Indigenous Claims to Foreign Land: Update from Canada

By Stephen G.A. Pitel, Faculty of Law, Western University

In 2013 two Innu First Nations sued, in the Superior Court of Quebec, two mining companies responsible for a mega-project consisting of multiple open-pit mines near Schefferville, Quebec and Labrador City, Newfoundland and Labrador. The Innu asserted a right to the exclusive use and occupation of the lands affected by the mega-project. They claimed to have occupied, since time immemorial, a traditional territory that straddles the border between the provinces of Quebec and Newfoundland and Labrador. They claimed a constitutional right to the land under s. 35 of the *Constitution Act, 1982*.

The mining companies and the Attorney General of Newfoundland and Labrador each moved to strike from the Innu's pleading portions of the claim which, in their view, concerned real rights over property situated in Newfoundland and Labrador and, therefore, fell under the jurisdiction of the courts of that province.

In *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, the Supreme Court of Canada held (by 5-4 majority) that the motion to strike failed and that the Quebec court had jurisdiction over the entire claim advanced by the Innu.

Quebec's private international law is contained in Book Ten of the Civil Code of Quebec. Jurisdiction over the mining companies was based on their being domiciled in Quebec. However, as a special rule of jurisdiction, Division III governs what are called real and mixed actions (para. 18). The general rule is that Quebec has jurisdiction to hear a real action only if the property in dispute is situated in Quebec (art. 3152). In the case of a mixed action, Quebec must have jurisdiction over both the personal and real aspects of the matter: see *CGAO v Groupe Anderson Inc.*, 2017 QCCA 923 at para. 10 (para. 57). These rules required the court to properly characterize the Innu's action.

The majority held that the claim was a mixed action (para. 56). This was because the Innu sought both the recognition of a *sui generis* right (a declaration of Aboriginal title) and the performance of various obligations related to failures to

respect that right. However, the claim was not a "classical" mixed action, which would require the court to have jurisdiction over both the personal and real aspects of the matter. Rather, this was a "non-classical" mixed action that involved the recognition of *sui generis* rights and the performance of obligations (para. 57). Put another way, the nature of the indigenous land claims made them different from traditional claims to land. Accordingly, the claim did not fall within the special jurisdiction provisions in Division III and jurisdiction could simply be based on the defendants' Quebec domicile.

The majority was influenced by access to justice considerations, being concerned about requiring the Innu to litigate in both Quebec and Newfoundland and Labrador. It noted that "[t]he Innu have argued that separating their claim along provincial borders will result in higher — perhaps prohibitive — costs caused by "piecemeal" advocacy, and inconsistent holdings that will require further resolution in the courts. … These are compelling access to justice considerations, especially when they are coupled with the pre-existing nature of Aboriginal rights" (paras. 46-47).

The dissenting reasons are lengthy (quite a bit longer than those of the majority). Critically, it held that "Aboriginal title and other Aboriginal or treaty rights are "real rights" for the purposes of private international law, which is to say that they *resemble* or are at least *analogous* to the domestic institution of real rights" (emphasis in original) (para. 140). Labeling them as *sui generis* was not sufficient to avoid the jurisdictional requirement for a mixed action that the land had to be in Quebec: "the fact that Aboriginal title is *sui generis* in nature does not mean that it cannot be a proprietary interest or a real right strictly for the purposes of private international law" (para. 155).

In the view of the dissent, " if Quebec authorities were to rule directly *on the title* that the Innu believe they hold to the parts of Nitassinan that are situated outside Quebec, the declarations would be binding on *no one*, not even on the defendants … , precisely because Quebec authorities lack jurisdiction in this regard" (emphasis in original) (para. 189).

On the issue of access to justice, the dissent stated that "access to justice must be furnished within the confines of our constitutional order. Delivery of efficient, timely and cost-effective resolution of transboundary Aboriginal rights claims must occur within the structure of the Canadian legal system as a whole. But this

is not to suggest that principles of federalism and provincial sovereignty preclude development by superior courts, in the exercise of their inherent jurisdiction, of innovative *yet* constitutionally sound solutions that promote access to justice" (emphasis in original) (para. 217). It went on to proffer the interesting procedural option that both a Quebec judge and a Newfoundland and Labrador judge could sit in the same courtroom at the same time, so that the proceedings were heard by both courts without duplication (para. 222).

There are many other issues in the tension between the majority and the dissent, including the role of Newfoundland and Labrador as a party to the dispute. It was not sued by the Innu and became involved as a voluntary intervenor (para. 9).

The decision is very much rooted in the private international law of Quebec but it has implications for any Indigenous claims affecting land in any legal system. Those systems would also need to determine whether their courts had jurisdiction to hear such claims in respect of land outside their territory. Indeed, the decision offers a basis to speculate as to how the courts would handle an Indigenous land claim brought in British Columbia in respect of land that straddled the border with the state of Washington. Is the court's decision limited to cases that cross only internal federation borders or does it extend to the international realm? And does there have to be a straddling of the border at all, or could a court hear such a claim entirely in respect of land in another jurisdiction? The court's decision leaves much open to interesting debate.

Dubious Cross-Border Insolvency Framework in India: The Need of a new Paradigm?

By Gaurav Chaliya and Nishtha Ojha. The authors are third year students at the National Law University, Jodhpur, India.

Introduction

In 2018, around 47 entities forming the part of corporate groups were reported to be in debt which reflects the necessity of having an effective cross-border legal framework. The flexibility in the framework of cross border insolvency helps in overcoming the hurdles encountered in cross border disputes. This framework essentially girdles around the principle of coordination and cooperation and in consonance with these principles the National Company Law Appellate Tribunal ["**NCLAT**"] in *Jet Airways* case has extended these principles by providing sufficient rights to Dutch trustee and observed that–

"*as per law, he (Dutch Trustee) has a right to attend the meeting of the Committee of Creditors*"

However, despite effective coordination and cooperation, the proceedings against one entity is questioned to be extended to others as *first*, the elemental issue concerned is that each entity is managed by its own interests and such extension may be prejudicial to the interest of other entities and *second*, the legal conundrum associated in determining the Centre of Main Interest ["**COMI**"] of an entity. With regards to the first question, it is imperative that extension of insolvency proceeding is not prejudicial to the interests of the other entities as it is only extended in case of existence of reasonable nexus between entities in terms of financial and commercial relationship which makes them interdependent on each other. The authors would elaborate upon the second question in the subsequent section.´

Deficient Regulatory Framework

Section 234 and 235 of the Insolvency and Bankruptcy Code, 2016 ["**IBC**"] governs the cross border disputes in India. Section 234 empowers the government to enter into bilateral agreements with another country and Section 235 provides that Adjudicating Authority can issue a letter of request, to a country with which bilateral agreement has

been entered into, to deal with assets situated thereto.

As is evident, the impediments associated with this regulatory framework are: *first*, it does not provide for a legal framework for foreign representatives to apply to the Indian courts and most importantly these sections are not notified yet and *second*, the current legal framework under IBC provides for entering into bilateral treaties which is uncertain and in addition is a long term negotiation process. For instance, in Australia the regulatory framework therein was not sufficient to deal with the complexities associated with cross-border insolvencies as bilateral treaties can provide some solution but they are not easy to negotiate and have intrinsic intricacies. Consequently, it passed the Cross Border Insolvency Act, 2008 which provides adoption and enactment of the United Nations Commission on International Trade Law ["**Model law**"]. In light of same, India should also consider the enactment of the Model law though with modifications, one of which is suggested and dealt in the next section.

Resolving the Complications

Complications in the field of International Insolvency are never-ending primarily due to the lack of a comprehensive legal framework. The Model Law seeks to alleviate these complications by providing a pragmatic legal framework. As asserted earlier, *Jet Airways* case acknowledges and applies the principles enshrined under the Model Law. The Model Law, unlike any treaty or convention, is a model form of legislation which is adopted by 46 nations till date.

The Model Law sets out the principle of Centre of Main Interest ["**COMI**"] for determining the jurisdiction of the proceedings. Interestingly, it does not define the COMI and therefore, determining COMI possesses the greatest challenge. Also, the principal concern that remains is that the debtor can escape its liability by changing its COMI according to its

favourable outcome. However, the Model law safeguards the rights of the creditor by providing that *first*, as per Article 16 of the Model Law, COMI corresponds to the place where debtor has its registered office and *second*, COMI is dependent on many other factors viz. seat of an entity having major stake in terms of control over assets and its significant operations, which is basically dependent upon the transparent assessment by the third parties. Consequently, the debtor cannot escape its liability by changing COMI as determination of the same is dependent upon assessment by third parties. Hence, the Model Law addresses the prime issues which are present in the current regulatory framework.

In India, the Report of Insolvency Law Committee ["**ILC**"] was constituted to examine the issues related to IBC, which recommended the impending need to adopt the Model Law. However, the proposed draft disregards the objective of coordination and cooperation among all nations by mandating the requirement of *reciprocity*. The authors subscribe to the view, that, until the Model Law has been adopted to a significant extent by other counties, the absolute requirement of reciprocity as postulated under the draft should be done away with and courts should be given the discretion on *case to case* basis. As such an absolute requirement of reciprocity i.e. entering into a treaty with other countries take us back to the present legal framework in India by limiting adjudicating authority's power to only 46 countries. For instance, in case the corporate debtor has COMI in country A, which has adopted the Model Law, whereas his assets are located in country B, which has not adopted the Model Law. In such a situation, if the requirement of reciprocity is imposed then the administration of assets in country B would become difficult, as an entity in country B would always be reluctant to become a part of the insolvency proceedings relying on probable defences such as of lex situs and absence of bilateral agreements.

In essence, this whole process would be detrimental to the interest of the creditor as it would hamper the maximization of the value of assets. Moreover, in *Rubin v. Eurofinance*, the Supreme Court of U.K. has observed that the court is allowed to use the

discretion provided to it by the system. Hence, by this approach courts are allowed to cooperate and coordinate with those countries that are acquiescent to return the favour. It is pertinent to clarify
that by granting discretion to court, the authors do not concede to the practice of Gibb's principle. Rather the said principle is inherently flawed as it does not recognise the foreign insolvency process preceding over English law per contra courts generally expects other jurisdictions to accept their judgements.

Concluding Remarks

After a careful
analysis of present cross border legal framework in India, it can be ascertained that current system is highly ineffective and in light of instances provided, the adoption of the Model Law with modifications seems to be a better alternative. The Model Law provides an orderly mechanism as it recognises the interest of the enforcing country by taking into account its public policy and national interest. The Appellate Tribunal in *Jet Airways* case has attempted to extend the principles of the
Model Law into domestic case laws therefore it is optimal time that India adopts such legislation. Though with regards to the problem of reciprocity as pointed earlier, the absolute requirement or non-requirement
of the reciprocity would not solve the problem and according to *Rubin's* case, discretion should be given
to the courts which would widen the scope of the application of the law, thereby, being in consonance with the objectives of the principles i.e. of effective cooperation and coordination among all nations. Hence, the Model law contains enough of the measures to prevent any misuse of the process and adopting it with modifications would resolve the problem associated.

Claims Against Corporate Defendant Founded on Customary International Law Can Proceed in Canada

By Stephen G.A. Pitel, Faculty of Law, Western University

Eritrean mine workers who fled from that country to British Columbia sued the mine's owner, Nevsun Resources Ltd. They sought damages for various torts including battery, false imprisonment and negligence. They also sought damages for breaches of customary international law. Their core allegation was that as conscripted labourers in Eritrea's National Service Program, they were forced to work in the mine in intolerable conditions and Nevsun was actively involved in this arrangement.

Nevsun moved to strike out all of the claims on the basis of the act of state doctrine. It also moved to strike out the proceedings based on violations of customary international law because they were bound to fail as a matter of law.

In its decision in *Nevsun Resources Ltd v Araya*, 2020 SCC 5, the Supreme Court of Canada has held (by a 7-2 decision) that the act of state doctrine is not part of Canadian law (para. 59) and so does not preclude any of the claims. It has also held (by a 5-4 decision) that the claims based on customary international law are not bound to fail (para. 132) and so can proceed.

Act of State Doctrine

Justice Abella, writing for five of the court's nine judges, noted that the act of state doctrine had been heavily criticized in England and Australia and had played no role in Canadian law (para 28). Instead, the principles that underlie the doctrine were subsumed within the jurisprudence on "conflict of laws and judicial restraint" (para 44).

In dissent, Justice Cote, joined by Justice Moldaver, held that the act of state doctrine is not subsumed by choice of law and judicial restraint jurisprudence

(para. 275). It is part of Canadian law. She applied the doctrine of justiciability to the claims, finding them not justiciable because they require the determination that the state of Eritrea has committed an internationally wrongful act (para. 273).

This division raises some concerns about nomenclature. How different is "judicial restraint" from "non-justiciability"? Is justiciability an aspect of an act of state doctrine or is it a more general doctrine (see para. 276)? Put differently, it appears that the same considerations could be deployed by the court either under an act of state doctrine or without one.

The real division on this point is that Justice Cote concluded that the court "should not entertain a claim, even one between private parties, if a central issue is whether a foreign state has violated its obligations under international law" (para. 286). She noted that the cases Justice Abella relied on in which Canadian courts have examined and criticized the acts of foreign states are ones in which that analysis was required to ensure that Canada comply with its own obligations as a state (para. 304). In contrast, in this case no conduct by Canada is being called into question.

In Justice Abella's view, a Canadian court can indeed end up determining, as part of a private civil dispute, that Eritrea has engaged in human rights violations. She did not, however, respond to Justice Cote's point that her authorities were primarily if not all drawn from the extradition and deportation contexts, both involving conduct by Canada as a state. She did not squarely explain why the issue of Eritrea's conduct was justiciable or not covered by judicial restraint in this particular case. Having held that the act of state doctrine was not part of Canadian law appears to have been sufficient to resolve the issue (para. 59).

Claims Based on Violations of Customary International Law

The more significant split relates to the claims based on violations of customary international law. The majority concluded that under the "doctrine of adoption", peremptory norms of customary international law are automatically adopted into Canadian domestic law (para. 86). So Canadian law precludes forced labour, slavery and crimes against humanity (paras. 100-102). Beyond that conclusion, the majority fell back on the hurdle for striking out claims, namely that they have to be bound ("plain and obvious") to fail. If they have a prospect of success, they

should not be struck out. The majority found it an open question whether these peremptory norms bind corporations (para. 113) and can lead to a common law remedy of damages in a civil proceeding (para. 122). As a result the claims were allowed to proceed.

Four of the judges dissented on this point, in reasons written by Brown and Rowe JJ and supported by Cote and Moldaver JJ. These judges were critical of the majority's failure to actually decide the legal questions raised by the case, instead leaving them to a subsequent trial (paras. 145-147). In their view, the majority's approach "will encourage parties to draft pleadings in a vague and underspecified manner" which is "likely not to facilitate access to justice, but to frustrate it" (para. 261). The dissent was prepared to decide the legal questions and held that the claims based on violations of customary international law could not succeed (para. 148).

In the dissent's view, the adoption into Canadian law of rules prohibiting slavery, forced labour and crimes against humanity did not equate to mandating that victims have a civil claim for damages in response to such conduct (para. 172). The prohibitions, in themselves, simply did not include such a remedy (para. 153). The right to a remedy, the dissent pointed out, "does not necessarily mean a right to a particular form, or kind of remedy" (para. 214).

Further, as to whether these rules can be directly enforced against corporations, the dissent was critical of the complete lack of support for the majority's position: "[i]t cites no cases where a corporation has been held civilly liable for breaches of customary international law anywhere in the world" (para. 188). As Justice Cote added, the "widespread, representative and consistent state practice and *opinio juris* required to establish a customary rule do not presently exist to support the proposition that international human rights norms have horizontal application between individuals and corporations" (para. 269).

On this issue, one might wonder how much of a victory the plaintiffs have achieved. While the claims can now go forward, only a very brave trial judge would hold that a corporation can be sued for a violation of customary international law given the comments of the dissenting judges as to the lack of support for that position. As Justices Brown and Rowe put it, the sole authority relied on by the majority "is a single law review essay" (para. 188). Slender foundations indeed.

ERA: Recent European Court of Human Rights Case Law in Family Matters (conference report)

Report written by Tine Van Hof, researcher at the University of Antwerp

On the 13th and 14th of February 2020, the Academy of European Law (ERA) organized a conference on 'Recent ECtHR Case Law in Family Matters'. This conference was held in Strasbourg and brought together forty participants coming from twenty-one different countries. This report will set out some of the issues addressed at the conference.

The presentation, made by ***Ksenija Turkovi?***, Judge at the European Court of Human Rights, focused on children on the move and more specifically on minors in the context of migration. On this topic the European Court of Human Rights (ECtHR) has developed a child-specific human rights approach. This approach implies taking into account three particular concepts: vulnerability, best interests and autonomy. Judge Turkovi? pointed to the interesting discussion on whether vulnerability could only apply to young migrant children. On this discussion, there is now agreement that the vulnerability applies to all children under the age of 18 and regardless whether they are accompanied by adults. The ECtHR made very clear in its case law that migrant children are especially vulnerable and that this vulnerability is a decisive factor that takes precedence over the children's migrant status. This vulnerability also plays a role in the cases on the detention of children. The more vulnerable a person is, the lower the threshold for a situation of detention to fall within the scope of Article 3 of the European Convention on Human

Rights (ECHR), encompassing the prohibition of torture.

Family unification and the free movement of family status was the second topic of the day. ***Michael Hellner***, professor at Stockholm University, discussed several cases of the ECtHR (Ejimson v Germany) and the Court of Justice of the EU (CJEU) (K.A. v Belgium, Coman and S.M.). He concluded that family life does not automatically create a right of residence but it can create such a right in certain circumstances. In the Coman case for example, the CJEU decided that Romania had to recognize the marriage between the two men for the purpose of enabling such persons to exercise the rights they enjoy under EU law (i.e. free movement). Professor Hellner noted that it seems to be quite easy to circumvent national law in the future if one looks at the Coman case. He considered it positive if the consequence was that same-sex marriages and surrogacy arrangements created abroad were recognized. However, he made the interesting observation that it might be a very different story if one thinks about child marriages and the recognition thereof.

Maria-Andriani Kostopoulou, consultant in family law for the Council of Europe, thereafter shared her insights on parental rights, pre-adoption foster care and adoption. She discussed i.a. the evolution in the case law of the ECtHR on the representation of the child before the Court. In the Strand-Lobben case, the Court stated that the issue of representation does not require a restrictive or technical approach and thus made clear that a certain level of flexibility is necessary. In the Paradisio and Campanelli case, the ECtHR provided three criteria that should be taken into account for assessing the representation of the child: the link between the child and the representative, the subject-matter of the case and any potential conflict of interests between the interests of the child and those of the representative. The latest case, A. and B. against Croatia, introduced a security safeguard. In this case, the ECtHR asked the Croatian Bar Association to appoint a legal representative for the child for the procedure before the ECtHR since the Court was not sure that there were no conflict of interests between the child and the mother, who proposed to be the representative.

To end the first conference day, ***Dmytro***

Tretyakov, lawyer at the Registry of the ECtHR, enlightened us about the misconceptions and best practices of submitting a case to the Court. His most important tips for a submission to the Court are the following:

- Use the current application form and not an old one;
- Submit well in time and certainly within the six-month period;
- Summarize the facts of the case on the three pages provided. This summary has to be clear, readable (for those that do it in handwriting) and comprehensible;
- To state claims, refer to the relevant Article from the ECHR (do not cite it) and explain what the specific problem is with regard to that Article;
- Support each claim with documents; and
- Sign the form in the correct boxes and carefully look where the signature of the applicant and where the signature of the representative is required.

The second day of the conference started with the presentation of ***Nadia Rusinova***, attorney-at-law and lecturer at the Hague University of Applied Science, on international child abduction. She discussed i.a. the issue of domestic violence in child abduction cases. Several questions can be raised in this regard, for example: what constitutes domestic violence? When should a court accept the domestic violence to be established? What is adequate protection in light of the Hague Convention on International Child Abduction (1980) and who decides on this? In the case O.C.I. and others v Romania, one of the questions was whether there is such a thing as light violence that does not amount to a grave risk in the sense of Article 13(1)(b) of the Hague Convention. The ECtHR approached this issue very critically and stated that no form of corporal punishment is acceptable. Regarding the adequate measures, the Court stated that domestic authorities have a discretion to decide what is adequate but the measures should be in place before ordering the return of the child. Another point raised by Ms. Rusinova is the time factor that is required. If one looks at Article 11(2) of the Hague Convention and at

Article 11(3) of the Brussels IIbis Regulation together, six weeks is the required time period for the return proceedings. The Brussels IIbis Recast clarified that the procedure should take no more than six weeks per instance. However, according to Ms. Rusinova it is hardly possible to do the procedures in six weeks; it will only work when the proceeding is not turned into an adversarial proceeding in which all kinds of claims of both parents are dealt with.

Samuel Fulli-Lemaire, professor at the University of Strasbourg, addressed the interesting evolution of reproductive rights and surrogacy. In the case of C. and E. v France, the French Court of Cassation asked the ECtHR for an advisory opinion on the question whether the current state of the case law in France was compatible with the obligations under Article 8 ECHR (the right to respect for private and family life). The status of the French case law was that the genetic parent was fully accepted but the other intended parent was required to adopt the child if he or she wished to establish parentage links. The ECtHR replied that the obligation under Article 8 entailed that there must be a possibility of recognition of the parent-child relationship but that it is up to the States to decide how to do this. Adoption is a sufficient method of recognizing such relationship, provided that it is quick and effective enough. The Court also refers to the possibility of transcription of the birth certificate as an alternative to adoption. However, professor Fulli-Lemaire pointed out that there is a misconception on what transcription means under French law. The mere transcription of the birth certificate does not establish legal parentage in France. The fact that the ECtHR says that an intended parent can adopt or transcribe the birth certificate is therefore tricky because under French law the effects of the two methods are not at all the same.

The very last presentation of the conference was given by ***Gabriela Lünsmann***, attorney-at-law and member of the Executive Board of the Lesbian and Gay Federation in Germany. She spoke about LGBTQI rights as human rights and hereby focused i.a. on transsexuals' gender identity and the case of X. v North-Macedonia. The question raised in that case is whether the state must provide for a procedure to recognize a different gender. The applicant had tried to change their gender but North-Macedonia did not offer

any possibility to undergo an operation or to have medical treatment in that regard.
The applicant then went abroad for treatment. Back in North-Macedonia, he had his name changed but it was not possible to change his officially registered gender.
The applicant claimed that this amounted to a violation of Article 8 ECHR and specially referred to the obligation of the state to respect a person's physical and psychological integrity. The Court found that there was indeed a violation. What is as yet unclear, and is thus an interesting point for reflection, is whether states are under an obligation to provide for a procedure for the recognition of a change of gender without the person having had an operation.

The author would like to thank ERA for the excellent organization of the conference and for the interesting range of topics discussed.

Common law recognition of foreign declarations of parentage

This note addresses the question whether there is a common law basis for the recognition of foreign declarations of parentage. It appears that this issue has not received much attention in common law jurisdictions, but it was the subject of a relatively recent Privy Council decision (*C v C* [2019] UKPC 40).

The issue arises where a foreign court or judicial authority has previously determined that a person is, or is not, a child's parent, and the question of parentage then resurfaces in the forum (for example, in the context of parentage proceedings or maintenance proceedings).

If there is no basis for recognition of the foreign declaration, the forum court will have to consider the issue de novo (usually by applying the law of the forum: see, eg, Status of Children Act 1969 (NZ)). This would increase the risk of "limping" parent-child relationships (that is, relationships that are recognised in some countries but not in others) – a risk that is especially problematic in the context of children born by way of surrogacy or assisted human reproduction technology.

The following example illustrates the problem. A baby is born in a surrogacy-friendly country to a surrogate mother domiciled and resident in that country, as the result of a surrogacy arrangement entered into with intending parents who are habitually resident in New Zealand. The courts of the foreign country declare that the intending parents are the legal parents of the child. Under New Zealand law, however, the surrogacy arrangement would have no legal effect, and the surrogate mother and her partner would be treated as the child's legal parents upon the child's birth. Unless the foreign judgment is capable of recognition in New Zealand, the only way for the intending parents to become the child's legal parents in New Zealand is to apply for adoption (see, eg, *Re Cobain* [2015] NZFC 4072, *Re Clifford* [2016] NZFC 1666, *Re Henwood* [2015] NZFC 1541, *Re Reynard* [2014] NZFC 7652, *Re Kennedy* [2014] NZFLR 367, *Re W* [2019] NZFC 2482, *Re C* [2019] NZFC 1629).

So what is the relevance of a foreign declaration on parentage in common law courts? In *C v C* [2019] UKPC 40, [2019] WLR(D) 622, the Privy Council decided that there was a basis in the common law for recognising such declarations, pursuant to the so-called *Travers v Holley* principle. This principle, which has traditionally been applied in the context of divorce and adoption, calls for recognition of foreign judgments on the basis of "jurisdictional reciprocity" (at [44]). The Privy Council applied the principle to recognise a declaration of parentage made in Latvia, in relation to a child domiciled and habitually resident in Latvia, for the purposes of maintenance proceedings in the forum court of Jersey. Lord Wilson emphasised that, although foreign judgments may, in some cases, be refused on

grounds of public policy, recognition will not be refused lightly: “a court’s recognition of a foreign order under private international law does not depend on any arrogant attempt on that court’s part to mark the foreign court’s homework” (at [58]).

As a matter of policy, my first impression is that the Privy Council’s decision is to be welcomed. Common law jurisdictions have traditionally taken a conservative, relatively “closed” approach to the recognition of foreign laws and judgments on parentage (see Hague Conference on Private International Law *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements* (Prelim Doc No 3C, 2014)). Such an approach has become increasingly indefensible in a world that is witnessing unprecedented levels of cross-border mobility and migration. The conflict of laws should, as a matter of priority, avoid limping parent-child relationships: for example, a child who was declared by the courts of their place of birth to be the child of the intending parents, but who is nevertheless treated as the surrogate mother’s child under New Zealand law. The ability to recognise foreign judgments on parentage may not amount to *much* progress, given that it can apply only where the foreign court has, in fact, made a declaration of parentage: it would have no application where the relevant parent-child relationship simply arises by operation of law or through an administrative act (such as entry of the intending parents in the birth register). There is no doubt that an international solution must be found to the problem as a whole. But it is surely better than nothing.

Another question is what to make of the Privy Council’s reliance on the *Travers v Holley* principle. Based on the decision in *Travers v Holley* [1953] P 246 (CA), the principle enables recognition of foreign judgments by virtue of reciprocity: the forum court will recognise a foreign judgment if the forum court itself would have had jurisdiction to grant the judgment had the facts been reversed (ie had the forum court been faced with the equivalent situation as the foreign court). In the context of divorce, the principle has since been subsumed within a wider principle of “real and substantial connection” (*Indyka v Indyka* [1969] 1 AC 33 (HL)). In the context of adoption, the principle has been applied to recognise “the status of

adoption duly constituted … in another country in similar circumstances as we claim for ourselves" (*Re Valentine's Settlement* [1965] Ch 831 (CA) at 842).

Perhaps it is not a big step from adoption to parentage more generally. The Privy Council recognised that the latter primarily represents "a conclusion of biological fact", while adoption "stamps a person with a changed legal effect" (at [39]). But the Privy Council did not seem to consider that this distinction should warrant a different approach in principle. In *C v C*, the issue of parentage involved a relatively straightforward question of paternity. Had the case involved a question of surrogacy or human assisted reproduction, the answer might well have been different. There is an argument that a parent-child relationship created under foreign law can only be recognised in the forum if the foreign law is substantially similar to forum law. Thus, in the context of adoption, it has been asked whether the concept of adoption in the foreign country "substantially conform[s] to the English concept" (*Re T & M (Adoption)* [2010] EWHC 964, [2011] 1 FLR 1487 at [13]). This requirement might not be made out where, for example, the law of the forum does not recognise parentage by way of surrogacy (as is the case in New Zealand).

The Privy Council cautioned that the Board did not receive full argument on the issue and that the reader "must bear the lack of it in mind" (at [34]). It seems especially important, then, for conflict of laws scholars to give the issue further consideration. This note may serve as a careful first step – I would be interested to hear other views. Perhaps the most encouraging aspect of the Board's reasoning, in my mind, is its openness to recognition. The Board's starting point was that the declaration could be recognised. Arguably, this was because counsel seemed to have largely conceded the point. But to the extent that it cuts through an assumption that questions of parentage are generally left to the law of the forum, it nevertheless strikes me as significant – even more so since the UK Supreme Court's previous refusal to extend the *Travers v Holley* principle beyond the sphere of family law (*Rubin v Eurofinance SA* [2012] UKSC 46, [2012] 3 WLR 1019 at [110], [127]).

Recognition in the UK of a marriage celebrated in Somaliland

Can a foreign marriage be recognised in the UK if the State where it was celebrated is not recognised as a State? This was the question which the High Court of Justice (Family Division) had to answer in MM v NA: **[2020] EWHC 93 (Fam)**.

The Court distilled two questions: was the marriage validly celebrated and if so, can it be recognised in the UK? If the answers to both questions were affirmative, the court could give a declaratory order; if one of them were negative, the parties could celebrate a new marriage in the UK.

In assessing the **first question**, the court considered issues of formal and essential validity. It took account of the various systems of law in Somaliland: formal law (including the Somali civil code, which is still in force in Somaliland on the basis of its continuation under the Somaliland constitution), customary law and Islamic law. In matters of marriage, divorce and inheritance, the latter applies. On the basis of the facts, the Court came to the conclusion that the parties were validly married according to the law of Somaliland.

Although this would normaly be the end of the matter, the Court had to consider what to do with a valid marriage emanating from a State not recognised by the UK (the **second question**). The Court referred to the one-voice principle, implying that the judiciary cannot recognise acts by a State while the executive branch of the UK refuses to recognise the State. It then considered exceptions and referred to cases concerning the post-civil war US, post-World War II Eastern Germany, the Turkish Republic of Northern Cyprus, Ciskei (one of the 'States' created by Apartheid-era South Africa), and Southern Rhodesia.

It also referred to the ICJ Advisory Opinion of 21 June 1971 on the continued presence of South Africa in Namiba, particularly its §125, which states:

"while official acts performed by the Government of South Africa on behalf of or

concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."

The Court found that an exception to the one-voice doctrine is acceptable in matters of private rights. The Court also explained that it had conferred with the Foreign and Commonwealth Office of the UK Government, who would not object to the recognition of a Somaliland marriage even though that State is not recognised.

It thus gave the declaration of recognition of the marriage.

(Thanks to Prakash Shah for the tip.)

Private International Law and Venezuelan Academia in 2019: A Review

by José Antonio Briceño Laborí, Professor of Private International Law, Universidad Central de Venezuela y Universidad Católica Andrés Bello

In 2019 the Venezuelan Private International Law (hereinafter "PIL") academic community made clear that, despite all the difficulties, it remains active and has the energy to expand its activities and undertake new challenges.

As an example of this
we have, firstly, the different events in which our professors have
participated and the diversity of topics developed by them, among which the following stand out:

- XI
  Latin American Arbitration Conference, Asunción, Paraguay, May 2019

(Luis
Ernesto Rodríguez – How is tecnology impacting on arbitration?)

- Conferences for the 130th
  Anniversary of the Treaties of Montevideo of 1889, Montevideo, Uruguay, June
  2019 (Eugenio Hernández-Bretón and Claudia Madrid Martínez – The recent
  experience of some South American countries not part of Montevideo Treaties in comparative
  perspective to them. The case of Venezuela).
- OAS XLVI Course on
  International Law. Rio de Janeiro, Brazil, August 2019 (Javier Ochoa Muñoz – Effectiveness
  of foreign judgements and transnational access to justice. Reflections from global
  governance).
- The Role of Academia in Latin
  American Private Intertnational Law, Hamburg, Germany, September 2019 (Javier
  Ochoa Muñoz – The Legacy of Tatiana Maekelt in Venezuela and in the Region).
- XIII ASADIP Annual Conference
  2019: Transnational Effectiveness of Law: Recognition and enforcement of foreign judgments, arbitral awards and other acts (Claudia Madrid Martínez –
  Transnational Efficacy of Foreign Judgments – Flexibilization of Requirements; Eugenio
  Hernández-Bretón – Transnational Effectiveness of Provisional Measures; and
  Luis Ernesto Rodríguez – New Singapore Convention and the execution of international agreements resulting from cross-border mediation).

However, this year's three
most important milestones for our academic community occurred on Venezuelan soil. Below we review each one in detail:

1. **Celebration of the 20th**

Anniversary of the Venezuelan PIL Act

The Venezuelan PIL Act, the first autonomous legislative instrument on this subject in the continent, entered into force on February 6, 1999 after a six months *vacatio legis* (since it was enacted in the Official Gazette of the Republic of Venezuela on August 6, 1998).

This instrument has a long history, as its origins date back to the Draft Law on PIL Norms written by professors Gonzalo Parra-Aranguren, Joaquín Sánchez-Covisa and Roberto Goldschmidt in 1963 and revised in 1965. The Draft Law was rescued in 1995 on the occasion of the First National Meeting of PIL Professors. Its content was updated and finally a new version of the Draft Law was sent by the professors to the Ministry of Justice, which in turn sent it to the Congress, leading to its enactment (for an extensive overview of the history of the Venezuelan PIL Act and its content, see: Hernández-Bretón, Eugenio, Neues venezolanisches Gesetz über das Internationale Privatrecht, *IPRax* 1999, 194 (Heft 03); Parra-Aranguren, Gonzalo, The Venezuelan Act on Private International Law of 1998, *Yearbook of Private International Law*, Vol. 1 1999, pp. 103-117; and B. de Maekelt, Tatiana, Das neue venezolanische Gesetz über Internationales Privatrecht, *RabelsZ*, Bd. 64, H. 2 (Mai 2000), pp. 299-344).

To celebrate the 20th anniversary of the Act, the Private International and Comparative Law Professorship of the Central University of Venezuela and the "Tatiana Maekelt" Institute of Law with the participation of 7 professors and 9 students of the Central University of Venezuela Private International and Comparative Law Master Program.

All the expositions revolved around the Venezuelan PIL Act, covering the topics of the system of sources, vested rights, ordre public, in rem rights, consumption contracts, punitive damages, jurisdiction matters, international labour relations, recognition and enforcement of foreign judgements, transnational provisional

measures and the relations between the Venezuelan PIL Act and international arbitration matters. The conference was both opened and closed by the professor Eugenio Hernández-Bretón with two contributions: “The Private International Law
Act and the Venezuelan university” and “The ‘secret history’ of the Private International Law Act”.

- **Private International and Comparative Law Master Program’s Yearbook**

On the occasion of the XVIII National Meeting of Private International Law Professors, the Private International and Comparative Law Master’s Degree Program of the Central University of Venezuela launched its website and the first issue of its yearbook. This specialized publication was long overdue, particularly in the Master’s Program context which is focused on educating and training researchers and professors in the areas of Private International Law and Comparative Law with a strong theoretical foundation but with a practical sense of their fields. The Yearbook will allow professors, graduates, current students and visiting professors to share their views on the classic and current topics of Private International Law and Comparative Law.

This first issue included the first thesis submitted for a Master’s Degree on the institution of *renvoi*, four papers spanning International Procedural Law, electronic means of payment, cross-border know-how contracts and International Family Law, sixteen of the papers presented during the Commemoration of the Twentieth Anniversary of the Venezuelan Private International Law Act’s entry into force, and two collaborations by Guillermo Palao Moreno and Carlos Esplugues Mota, professors of Private International Law at the University of Valencia (Spain), that shows the relation of the Program with visiting professors that have truly nurtured the students’ vision of their area of knowledge.

The

Call of Papers for the 2020 Edition of the Yearbook is now open. The deadline for the reception of contributions will be April 1st, 2020 and the expected date of publication is May 15th, 2020. All the information is available here.
The author guidelines are available here. Scholars from all over the world are invited to contribute to the yearbook.

- **Libro Homenaje al Profesor Eugenio Hernández-Bretón**

On December 3rd, 2019 was launched a book to pay homage to Professor Eugenio Hernández-Bretón. Its magnitude (4 volumes, 110 articles and 3298) is a mirror of the person honored as we are talking about a highly productive and prolific lawyer, professor and researcher and, at the same time, one of the humblest human beings that can be known. He is truly one of the main reasons why the Venezuelan Private International Law professorship is held up to such a high standard.

The legacy of Professor Hernández-Bretón is recognized all over the work. Professor of Private International Law at the Central University of Venezuela, Catholic University Andrés Bello and Monteávila University (he is also the Dean of the Legal and Political Sciences of the latter), Member of the Venezuelan Political and Social Sciences Academy and its President through the celebration of the Academy's centenary, the fifth Venezuelan to teach a course at The Hague Academy of International Law and a partner in a major law firm in Venezuela (where he has worked since his law school days) are just some of the highlights of his career.

The contributions collected for this book span the areas of Private International Law, Public International Law, Comparative Law, Arbitration, Foreign Investment, Constitutional Law, Administrative Law, Tax Law, Civil Law, Commercial Law, Labor Law, Procedural Law, Penal Law, General Theory of Law, Law & Economics and Law & Politics. The book closes with six studies on the honored.

The
contributions of Private International Law take the entire first volume. It
includes the following articles:

- Adriana
  Dreyzin de Klor – El Derecho internacional privado argentino aplicado a partir
  del nuevo Código Civil y Comercial (The Argentine Private International Law
  applied from the new Civil and Commercial Code).
- Alfredo
  Enrique Hernández Osorio – Objeto, contenido y características del Derecho
  internacional privado (Purpose, content and characteristics of Private
  International Law).
- Andrés
  Carrasquero Stolk – Trabajadores con elevado poder de negociación y Derecho
  applicable a sus contratos: no se justifica restricción a la autonomía de las
  partes (Workers with high bargaining power and applicable law to their
  contracts: no restriction to party autonomy is justified).
- Carlos
  E. Weffe H. – La norma de conflicto. Notas sobre el método en el Derecho
  internacional privado y en el Derecho internacional tributario (The conflict
  norm. Notes on the method in Private International Law
  and in International Tax Law).
- Cecilia
  Fresnedo de Aguirre – Acceso al derecho extranjero en materia civil y
  comercial: cooperación judicial y no judicial (*Access to foreign law in civil and commercial matters: judicial and non-judicial cooperation*).
- Claudia
  Madrid Martínez – El rol de las normas imperativas en la contratación
  internacional contemporánea (The role of peremptory norms in contemporary
  international contracting).
- Didier

Opertti Badán – Reflexiones sobre gobernabilidad y Derecho internacional privado (Reflections on governance and Private International Law).

- Fred
  Aarons P. – Regulación del internet y el derecho a la protección de datos personales en el ámbito internacional (Internet regulation and the right to personal data protection at international level).
- Gerardo
  Javier Ulloa Bellorin – Interpretación del contrato: estudio comparativo entre
  los principios para los contratos comerciales internacionales del UNIDROIT y el
  derecho venezolano (Contract interpretation: comparative study between the
  UNIDROIT Principles on International Commercial Contracts and Venezuelan law).
- Gilberto
  Boutin I. – El recurso de casación en las diversas fuentes del Derecho internacional privado panameño (Cassational complaint in the various sources of
  Panamanian Private International Law).
- Guillermo
  Palao Moreno – La competencia judicial internacional en la nueva regulación
  europea en materia de régimen económico matrimonial y de efectos patrimoniales de
  las uniones registradas (International jurisdiction in the new European regulation on the economic matrimonial regime and the property effects of
  registered partnerships).
- Héctor
  Armando Jaime Martínez – Derecho internacional del trabajo (International Labor
  Law).
- Javier
  L. Ochoa Muñoz – El diálogo de las fuentes ¿un aporte del Derecho internacional
  privado a la teoría general del Derecho? (The dialogue

of sources: a contribution from private international law to the general theory
of law?

- Jorge
  Alberto Silva – Contenido de un curso de Derecho internacional regulatorio del
  proceso (Content of a course on international law regulating the process).
- José
  Antonio Briceño Laborí – La jurisdicción indirecta en la ley de derecho internacional privado.
- José
  Antonio Moreno Rodríguez – Los Principios Unidroit en el derecho paraguayo (The
  UNIDROT Principles in Paraguayan law).
- José
  Luis Marín Fuentes – ¿Puede existir una amenaza del Derecho uniforme frente al
  Derecho interno?: ¿podríamos hablar de una guerra anunciada? (Can there be a threat to national law from uniform law? Could we talk
  about an announced war?).
- Jürgen
  Samtleben – Cláusulas de jurisdicción y sumisión al foro en América Latina (Jurisdiction
  and submission clauses in Latin America).
- Lissette
  Romay Inciarte – Derecho procesal internacional. Proceso con elementos de extranjería
  (International Procedural Law. Trial with foreign elements).
- María
  Alejandra Ruíz – El reenvío en el ordenamiento jurídico venezolano (*Renvoi*
  in the Venezuelan legal system).
- María
  Mercedes Albornoz – La Conferencia de La Haya de Derecho Internacional Privado
  y el Derecho aplicable a los negocios internacionales (The Hague Conference on

Private International Law and the applicable Law to International Business).

- María Victoria Márquez Olmos – Reflexiones sobre el tráfico internacional de niños y niñas ante la emigración forzada de venezolanos (Reflections on international child trafficking in the face of forced migration of Venezuelans).
- Mirian Rodríguez Reyes de Mezoa y Claudia Lugo Holmquist – Criterios atributivos de jurisdicción en el sistema venezolano de Derecho internacional privado en materia de títulos valores (Attributive criteria of jurisdiction in the Venezuelan system of Private International Law on securities trading matters).
- Nuria González Martín – Globalización familiar: nuevas estructuras para su estudio (Globalization of the family: new structures for its study).
- Peter Mankowski – A very special type of renvoi in contemporary Private International Law. Article 4 Ley de Derecho Internacional Privado of Venezuela in the light of recent developments.
- Ramón Escovar Alvarado – Régimen aplicable al pago de obligaciones en moneda extranjera (Regime applicable to the payment of obligations in foreign currency).
- Roberto Ruíz Díaz Labrano – El principio de autonomía de la voluntad y las relaciones contractuales (The party autonomy principle and contractual relations).
- Stefan Leible – De la regulación de la parte general del Derecho internacional privado en la Unión Europea (Regulation of the general part of Private International

Law in the European Union).

- Symeon c. Symeonides – The Brussels I Regulation and third countries.
- Víctor Gregorio Garrido R. – Las relaciones funcionales entre el forum y el ius en el sistema venezolano de derecho internacional privado (The functional relations between forum and ius in the Venezuelan system of private international law.

As we see, the contributions are not just from Venezuelan scholars, but from important professors and researchers from Latin America, USA and Europe. All of them (as well as those included in the other three volumes) pay due homage to an admirable person by offering new ideas and insights in several areas of law and related sciences.

The book will be available for sale soon. Is a must have publication for anyone interested in Private International Law and Comparative Law.

A never-ending conflict: News from France on the legal parentage of children born trough surrogacy arrangements.

As reported previously, the ECtHR was asked by the French *Cour de cassation* for an advisory opinion on the legal parentage of children born through surrogacy arrangement. In its answer, the Court considered that the right to respect for private life (article 8 of ECHR) requires States parties to provide a possibility of

recognition of the child's legal relationship with the intended mother. However, according to the Court, a State is not required, in order to achieve such recognition, to register the child's birth certificate in its civil status registers. It also declared that adoption can serve as a means of recognizing the parent-child relationship.

The ECtHR's opinion thus confirms the position reached by French courts: the *Cour de cassation* accepted to transcribe the birth certificate only when the intended father was also the biological father. Meanwhile, the non-biological parent could adopt the child (See for a confirmation ECtHR, C and E v. France, 12/12/2019 Application n°1462/18 and n°17348/18).

The ECtHR advisory opinion was requested during the trial for a review of a final decision in the *Mennesson* case. Although it is not compulsory, the *Cour de cassation* has chosen to comply with its recommendations (Ass. plén. 4 oct. 2019, n°10-19053). Referring to the advisory opinion, the court acknowledged that it had an obligation to provide a possibility to recognize the legal parent-child relationship with respect to the intended mother. According to the *Cour de cassation*, the mere fact that the child was born of a surrogate mother abroad did not in itself justify the refusal to recognize the filiation with the intended mother mentioned in the child's birth certificate.

When it comes to the mean by which this recognition has be accomplished, the *Cour de cassation* recalled that the ECtHR said that the choice fell within the State's margin of appreciation. Referring to the different means provided under French law to establish filiation, the Court considered that preference should be given to the means that allow the judge to exercise some control over the validity of the legal situation established abroad and to pay attention to the particular situation of the child. In its opinion, adoption is the most suitable way.

However,
considering the specific situation of the Mennesson twins who had been involved in legal proceedings for over fifteen years, the Court admitted that neither an adoption nor an apparent status procedure were appropriate as both involve a judicial procedure that would take time. This would prolong the twins' legal uncertainty regarding their identity and, as a consequence, infringe their right to respect for private life protected by article 8 ECHR. In this particular case, this would not comply with the conditions set by the ECtHR in

its advisory opinion: “the procedure laid down by the domestic law to ensure that those means could be implemented promptly and effectively, in accordance with the child’s best interest”.

As a result and given the specific circumstances of the Mennessons’ situation, the *Cour de cassation* decided that the best means to comply with its obligation to recognize the legal relationship between the child and the intended mother was to transcribe the foreign birth certificate for both parents.

The *Cour de cassation’s* decision of October 2019 is not only the final act of the *Mennesson* case, but it also sets a *modus operandi* for future proceedings regarding legal parentage of children born trough surrogate arrangements: when it comes to the relation between the child and the intended mother, adoption is the most suitable means provided under domestic French law to establish filiation. When such an adoption is neither possible nor appropriate to the situation, judges resort to transcribing the foreign birth certificate mentioning the intended mother. Thus, adoption appears as the principle and transcription as the exception.

Oddly enough, the Court then took the first chance it got to reverse its solution and choose not to follow its own *modus operandi.*

By two decisions rendered on December 18th 2019 (Cass. Civ. 1ère, 18 déc. 2019, n°18-11815 and 18-12327), *the Cour de cassation* decided that the intended non-biological father must have its legal relationship with the child recognized too. However, it did not resort to adoption as a suitable means of establishing the legal relationship with the intended parent. Instead, the court held that the foreign birth certificate had to be transcribed for both parents, while no references were made to special circumstances which would have justified resorting to a transcription instead of an adoption or another means of establishing filiation.

The Court used a similar motivation to the one used in 2015 for the transcription

of the birth certificate when the intended father is also the biological father. It considered that neither the fact that the child was born from a surrogate mother nor that the birth certificate established abroad mentioned a man as the intended father were obstacles to the transcription of the birth certificate as long that they complied with the admissibility conditions of article 47 of the Civil Code.

But
while in 2015 the Court referred to the fact that the certificate "did not contain facts that did not correspond to reality", which was one of the requirements of article 47, in 2019 this condition is no longer required.

Thus,
it seems that the *Cour de cassation* is no longer reluctant to allow the full transcription of the foreign birth certificate of children born of surrogate arrangements. After years of constant refusal to transcribe the birth certificate for the non-biological parent, and just a few months after the ECtHR advisory opinion accepting adoption as a suitable means to legally recognize the parent-child relationship, this change of view was unexpected.

However,
by applying the same treatment to both intended parents, biological and non-biological,
this reversal of solution put into the spotlight the publicity function of the transcription into the French civil status register. As the *Cour de cassation* emphasized, a claim for the transcription of a birth certificate is different from a claim for the recognition or establishment of filiation. The transcription does not prevent later proceedings directed against the child-parent
relationship.

But

the end is still not near! On January 24th,
during the examination of the highly sensitive Law of Bioethics, the *Sénat* (the French Parliament's upper house) adopted an article prohibiting the full transcription
of the foreign birth certificates of children born trough surrogate arrangements. This provision is directly meant to "break" the *Cour de cassation's*

solution of December 18th 2019. The article will be discussed in front of the *Assemblée nationale*, the lower house, and the outcome of the final vote is uncertain.

The conflict over the legal parentage of children born trough surrogate arrangements is not over yet. To be continued…

C-493/18, UB v. VA and others – Exclusive jurisdiction under the European Insolvency Regulation

By Dr Lukas Schmidt (PhD EBS Law School), law clerk (*Rechtsreferendar)* at the Regional Court of Wiesbaden, Germany

In cross-border insolvencies questions of international jurisdiction might arise either in relation to the opening of an insolvency proceeding as such, or – further down the road – in relation to proceedings deriving from already opened insolvency proceedings. In both cases the European Insolvency Regulation Recast (Regulation 2015/848) provides for answers: According to Article 3 of the Regulation the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. Article 6 of the Regulation provides that the courts in such Member States shall have jurisdiction as well for actions deriving directly from insolvency proceedings and closely linked with them. Both kind of decisions are to be automatically recognized in all other member states, either through Art. 19 (judgments opening insolvency proceedings) or through Art. 32 (other judgments).

Whereas
Article 3 is also to be found in the old EIR (Regulation 1346/2000) as is Article 19 (Article 16) and Article 32 (Article 25), Article 6 is a new provision, however based without any doubt on the ECJ´s settled case law (Seagon, C-339/07 and Schmid, C-382/12) on the old EIR. Still on the old regulation, but with effect also for Art. 6 and 32 EIR, the ECJ has now specified in the case UB v. VA and others (C-493-18) the scope and the exclusive nature of the *vis attractiva concursus* as (now) laid down in Art. 6 of the EIR.

Some facts are necessary to understand the case:

The insolvent debtor UB, a Dutch citizen, owned an apartment and a property complex in France. Although his assets had been frozen by an English court he and his sister VA signed an acknowledgement of debt by which UB acknowledged owing VA the sum of EUR 500 000 in respect of various loans. UB undertook to repay that sum by 22 August 2017 and subsequently mortgaged, in favour of VA, the apartment and the property complex which he owned in France. In March 2010 he had sold the apartment to Tiger, a company founded by VA. On 10 May 2011 insolvency proceedings were opened against UB in the United Kingdom by the Croydon County Court. The Croydon County Court authorised the insolvency administrator, to bring an action before the courts in France in order to obtain a ruling that the sale of the properties and the mortgages granted over those properties were avoidable under the relevant United Kingdom bankruptcy law provisions. The insolvency administrator made use of this authorisation and succeeded before the French Regional Court and the Court of Appeal. However, the Court of Cassation referred the question of international jurisdiction of the French courts (and its recognition) to the ECJ for a preliminary ruling.

By answering the first two referred questions the ECJ has made clear – rather not surprising – that an action brought by the trustee in bankruptcy appointed by a court of the Member State within the territory of which the insolvency proceedings were opened seeking a declaration that the sale of immovable

property situated in another Member State and the mortgage granted over it are ineffective as against the general body of creditors falls within the exclusive jurisdiction of the courts of the first Member State.

The ECJ has pointed out that for determining whether actions derive directly from insolvency proceedings not the procedural context of the action is decisive, but its legal basis (the trustee asked the French courts to rule on a declaration of ineffectiveness rather than on an action to set the transactions aside).

Equally insignificant for international jurisdiction to hear an action for the restitution of immovable property to the bankruptcy estate is where those assets are located. The court underlines that the objective of improving the efficiency and speed of cross-border insolvency proceedings is only consistent with concentrating all the actions directly related to the insolvency proceedings before the courts of the Member State within the territory of which those proceedings were opened.

More intriguing and not yet subject to the ECJ's case law is the question whether a court can confer its international jurisdiction according to Art. 6 EIR. Eventually, this is what the Croydon Country Court did by authorizing the administrator to bring an action before the French courts in order to obtain a ruling that UB´s deals regarding the French properties were avoidable transactions under the relevant United Kingdom bankruptcy law provisions. The referring Court of Cassation therefore asked in his third question if the UK court's decision authorizing the insolvency administrator to bring an action before the French courts could be classified as a judgment concerning the course of insolvency proceedings within the meaning of Article 25 (now Article 32), which may, on that basis, be recognised with no further formalities, pursuant to that article.

The court's answer to this question is in line with its decision in Wiemer & Trachte v. Tadzher (C-296/17) in which it already confirmed the exclusive jurisdiction of the courts of the Member State within the territory of which

insolvency proceedings have been opened for set aside actions. Hence, the ECJ refused the UK court's approach quite quickly stating that Article 25 (now 32) EIR cannot be interpreted in such a way as to call into question the said exclusive nature of the international jurisdiction of the courts of the Member State within the territory of which the insolvency proceedings were opened to hear actions which derive directly from those proceedings and which are closely connected with them. According to the ECJ Article 25 EIR merely allows for the possibility that the courts of a Member State within the territory of which insolvency proceedings have been opened may also hear and determine an action which derives directly from those proceedings and is closely connected with them, whether that be the court which opened the insolvency proceedings under Article 3(1), or another court of that same Member State having territorial and substantive jurisdiction.

White Paper on Smart Derivatives Contract

by Matthias Lehmann

Smart contracts and the conflict of laws is a widely discussed topic today (see for instance the post by Giesela Rühl). A new contribution to this debate comes from ISDA, the International Swaps and Derivatives, in collaboration with the Singapore Academy of Law and leading law firms. Also involved is the provider of an existing smart contract platform (Corda), which guarantees the paper's practical relevance. The analysis focuses on a potential smart derivative contract to be implemented on Corda.

The authors of the paper take the view that a court in Singapore and the UK would have little difficulties in determining the law governing such a contract – it would simply be the one chosen in the derivatives master agreement. The same goes for the choice of the

competent court. In this context, it is important to note that only B2B transactions are considered, with no consumer contracts being involved. The authors also see little risk for the intervention of public policy rules.

Collateralised derivative transactions, which are of utmost practical importance, are more problematic to the extent that the collateral is governed by the *lex rei sitae*. But the paper also sees a way out here: The collateral could be represented by a token (through so-called tokenisation). Given that tokens have no real geographic location, the law applicable to the token could be determined again by a choice of the parties.

The paper even suggests an innovative way to avoid the need for enforcement: The parties could agree that the "notary" of the platform must implement any judgment rendered by the chosen court. In this way, the need to apply for cross-border recognition and enforcement in the country in which the platform is established would fall away.

Whether this proposal works in practice remains to be seen. One may reasonably fret that the platform will not enjoy complete immunity from the country in which it is established. As long as the courts of this country are liberal, there is however little reason for fear. The Singapore High Court has already shown its readiness to extending property protection to the holders of cryptocurrencies. The country could thus provide a safe haven for the operation of a smart derivatives platform, but that does not exclude the continuing power of its courts to intervene and the possible application of national law, e.g. in case of an insolvency of the platform provider.