' for the purposes of Dublin III should be contemplated as an *administrative decision only*, regardless of the child's habitual residence.

It is observed as a preamble that, according to a well-known CJEU practice, a child should not be regarded as to establish a habitual residence in a Member State in which he or she has never been physically present (CJEU, *OL v. PQ*, 8 June 2017, C-111/17 PPU; CJEU, *UD v. XB*, 17 October 2018, C-393/18 PPU). Hence, it appears procedurally just that the Swedish courts retained international jurisdiction over custody, perhaps with the aim of Brussels IIA, article 8 – the child's habitual residence at the time of the seisin, which occurred *prior to the transfer to Finland*. On that procedural departure, the Swedish courts custody judgment is *substantially fair* in that the father's abuse against the mother is indeed an element that should be retained for parental responsibility, including abduction, merits (CJEU ruling, § 48; UKSC judgment, § 62).

However, it is argued here that, particularly given that at the relevant time Sweden was the child's place of birth where he lived for around 14 months with his primary carer, the Swedish and the Finnish authorities might have '*concentrated*' jurisdiction and responsibility in one Member State, namely Sweden, ultimately to *avoid further length and costs related to the asylum procedures* in line with the same Dublin III objectives evoked by the CJEU – namely "*guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection*" (§ 5, Dublin III). Conversely, provided

that the *child's relocation was not wrongful* as indicated by the Finnish authorities, and confirmed by the CJEU ruling, the Swedish authorities may have opted for the 'transfer of jurisdiction' towards the Finnish authorities on the basis of Brussels IIA, article 15(1) lit. b, indicating the *child's new habitual residence* (cf. Advocate General's opinion, § 41) following the lawful relocation (cf. article 15.3., lit. a).

Importantly, concentration of jurisdiction-responsibility over a child seeking international protection in one Member State, in light of the Brussels IIA-Dublin III interplay, would essentially determine a coordinated interpretation of the child's best interests (cf. Brussels II, § 12, and Dublin III, § 13), avoiding two parallel administrative-judicial proceedings in two Member States whose authorities may not always come to similar views, as opposed to the present case, over such interests (AG's opinion, § 48). This is particularly true, if the child (non-)return to his/ her habitual residence might likely be influenced, as stated in the CJEU ruling, by his/ her administrative situation, which would potentially have an impact on the international custody jurisdiction determination. An example of controversial outcome, dealing with child abduction-asylum proceedings, is the profoundly divergent opinion arising from the UK and Swiss respective rulings, to the extent of child return in a situation where the mother, primary carer, *is or could* be subject to domestic violence in the requesting State.

Similarly, the UKSC guidance, in '*G v. G*', affirmed: "Due to the time taken by the in-country appeal process this bar is likely to have a devastating impact on 1980 Hague Convention proceedings. I would suggest that this impact should urgently be addressed by consideration being given as to a *legislative solution* […] However, whilst the court does not determine the request for international protection *it does determine the 1980 Hague Convention proceedings so that where issues overlap the court can come to factual conclusions on the overlapping issues* so long as the prohibition on determining the claim for international protection is not infringed […] First, as soon as it is appreciated that there are related 1980 Hague Convention proceedings and asylum proceedings *it will generally be desirable that the Secretary of State be requested to intervene in the 1980 Hague Convention proceedings*" (UKSC judgment, § 152-157). Clearly, the *legislative solution* on a more efficient coordination of child abduction-asylum proceedings, invoked by the UK courts, may also be raised with the EU [and Swiss] legislator, considering their effects on related custody orders.

– *Cross posted at the* EAPIL blog*.*

The Tango Between Brussels Ibis Regulation and Rome I Regulation under the Beat of Package Travel Directive

Written by Zhen Chen, doctoral candidate at the University of Groningen, the Netherlands

The article titled 'The Tango Between Art.17(3) Brussels Ibis and Art.6(4)(b) Rome I under the Beat of Package Travel Directive' is published on Maastricht Journal of European and Comparative Law with open access, available at https://doi.org/10.1177%2F1023263X211048595

In the field of European private international law, Brussels Ibis Regulation and Rome I Regulation are dancing partners that work closely with different roles. When it comes to consumer protection, Brussels Ibis Regulation is the leader and Rome I Regulation is the follower, since special protective rules over consumer contracts were first introduced in Articles 13–15 Brussels Convention[1] and then followed by Article 5 Rome Convention.[2]

1. **Package travel in Article 17(3) Brussels Ibis and Article 6(4)(b) Rome I**

Package travel tourists are explicitly protected as consumers under Article 6(4)(b) Rome I, but not under Article 17(3) Brussels Ibis since it does not expressly mention the term 'package travel'. Instead, the term used in Article 17(3) Brussels Ibis is the same as that in Article 5(5) Rome Convention, which has been abandoned by its successor Article 6(4)(b) Rome I. Such discrepancy is widened with the replacement of Directive 90/314 by Directive 2015/2302 with the

enlarged notion of package travel. This means that when Article 6(4)(b) Rome I Regulation is dancing under the beat of Directive 2015/2302, Article 17(3) Brussels Ibis Regulation is still dancing under the beat of Article 5(5) 1980 Rome Convention.

2. A uniform concept of package travel under Directive 2015/2302

The CJEU clarified in the *Pammer* judgment that the concept 'a contract which, for an inclusive price, provides for a combination of travel and accommodation' in Article 15(3) Brussels I should be *interpreted in line with* Article 6(4)(b) Rome I by reference to Directive 90/314.[3] The CJEU did not follow the opinion of the Advocate General, according to which the concept prescribed in Article 15(3) Brussels I *has to be interpreted in exactly the same way as* the term 'package' enshrined in Article 2(1) Directive 90/314.[4] The court stated that the concept in Article 15(3) Brussels I is 'close to'[5] the notion package in Directive 90/314. The wording 'close to', instead of 'identical' or 'the same as', indicates that the CJEU did not intend to interpret such two terms as having exactly the same meaning.

Since Article 15(3) Brussels I remains unchanged in its successor Article 17(3) Brussels Ibis, this article argues that Art.17(3) Brussels Ibis Regulation has been two steps behind Art.6(4)(b) Rome I when it comes to the protection of consumers in package travel contracts. In order to close the gap, a uniform concept of package travel should be given. It is suggested that Art.17(3) Brussels Ibis should adopt the concept of package travel provided in Directive 2015/2302.

3. Deleting package travel contracts from the exception of transport contracts

Despite the adoption of a uniform concept, Article 17(3) Brussels Ibis and Article 6 Rome I only cover packages containing transport, as an exception of transport contracts. Packages not including transport do not fall under the exception of transport contracts. Since all package travel contracts should be protected as consumer contracts, regardless of containing transport or not, it is more logical to delete package travel contracts from the exception of transport contracts in Art.6(4)(b) Rome I as well as Art.17(3) Brussels Ibis and establish a separate provision to regulate package travel contracts.

To this end, Article 17(3) Brussels Ibis and Article 6(4)(b) Rome I can be

simplified as 'This Section/article shall not apply to a contract of transport/carriage', whereas package travel contracts are expressly regulated as consumer contracts in a separate provision. In this regard, the framework in Article 5 Rome Convention is a better solution, according to which package travel contracts can be expressly included in Article 17 Brussels Ibis/Article 6 Rome I as follows:

Notwithstanding Article 17(3) Brussels Ibis/Article 6(4)(b) Rome I, this Section/article shall apply to a contract relating to package travel within the meaning of Council Directive 2015/2302/EU of 25 November 2015 on package travel and linked travel arrangements.

[1] The predecessor of Articles 17-19 Brussels Ibis Regulation.

[2] The predecessor of Article 6 Rome I Regulation.

[3] Joined cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof*, ECLI:EU:C:2010:740, para. 43

[4] Joined cases C-585/08 and C-144/09 *Pammer and Hotel Alpenhof*, ECLI:EU:C:2010:273, opinion of advocate general, para. 49.

[5] Case C-585/08 Pammer, ECLI:EU:C:2010:740, para. 36.

Chinese Court Enforces Singaporean Judgment based on De Jure Reciprocity

By Zheng Sophia Tang, Wuhan University Institute of International Law and Academy of International Law and Global Governance

Chinese courts recognize and enforce foreign civil and commercial judgments under two circumstances: the existence of treaty obligations and the existence of reciprocity. In the past, Chinese courts relied solely on de facto reciprocity to enforce foreign judgments, which requires evidence to prove the courts in the foreign country enforced Chinese judgments in previous cases. Some courts have adopted an even tougher approach and rejected enforcing foreign judgments even though one positive precedent exists in the foreign country, arguing one case is not enough to prove reciprocity. The application of de facto reciprocity causes difficulty to enforce foreign judgments in Chinese courts. It makes enforcement impossible if no application was made to the foreign court to enforce Chinese judgment in the past, and if the other country also adopts the de facto reciprocity. It also makes proving reciprocity difficulty, especially if the foreign country has no comprehensive case report system.

After China commenced the One-Belt-One-Road initiative, efforts were made to relax the threshold to prove reciprocity. The Supreme Court has proposed, in two OBOR opinions, that China should adopt a presumed reciprocity approach, which presumes reciprocity exists if the other country demonstrates intention to establish judicial cooperation with China and no negative precedence exists.[1] However, since these opinions are not legally binding, they are not enough to reverse court practice. Although more Chinese courts enforce foreign judgments after 2013, they still need the proof of one positive case in the foreign country.

20 July, 2021, Shanghai No 1 Intermediate Court decided to recognize and enforce the Singaporean monetary judgment.[2] Although de facto reciprocity already exists between China and Singapore and Chinese courts enforced Singaporean judgments based on de facto reciprocity in the past,[3] this case justifies the decision based on de jure reciprocity. The judgment states: “The reciprocal relationship exists between China and Singapore, because Chinese judgments can be recognized and enforced in Singapore under the same conditions. On the other hand, Singaporean High Court recognized and enforced Chinese judgments in the past, and precedents to recognize and enforce Singaporean judgments also exist in Chinese courts. It shows de facto reciprocal relationship also exists between China and Singapore.”

It is clear that this judgment discusses both de facto and de jure reciprocity. The

court considers whether Chinese judgments may be recognized and enforced in Singapore as a matter of law. However, proving de jure reciprocity is not easy. Unless the foreign law completely prohibits enforcing foreign judgments in the absence of treaty obligations, most law will provide conditions for foreign judgments enforcement. The conditions would allow foreign judgments enforced in certain circumstances and not others. In other words, no law would say foreign judgments can be recognized in all circumstances. How to assess if these conditions are enough to make enforcement possible in law? What if the foreign law provides different conditions to enforce foreign judgments from Chinese law? What if the foreign law require de facto reciprocity and China has not yet enforced judgments from this country, rendering enforcement of Chinese judgments practically impossible in the foreign court?

The Shanghai court adopts the equivalent condition test. It takes the seat of Singaporean court and imagine what may happen if this application is a Chinese judgment seeking Singaporean enforcement. It concludes that as far as Singaporean court can enforce Chinese judgments under the same condition, de jure reciprocity exists. In other words, it applies the Singaporean standard to assess enforceability of this judgment. The problem is it may lead to the result that between two countries de jure reciprocity exits in some cases but not others. As reciprocity refers to the relationship between two countries, it should be a systematic status, and not variable according to the different fact of a case.

Another difficulty is that it is usually hard for Chinese courts to know exactly how judicial decision of a foreign court may be made, especially how judicial discretion is going to be exercised in a foreign country. The assessment of the potential enforceability of Chinese judgments in the foreign court in the same condition can only be based on black-letter law which may not be so precise to test de jure reciprocity. Of course, it is arguable that de jure reciprocity only needs a general possibility for a foreign court to enforce Chinese judgments, but not specific Chinese judgments are definitely enforceable in the foreign country. If so, the equivalent condition test is not appropriate to assess de jure reciprocity.

One may suggest the legal comparability test. It argues that de jure reciprocity depends on whether the foreign law provide legally comparable conditions for FJR as Chinese law. This suggestion is also problematic, because many countries' law provide much lower threshold to enforce foreign law than Chinese law. For example, they do not require reciprocity as a pre-condition. These laws are not

comparable to Chinese law, but it is hard to argue that Chinese judgments cannot be enforced in those countries as a matter of law.

The third suggestion is the no higher threshold test. It suggests that if the foreign law does not make it more difficult to enforce Chinese judgments, de jure reciprocity exists. However, what if the foreign law adopts de facto reciprocity like most Chinese courts do in practice? Can we argue the foreign law provide higher threashold because one Chinese court uses de jure reciprocity? Or we consider these two laws provide simialr threshold and treat de jure reciprocity exists, even though the foreign court actually cannot enforce Chinese judgments because Chinese courts did not enforce judgments from this country before?

Anyway, although the test for de jure reciprocity is not settled, the Shanghai judgment shows a laudable progress. This is the first case that de jure reciprocity has been applied in a Chinese court. It shows a serious attempt to deviate from de facto reciprocity. Of course, since de facto reciprocity also exists between China and Singapore, this judgment does not bring significant difference in result. It is curious to see whether the Chinese court will apply de jure reciprocity alone to enforce foreign judgments in the future, and whether any new tests for de jure reciprocity may be proposed in the future judgments.

[1] Several Opinions of the Supreme People's Court Concerning Judicial Services and Protection Provided by People's Courts for the Belt and Road Initiative], [2015] Fa Fa No. 9, para 6; The Opinions of the SPC Regarding the People's Court's Further Provision of Judicial Services and Guarantees for the Construction of the Belt and Road, Fa Fa [2019] 29, para 24.

[2] (2019) Hu 01 Xie Wai Ren No 22.

[3] Singaporean case, Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte ltd [2014] 2 SLR 545; Chinese case, Kolmar Group AG v. Jiangsu Textile Industry Import and Export Corporation, (2016) Su 01 Xie Wai Ren No 3.

The German Federal Court of Justice on the validity of a proxy marriage concluded in Mexico

Written by Greta Siegert, doctoral candidate at the University of Freiburg.

In a recent decision of 29 September 2021 – case XII ZB 309/21, the German Federal Court of Justice (BGH) once again confirmed the validity of proxy marriages concluded abroad under the condition that they met the formal requirements of the applicable foreign law.

The parties, a German woman and a male citizen of Syria, had concluded a proxy marriage in Baja California Sur (Mexico). At the time of the marriage, neither of them was present in Mexico nor had ever met their respective representatives. The declarations of proxy had been prepared by a German notary both in English and Spanish. When the couple applied for a marriage name declaration in Germany, the responsible registry office denied such an entry, invoking the marriage's formal invalidity.

Reviewing this case, the German Federal Court ruled that there were no doubts regarding the marriage's formal validity, hence holding it valid in absence of other issues of concern.

The judges followed the line of argument brought forward by the higher regional court of Jena (Oberlandesgericht Jena), stating that the formal aspects of the marriage in question were ruled by Art. 11(1) of the Introductory Act to the Civil Code (EGBGB). Art. 11(1) EGBGB provides that a legal transaction is formally valid if it either complies with the formal requirements of the law governing the legal relationship forming the subject matter of the legal act (so-called *lex actus*) or with the legal formalities of the state where the transaction takes place (so-called *lex loci*).

The German Federal Court confirmed that, in this case, the proxy was merely a question of the marriage's formal validity: since the parties had already – prior to

the creation of their declaration of proxy – made their decision about the marriage and their respective spouse, the proxy solely served as a matter of representation in making the declarations of intention.

However, the judges acknowledged that, in other cases, proxies may also affect the substantive aspects of a marriage. This would be the case if the representation affected the substance of the partners' decision, i.e. if the future spouses had not decided about the marriage or their spouse themselves but had instead transferred the decision to their respective agent.

Since Mexican law – as the relevant *lex loci* – allows proxy marriages, the German Federal Court concluded that the marriage in question was formally valid. The court added that this result was compatible with German public policy (Art. 6 EGBGB). When drafting Art. 11(1) EGBGB more than 30 years ago, the German legislature recognized and accepted the possibility of marriages concluded abroad according to the rules of the respective *lex loci*. Though there were repeated calls for a revision of this legislation afterwards, especially regarding proxies in the context of forced marriages, the legislature held on to the *lex loci* principle. Against this backdrop, the German Federal Court found no evidence that the marriage in dispute violated fundamental principles of the German legal system.