Developments in Third-Party Litigation Funding in Europe and Beyond

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This blog post reports on a conference on Third Party Litigation funding (TPLF) as well as some other activities in the area of costs and funding, including a new project by the European Law Institute on TPLF.

(1) Conference 'The Future Regulation of Third-Party Funding in Europe'

22 June 2022, Erasmus University Rotterdam

The right of access to civil justice continues to be constrained by the cost, complexity and delays of litigation and the decline in legal aid. Private litigation funding methods litigation like third-party litigation funding (TPLF) and alternative dispute resolution (ADR) methods have been developing, which address these challenges to a certain extent. The debate on whether and to what extent TPLF should be regulated in Europe has also been gathering pace. On the one hand, proponents argue that it facilitates access to civil justice whilst, on the other hand, critics say that there may be risks of abuse. These issues were critically discussed during the conference 'The Future Regulation of Third-Party Funding in Europe' held on the 22nd of June 2022. It concluded the online seminar series on 'Trends and Challenges in Costs and Funding of Civil Justice' organised by Erasmus School of Law in the context of the Vici project Affordable Access to Justice, financed by the Dutch Research Council (NWO). Team members of the project are project leader Xandra Kramer, and Eva Storskrubb, Masood Ahmed, Carlota Ucin, Adriani Dori, Eduardo Silva de Freitas, Adrian Cordina, assisted by Edine Appeldoorn.

The series commenced in December 2021 with a general session that addressed several topics related to access to justice and costs and funding, including collective redress and litigation costs reforms, and a law-and-economics

perspective. The second seminar in January 2022 was dedicated to legal mobilisation in the EU. The third one in February addressed the impact of public interest litigation on access to justice, and the fourth one in March, litigation funding in Europe from a market perspective. The April seminar focused in on austerity policies and litigation costs reforms, and the May session was dedicated to funding and costs of alternative dispute resolution (ADR).

The aim of this seventh and final conference of the seminar series was to reflect on the need and type of regulation of TPLF from different points of view. By seeking to engage representatives from both academia and stakeholders, the conference aimed to foster a lively exchange and contribute to the debate. The event was introduced by a keynote speech by Professor Geert Van Calster (KU Leuven, Belgium) who examined the key issues in TPLF.

The first panel was chaired by Xandra Kramer and addressed the current status quo of the regulation of TPLF and the possibilities of further regulation. Paulien van der Grinten outlined the situation of TPLF in the Netherlands from the point of view Senior Legislative Lawyer at the Ministry of Justice and Security. The presentation of Johan Skog (Kapatens, Sweden) highlighted the lack of factual basis in the European Parliament Research Service Study for the concern of TPLF giving rise to excessive and frivolous litigation. David Greene (Edwin Coe, England) centred his presentation around a critical outlook on litigation costs and funding and the merits and demerits of TPLF in England and Wales. Following the presentations of the first panel, a discussion among the participants and attendees ensued, including discussant Quirijn Bongaerts (Birkway, The Netherlands). Amongst others, the question of disclosure of funding was debated.

The second panel was chaired by Eva Storskrubb (Uppsala University and Erasmus University Rotterdam) and focused on the modes and levels of regulation of TPLF. With respect to the Draft Report with recommendations to the Commission on Responsible Private Funding of Litigation, also examined in an earlier entry in this blog, Kai Zenner (European Parliament, Head of Office (MEP Axel Voss)) focused on the process which led up to the Draft Report and the risks of TPLF. Victoria Sahani (Professor, Arizona State University) approached the issue of TPLF from the perspective of arbitration, both commercial and investor-State arbitration. Finally, wrapping up the second panel and providing reflections connected to the preceding panelists, Albert Henke (Professor, Università degli Studi di Milano) addressed the issue of regulation and the multiple variables it

faces.

The conference was held in hybrid format. In spite of some coordination challenges that this posed, both the live audience and online attendants found the opportunity to comment on the presentations and interact with the speakers, also with the use of the chat function. The discussions and interventions showed how opportune the timing of the conference was, as it was held at a period when the Draft Report is being deliberated and scrutinised, and when the debate on regulating TPLF is taking centre stage at a European and international level.

A more extensive conference report is scheduled for publication in the Dutch-Flemish journal for mediation and conflict management (Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement (TMD).

(2) Further activities and publications on costs and funding

Recently, a special issue of Erasmus Law Review, edited by Vici members Masood Ahmed and Xandra Kramer on Global Developments and Challenges in Costs and Funding of Civil Justice (available open access). This Special Issue contains ten articles and is introduced by an editorial article by Ahmed and Kramer. It includes articles on different aspects of costs in six jurisdictions. John Sorabji focuses on legal aid insurance and effective litigation funding in England and Wales; David Capper on litigation funding in Ireland; Michael Legg on litigation funding in Australian class actions; Nicolas Kyriakides, Iphigeneia Fisentzou and Nayia Christodoulou on affordability and accessibility of the civil justice system in Cyprus; Jay Tidmarsh on shifting costs in American discovery; and Dorcas Quek Anderson on costs and enlarging the role of ADR in civil justice in Singapore. Three papers focus on general topics. Ariani Dori inquires in her paper whether the fact-finding process that supports the preparation of the EU Justice Scoreboard, as well as the data this document displays, conveys reliable and comparable information. Adrian Cordina critically examines, including from a law-and-economics perspective, the main sources of concern leading to the scepticism shown towards TPF in Europe, and how the regulatory frameworks of England and Wales, the Netherlands, and Germany in Europe, and at the European Union level, the Representative Actions Directive addresses these concerns. In view of the UKSC's finding of non-infringement of Article 6 ECHR in Coventry v. Lawrence [2015] 50, Eduardo Silva de Freitas argues that a more holistic view of the procedural guarantees provided for by Article 6 ECHR is called for to properly

assess its infringement, considering mainly the principle of equality of arms.

Some of the papers will be presented during an online seminar that will take place at the end of 2022.

(3) ELI project on Third Party Litigation Funding

The importance of Third Party Litigation Funding is also highlighted by the adoption of a new project by the European Law Institute (ELI) on TPLF. The commencement of the two-year-long project was approved by the ELI Council in July 2022. It will be conducted under the supervision of three reporters (Professor Susanne Augenhofer, Ms Justice Dame Sara Cockerill, and Professor Henrik Rothe) assisted by researchers Adriani Dori and Joseph Rich, and with the support of an International Advisory Committee. The project's main output will be the development of a set of principles (potentially supplemented by checklists) to identify issues to be considered when entering into a TPLF agreement. Adriani will participate as a project member (together with Mr Joseph Rich). The final outcome is expected in September 2024.

Greek court recognizes UK custody order to the non-biological parent in the context of a married same-sex couple

Greece still forms part of the EU Member States group not recognizing same-sex marriage. Same-sex couples do enjoy however some rights. The latest challenging issue concerned custody rights of a same-sex couple married abroad. The Thessaloniki Court of Appeal reversed the first instance ruling, and recognized an English custody order [Thessaloniki CoA, decision published on January 24, 2022, unreported].

FACTS: The appellant (Parent A) is a woman of Greek and American nationality. Her partner was a woman of American national (Parent B). They registered their partnership in the UK on 20 August 2013. Nearly a month later, Parent B gave birth to a child. The partners married in January 2015. Parent A. filed an application for child custody and parenting arrangements order in the UK. The court granted the application, and ordered that the child stays with the psychological (non-biological) mother on the basis of previous decisions concerning parental responsibility rights issued in the same country. In addition, the court ordered that the child reside with Parent A., and it issued an order to remove the child permanently to Greece. Finally, the same court arranged the contact rights of the biological mother. The UK order was issued by the High Court – Family Division in Chelmsford, and it was final. Parent A. filed an application for the recognition and enforcement of the UK order before the Court of First Instance in Thessaloniki.

The Court refused recognition. It entered into an analysis of the public policy defense, culminating in the conclusion, that the forum judge is obliged to defend national public policy, while at the same time demonstrating respect towards the state's international obligations. To that end, a proportionality test of the domestic public policy with Article 8 ECHR standards is imperative. Following the above introduction, the court declared that same-sex marriage, and any subsequent relations emanating thereof are not allowed in Greece. A detailed presentation of the first instance court reasoning may be found here.

Parent A appealed.

THE DECISION: Unlike the lower instance court, the Thessaloniki CoA primarily underlined the European context of the dispute, citing Articles 21 et seq of the Brussels II bis Regulation. It then referred to a significant number of pertinent provisions, such as: Articles 8, 12 and 14 of the European Convention of Human Rights; articles 23 and 26 of the International Covenant on Civil and Political Rights (ICCPR); articles 7 and 9 of the Charter of Fundamental Rights; the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Greek Civil Union law nr. 4356/2015; article 21 of the Greek Constitution, on the protection of family; 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; and finally, articles 2

and 3 of the United Nations Convention on the Rights of the Child (UNCRC), ratified in Greece by law nr. 2101/1992.

On the grounds of the above references, the CoA found no violation of the Greek public policy, and reversed the ruling of the first instance court. In particular, the CoA emphasized two points:

- The diversity of views, i.e., the non-recognition of same sex marriage in Greece may not result to the infringement of the child's best interests, reflected in the UK court findings.
- The ruling of the first instance court results to the discrimination of children on the grounds of their parents' sexual orientation.

The battle for full equality is not yet won. A couple of days after the decision of the Thessaloniki CoA was published, the Athens CoA refused recognition to a South African adoption decree issued upon the application of a same-sex (male) couple. Yet again, public policy was the defense hindering recognition. To sum up: Same sex couples may not marry or adopt children in Greece; they may however be appointed as foster parents, and exercise custody rights. Hence, equality evolves in a piecemeal fashion. And last but not least, let us not forget: the Supreme Court has the final word.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 3/2022: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)" features the following articles:

(These abstracts can also be found at the IPRax-website under the following link: https://www.iprax.de/en/contents/)

P. Hay: **On the Road to a Third American Restatement of Conflicts Law**

American private international law (Conflict of Laws, "Conflicts Law") addresses procedure (jurisdiction of courts, recognition of judgments) as well as the choice of the applicable law. The last of these has been a mystery to many scholars and practitioners – indeed, even in the United States. Since 2014 the American Law Institute now seeks to draft a new "Restatement" – the Third – of the subject, with the aim to clarify and perhaps to bring more uniformity to the resolution of conflict-of-laws problems. The following comments first recall the role of restatements in American law. The second part provides some historical background (and an assessment of the current state of American conflicts law, as it relates to choice of law) in light of the Second Restatement, which was promulgated in 1971. The third part addresses the changes in methodology adopted and some of the rules so far proposed by the drafters of the future new Restatement. Examples drawn from existing drafts of new provisions may serve to venture some evaluation of these proposed changes. In all of this, it is important to bear in mind that much work still lies ahead: it took 19 years (1952–1971) to complete the Second Restatement.

L. Hübner: **Climate change litigation at the interface of private and public law – the foreign permit**

The article deals with the interplay of private international law, substantive law, and public law in the realm of international environmental liability. It focuses on the question, whether the present dogmatic solution for the cognizance of foreign permits in "resident scenarios" can be extended to climate change scenarios. Since there exists significant doubts as to the transferability of this concept, the article considers potential solutions under European and public international law.

C. Kohler: **Recognition of status and free movement of persons in the EU**

In Case C-490/20, V.M.A., the ECJ obliged Bulgaria to recognise the Spanish birth certificate of a child in which two female EU citizens, married to each other, were named as the child's parents, as far as the implementation of the free movement of persons under EU law was concerned, but left the determination of the family

law effects of the certificate to Bulgarian law. However, the judgment extends the effects of the recognition to all rights founded in Union law, including in particular the right of the mobile Union citizen to lead a "normal family life" after returning to his or her country of origin. This gives the ECJ the leverage to place further effects of recognition in public law and private law under the protection of the primary and fundamental rights guarantees of EU law without regard to the law applicable under the conflict rules of the host Member State. The author analyses these statements of the judgment in the light of European and international developments, which show an advance of the recognition method over the traditional method of referral to foreign law in private international law.

W. Hau: **Interim relief against contracting authorities: classification as a civil and commercial matter, coordination of parallel proceedings and procedural autonomy of the Member States**

After a Polish authority awarded the contract for the construction of a road to two Italian companies, a dispute arose between the contracting parties and eventually the contractors applied for provisional measures in both Poland and Bulgaria. Against this background, the ECJ, on a referral from the Bulgarian Supreme Court of Cassation, had to deal with the classification of the proceedings as a civil and commercial matter and the coordination of parallel interim relief proceedings in different Member States. The case also gave the ECJ reason to address some interesting aspects of international jurisdiction under Article 35 of the Brussels Ibis Regulation and the relationship between this provision and the procedural laws of the Member States.

M. Thon: **Jurisdiction Clauses in General Terms and Conditions and in Case of Assignment**

Choice of court agreements are one of the most important instruments of international civil procedure law. They are intended to render legal disputes plannable and predictable. The decision under discussion comes into conflict with these objectives. In DelayFix, the CJEU had to deal with the question of whether (1.) Art. 25 of the Brussels Ibis Regulation is to be interpreted as precluding a review of unfairness of jurisdiction clauses in accordance with Directive

93/13/EEC and whether (2.) an assignee as a third party is bound by a jurisdiction clause agreed by the original contracting parties. The first question is in considerable tension between consumer protection and the unification purpose of the Brussels Ibis Regulation considering that the Member States may adopt stricter rules. For the latter question, the CJEU makes it a prerequisite that the assignee is the successor to all the initial contracting party's rights and obligations, which regularly occurs in the case of a transfer of contract, but not an assignment. In this respect, too, the CJEU's decision must be critically appraised.

C.F. Nordmeier: **International jurisdiction and foreign law in legal aid proceedings – enforcement counterclaims, section 293 German Code of Civil Procedure and the approval requirements of section 114 (1) German Code of Civil Procedure**

The granting of legal aid in cases with cross-border implications can raise particular questions. The present article illustrates this with a maintenance law decision by the Civil Higher Regional Court of Saarbrücken. With regard to international jurisdiction, a distinction must be made between an enforcement counterclaim and a title counterclaim. The suspension of legal aid proceedings analogous to section 148 of the German Code of Civil Procedure with pending preliminary ruling proceedings before the European Court of Justice in a parallel case is possible. When investigating foreign law in accordance with section 293 of the German Code of Civil Procedure, the court may not limit itself to "pre-ascertaining" foreign law in legal aid proceedings. In principle, the party seeking legal aid is not obliged to provide information on the content of foreign law. If the desired decision needs to be enforced abroad and if this is not possible prospectively, the prosecution can be malicious. Regardless of their specific provenance, conflict-of-law rules under German law are not to be treated differently from domestic norms in legal aid proceedings.

R.A. Schütze: **Security for costs under the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America**

The judgment of the Regional Court of Appeal Munich deals with the application

of the German-American Treaty of Friendship, Commerce and Navigation as regards the obligation to provide security of costs in German civil procedure, especially the question whether a branch of plaintiff in Germany reliefs him from his obligation under section 110 German Code of Civil Procedure. The Court has based its judgment exclusively on article VI of the Treaty and section 6 and 7 of the protocol to it and comes to the conclusion that any branch of an American plaintiff in Germany reliefs him from the obligation to put security of costs.

Unfortunately, the interpretation of the term "branch" by the Court is not convincing.

The court has not taken into regard the ratio of section 110 German Code of Civil Procedure. The right approach would have been to distinguish whether the plaintiff demands in the German procedure claims stemming from an activity of the branch or from an activity of the main establishment.

P. Mankowski: **Whom has the appeal under Art. 49 (2) Brussels Ibis Regulation to be (formally) lodged with in Germany?**

Published appeal decisions in proceedings for the refusal of enforcement are a rare breed. Like almost anything in enforcement they have to strike a fine balance between formalism and pragmatism. In some respects, they necessarily reflect a co-operative relationship between the European and the national legislators. In detail there might still be tensions between those two layers. Such a technical issue as lodging the appeal to the correct addressee might put them to the test. It touches upon the delicate subject of the Member States' procedural autonomy and its limits.

K. Beißel/B. Heiderhoff: **The closer connection under Article 5 of the Hague Protocol 2007**

According to Article 5 of the Hague Protocol 2007 a spouse may object to the application of the law of the creditor's habitual residence (Article 3 of the Protocol) if the law of another state has a "closer connection" with the marriage. The Local Court of Flensburg had to decide whether there was a "closer

connection" to the law of the state, in which the spouses had lived together for five years in the beginning of their marriage. The criteria which constitute a "closer connection" in the sense of Article 5 of the Protocol have received comparatively little discussion to date. However, for maintenance obligations, the circumstances at the end of marriage are decisive in order to ascertain the claim. Therefore, they should also have the greatest weight when determining the closest connection. This has not been taken into account by the Local Court of Flensburg, which applied the law of the former common habitual residence, the law of the United Arab Emirates (UAE).

The authors also take a critical stance towards the Court's assessment of public policy under Article 13 of the Protocol. As the law of the UAE does not provide for any maintenance obligations of the wife (as opposed to maintenance obligations of the husband), the Court should not have denied a violation.

M. Lieberknecht: **Transatlantic tug-of-war – The EU Blocking Statute's prohibition to comply with US economic sanctions and its implications for the termination of contracts**

In a recent preliminary ruling, the European Court of Justice has fleshed out the content and the limitations of the EU's Blocking Statute prohibiting European companies from complying with certain U.S. economic sanctions with extraterritorial reach. The Court holds that this prohibition applies irrespective of whether an EU entity is subject to a specific order by U.S. authorities or merely practices anticipatory compliance. Moreover, the ruling clarifies that a termination of contract – including an ordinary termination without cause – infringes the prohibition if the terminating party's intention is to comply with listed U.S. sanctions. As a result, such declarations may be void under the applicable substantive law. However, the Court also notes that civil courts must balance the Blocking Statute's indirect effects on contractual relationships with the affected parties' rights under the European Charter of Fundamental Rights.

E. Piovesani: **The Falcone case: Conflict of laws issues on the right to a name and post-mortem personality rights**

By the commented decision, the LG Frankfurt dismissed the action of two Italian claimants, namely the sister of the anti-mafia judge Falcone and the Falcone Foundation, for protection of their right to a name and the said judge's postmortem personality right against the owner of a pizzeria in Frankfurt. The decision can be criticized on the grounds that the LG did not apply Italian law to single legal issues according to the relevant conflict of laws rules. The application of Italian law to such legal issues could possibly have led to a different result than that reached by the court.

M. Reimann: **Jurisdiction in Product Liability Litigation: The US Supreme Court Finally Turns Against Corporate Defendants, Ford Motor Co. v. Montana Eighth Judicial District Court / Ford Motor Company v. Bandemer (2021)**

In March of 2021, the US Supreme Court handed down yet another important decision on personal jurisdiction, once again in a transboundary product liability context. In the companion cases of Ford Motor Co. v. Eighth Montana District Court and Ford Motor Co. v. Bandemer, the Court subjected Ford to jurisdiction in states in which consumers had suffered accidents (allegedly due to a defect in their vehicles) even though their cars had been neither designed nor manufactured nor originally sold in the forum states. Since the cars had been brought there by consumers rather than via the regular channels of distribution, the "stream-of-commerce" theory previously employed in such cases could not help the plaintiffs (see World-Wide Volkswagen v. Woodson, 444 U.S. 286, 1980). Instead, the Court predicated jurisdiction primarily on the defendant's extensive business activities in the forum states. The problem was that these in-state activities were not the cause of the plaintiffs' harm: the defendant had done nothing the forum states that had contributed to the plaintiffs' injuries. The Court nonetheless found the defendant's business sufficiently "related" to the accidents to satisfy the requirement that the defendant's contacts with the forum state be connected to the litigation there. The consequences of the decision are far-reaching: product manufacturers are subject to in personam jurisdiction wherever they are engaged in substantial business operations if a local resident suffers an accident involving merely the kind of product marketed in the forum state, regardless how the particular item involved arrived there. This is likely to apply against foreign corporations, especially automobile manufacturers, importing

their products into the United States as well. The decision is more generally remarkable for three reasons. First, it represents the first (jurisdictional) victory of a consumer against a corporation in the Supreme Court in more than half-a-century. Second, the Court unanimously based in personam jurisdiction on the defendant's extensive business activities in the forum state; the Court thus revived a predicate in the specific-in-personam context which it had soundly rejected for general in personam jurisdiction just a few years ago in Daimler v. Baumann (571 U.S. 117, 2014). Last, but not least, several of the Justices openly questioned whether corporations should continue to enjoy as much jurisdictional protection as they had in the past; remarkably these Justices hailed from the Court's conservative camp. The decision may thus indicate that the days when the Supreme Court consistently protected corporations against assertions of personal jurisdiction by individuals may finally be over.

R. Geimer: **Service to Foreign States During a Civil War: The Example of an Application for a Declaration of Enforceability of a Foreign Arbitral Award Against the Libyan State Under the New York Convention**

With the present judgment, the UK Supreme Court confirms a first-instance decision according to which the application to enforce an ICC arbitral award against the state of Libya, and the later enforcement order (made ex parte), must have been formally served through the Foreign, Commonwealth and Development Office under the State Immunity Act 1978, despite the evacuation of the British Embassy due to the ongoing civil war. The majority decision fails to recognize the importance of the successful claimant's right of access to justice under Art 6(1) ECHR and Art V of the 1958 New York Convention.

K. Bälz: **Arbitration, national sovereignty and the public interest – The Egyptian Court of Cassation of 8 July 2021 ("Damietta Port")**

The question of whether disputes with the state may be submitted to arbitration is a recurrent topic of international arbitration law. In the decision Damietta Port Authority vs DIPCO, the subject of which is a dispute relating to a BOT-Agreement, the Egyptian Court of Cassation ruled that an arbitral award that (simultaneously) rules on the validity of an administrative act is null and void. The

reason is that a (private) arbitral tribunal may not control the legality of an administrative decision and that the control of the legality of administrative action falls into the exclusive competency of the administrative judiciary. This also applies in case the legality of the administrative decision is a preliminary question in the arbitral proceedings. In that case, the arbitral tribunal is bound to suspend the proceedings and await the decision of the administrative court. The decision of the Egyptian Court of Cassation is in line with a more recent tendency in Egypt that is critical of arbitration and aims at removing disputes with the state from arbitration in order to preserve the "public interest".

Granting asylum to family members with multiple nationalities – the choice-of-law implications of the CJEU-Judgment of 9th November 2021, Case C-91/20

Written by Marie-Luisa Loheide, doctoral candidate at the University of Freiburg.

From a PIL-perspective, granting asylum to the family members of a recognised asylum-seeker or refugee is relevant regarding the determination of an individual's personal status and, more specifically, concerning the question of the relation between the individual's political status (*status politicus*) and his or her personal status (*status privatus*). Whereas the personal status of an individual is ususally determined according to her or his own protection status, it is disputed with regard to *personae coniunctae* – meaning relatives of a protected person who do not (yet) possess a protection status of their own –, whether their personal

status may be derived from the status of the already protected family member or whether it has to be determined by the person's individual status. This is decisive as to the applicability of Art. 12(1) of the Convention relating to the Status of Refugees signed in Geneva on 28th July 1951 (Geneva Convention), according to which all conflict rules leading to the law of the persecuting state are modified by substituting habitual residence for nationality.

In Germany, § 26 of the Asylum Act (Asylgesetz) – with only few exemptions made in its para. 4 – grants family asylum to people who themselves do not satisfy the conditions for receiving asylum (Art. 16a of the German Basic Law), but whose spouse or parent has been granted this status. According to § 26(5) Asylgesetz, this also comprises international protection within the meaning of the refugee status as defined by the Geneva Convention as well as the EU-specific subsidiary protection status (§ 4 Asylgesetz, implementing Art. 15 et seq of the EU-Directive No. 2004/83). The close relative's protection is thus a derived right from the family member's political status. However, by this – even though the opposite might be implied by the misleading terminology of "derived" – the spouse or child of the protected person acquire a protection status of their own. § 26 Asylgesetz is meant to support the unity of the family and aims to simplify the asylum process by liberating family members from the burdensome task of proving that they individually satisfy the conditions (e.g. individual religious or political persecution) for benefitting from international protection or asylum.

While the exemptions made in § 26(4), (5) and § 4(2) Asylgesetz correspond to Art. 1D of the Geneva Convention as well as to Art. 12(2) of the EU-Directive No. 2011/95 (Qualification Directive), the non-exemption of people with multiple nationalities, who could also be granted protection in one of the states of which they are nationals, goes further than the Geneva Convention and the Qualification Directive (see Art. 1A(no. 2) of the Geneva Convention and Art. 4(3)(e) of the Qualification Directive).

This discrepancy was the subject of a preliminary question asked by the German Federal Administrative Court (*Bundesverwaltungsgericht*) and was decided upon by the CJEU on 9th November 2021 (Case C-91/20). The underlying question was whether the more favourable rule of § 26 Asylgesetz is compatible with EU law.

The CJEU in general affirmed this question. For doctrinal justification, it referred to Art. 3 of the Qualification Directive, which allows more favourable rules for granting international protection as long as they do "not undermine the general scheme or objectives of that directive" (at [40]). According to the CJEU, Art. 23(2) of the Qualification Directive leads to the conclusion that the line is to be drawn where the family member is "through his or her nationality or any other element characterising his or her personal legal status, entitled to better treatment in […] [the host] Member State than that resulting from the grant of refugee status" (at [54]). For example, this could be the case if the close relative is a national of their spouse's or parent's host country or one of their nationalities entitles them to a better treatment there (like a Union citizenship). This interpretation also corresponds to the UNHCR's guidelines in respect to the Geneva Convention (see [56] et seq.).

The CJEU's judgment strengthens the right to family life guaranteed by human rights, namely Art. 8 ECHR as well as Art. 7 and Art. 24 of the Charter of Fundamental Rights of the EU (see [55]). Disrupting a family unit can have a negative impact on the individual integration process (see *Corneloup et al.*, study PE 583.157, p. 11), which should be neither in the interest of the individual nor the host state. This right to family unity, according to the CJEU, exists irrespective of the fact that the concerned families could alternatively take residence in one of the family member's home states, because otherwise the person who had already been granted a protection status in a different country could not make use of his or her own protection (see [59] et seq.). In so far, the judgment is to be welcomed. On the other hand, opening the doors to more favourable domestic laws on a derivative protection of family members will lead to more situations where the law applicable to a family relationship between a person applying for family asylum and the person who had already been granted international protection must be determined under prior consideration of domestic PIL rules. However, PIL rules in this regard are frequently inconsistent among the EU Member States.

In practice, the CJEU's judgment discussed here is particularly relevant in the overall picture that is characterised by the CJEU's recent judgment of 19th

November 2020 (C-238/19), according to which – contrary to the previous German Federal Administrative Court's practice – the refugee status according to the Geneva Convention may be granted to individuals who are eligible to be drafted for military service in Syria, which potentially means all Syrian men of a certain age. However, the precise implementation of this judgment in current German judicial and administrative practice remains controversial (see here). In cases where Syrian men actually are granted a protective status, their spouses and children are entitled to receive family asylum as well. In Germany, this is the case even if they possess multiple nationalities, but, according to the CJEU judgment discussed here, only as long as they are not entitled to a better treatment in the host Member State through a different legal status in this country, e.g. nationality or Union citizenship. As a matter of fact, there will be most probably very few people among those seeking protection in a Member State who have a Union citizenship, so that the CJEU's restriction to the scope of § 26 Asylgesetz will only be practically relevant in very few cases.

Call for Papers and Panels: "Identities on the move – Documents cross borders" Final Conference

by **Paul Patreider**

The European Project "***DXB – Identities on the move – Documents cross borders***" aims at facilitating the dissemination and implementation of Regulation (EU) 2016/1191 in the everyday practice of several EU Member States, improve the knowledge of the links between circulation of public documents, fundamental rights and freedom of movement, ensure a sound implementation of the Regulation for "hard cases" and raise awareness among registrars and legal practitioners. The partnership is supported by a consortium of academic

institutions and associations of registrars. More information on the Project and its partners on the official website.

DxB's Final Conference takes place on **23–24 June 2022** at the premises of A.N.U.S.C.A.'s **Academy in Castel San Pietro Terme, Bologna (Italy)**. The conference will offer a unique opportunity to take stock of the implementation status of Regulation (EU) 2016/1191. The event will also launch the Commentary and the EU-wide comparative survey placing the Regulation in the context of daily national practice.

The Conference will be a truly international event, gathering scholars, registrars, public administrators, political scientists, judges, PhD students and practitioners from all over Europe. Translation services are offered in **English**, **Italian and German**. To ensure wide participation as well as the variety of topics and viewpoints, we are pleased to announce a **Call for Papers & Panels**.

CONFERENCE TOPICS

Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents has so far gone largely unnoticed in scholarly debates and practitioners' discussions. As issues related to the circulation and mutual recognition of authentic instruments in civil status and criminal matters are becoming more and more pressing, the Regulation represents a great opportunity to strengthen the principles and values of the European Union.

Given the strict connection between the scientific and practical dimension of Regulation 2016/1191, authors are invited to examine how this act is currently implemented in the context of national civil status systems and fundamental rights. They should explore the potential positive impact on the freedom of movement of European citizens and on the enjoyment of their fundamental rights as well as focus on critical aspects and deficiencies of the current legal framework.

We encourage applicants to submit proposals for papers and panels related to the Regulation and its context. Possible topics include:

- The creation of a common European civil status framework;
- The **notion of "public document"** under the Regulation and similar instruments (e.g. formal and substantial requirements) and under domestic law;
- The circulation of **criminal records**;
- Problems arising from the lack of standardized definitions shared by all Member States (e.g. **"crime", "sex", "intended parent", "intersex"**);
- The impact of the Regulation on the effective exercise of the **freedom of movement**;
- Connections between **EU citizenship**, national citizenship status, and circulation of public documents;
- Case-law of the Court of Justice influencing the interpretation and implementation of the Regulation, with special regard to the Charter of Fundamental Rights and the ECHR;
- Exercise of **electoral rights** and the circulation of public documents under Article 2.2. of the Regulation;
- Analysis of "**hard cases**" when applying the Regulation (e.g. marriages celebrated by religious authorities as third-country public documents etc.);
- The Regulation in comparison to the **ICCS Conventions** and other relevant international conventions (e.g. the Hague Apostille Convention (1961));
- **E-Justice Portal tools** (e.g. the multilingual form-filling system) and the efficiency of the Internal Market Information System (IMI) in the event of doubts as to the veracity of the documents, or the authenticity of the authority that signed them;
- The **digitalization of documents** and their circulation; how to ensure the authenticity of digital documents (both native digital size or digital copies of a paper original); forms of electronic signature or seals, with special regard to electronic signatures governed by the **eIDAS Regulation** and country-specific standards;
- Extension of the scope of the Regulation to public documents relating to, among others, the **legal status and representation of a company or other undertakings**, diplomas, certificates and other evidence of formal qualifications, officially recognised disabilities, etc. (see article 23 of the Regulation);
- Critical issues related to **multilingual standard forms** (**regional/local**

linguistic minorities; public documents for which multilingual standard forms are not yet established by the Regulation etc.).

WHO SHOULD PARTICIPATE

Participation is not restricted to **lawyers** or to **established scholars**. We welcome **registrars, public administrators, professionals, practitioners, doctoral students**. We welcome proposals that offer multi-disciplinary perspectives from various areas of law (including European, civil, administrative, comparative, international, criminal, and labour law), as well as from scholars in the humanities and the social sciences (e.g. history, economics, political science, sociology) with an interest in the Conference's themes. We also welcome submissions from both senior and junior scholars (including doctoral students) as well as interested practitioners.

PAPER AND PANEL SUBMISSIONS

- Submit your **PAPER proposal** with an **abstract of a maximum of 500 words** and **5 keywords**. The abstract must also contain **Title**, **Name**, **Affiliation** (e.g. university, institution, professional association), **Country** and **E-mail address**.
- Submit your **PANEL proposal** with an **abstract of a maximum of 800 words** and **5 keywords**. We welcome a state-of-the art symposium or a round-table providing on key issues. Fully formed panel proposals should include at least three and no more than five presentations by scholars or practitioners who have agreed in advance to participate. Panel proposals should also identify **one panel chair/moderator**. Include: **title of the panel**, **names of speakers** and of the **chair/moderator** and their **affiliation** (e.g. university, institution, professional association), t**itle of each presentation** (if applicable), e**-mail address** of panel participants, **language**(s) to be used.

We encourage submissions in **English**. However, as part of the vision of a truly European conference, paper and panel proposals will also be **accepted in Italian and German**.

Selected paper authors will receive further information on the publication of the proceedings.

Submission templates for paper & panel proposal are available on the DXB website.

HOW AND WHEN TO SUBMIT

Send proposals to: info@identitiesonthemove.eu. Indicate in the e-mail subject line: *"Conference call – name of the (lead) author (or moderator) – Title of the paper or panel proposal"*.

The deadline for submitting the paper or panel abstract proposal is 22 December 2021.

Applicants will be informed about the outcome of the abstract selection process no later than **15 January 2022**. If successfully selected, full papers must be submitted by **15 April 2022**.

PROGRAMME AND REGISTRATION

The draft of the **Conference Programme** will be published on 1st March 2022. The final Conference Programme with all panel sessions will become available on 25 April 2022.

Registration for the Conference opens on the DXB website on 15 January and **closes on 20 May 2022**.

The event will be held in person, in compliance with the current health safety regulations, and will also be **broadcast online via live streaming with free access**.

Onsite participants will need a **Covid-19 digital certificate** (Green Pass), or equivalent certificate recognized under Italian law, if still so required by the Authorities at the time of the conference.

N.B. All speakers and moderators, including those invited under the call,

are required to attend the event in person.

Registration fee: it includes conference materials, shuttle service (see website for details), tea/coffee and lunch refreshments as well as the certificate of attendance.

Ordinary fee: 80 Euros

Reduced student fee (including Ph.D. students): 40 Euros

Check the Project website for updates.

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Mag. Paul Patreider, Institut für Italienisches Recht, Fachbereich Privatrecht, Universität Innsbruck

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Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms has entered into force – beware: the time for filing an application has been shortened

from 6 to 4 months

Today (1 August 2021) the Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms has entered into force. This Protocol will apply in all 47 States Parties. Although it was open for signature/ratification since 2013, the ratification of Italy only occurred until 21 April 2021.

In the past, we have highlighted in this blog the increasing interaction between human rights and private international law and the need to interpret them harmoniously (see for example our previous posts here (HCCH Child Abduction Convention) and here (transnational surrogacy)).

Protocol No. 15 has introduced important amendments to the text of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In particular, it has included the principle of subsidiarity and the doctrine of the margin of appreciation in the preamble, which have long and consistently been adopted by the case law of the European Court of Human Rights (ECtHR), and thus this is a welcome amendment.

It will now read as follows (art. 1 of the Protocol):

> *"Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention".*

Of great important is the shortening of the time for the filing of an application in accordance with article 35 of the ECHR: from 6 to 4 months. This amendment will enter into force 6 months later (I assume on 1 February 2022). Articles 4 and 8(3) of the Protocol state the following:

> *Article 4*
>
> *"In Article 35, paragraph 1 of the Convention, the words "within a period of six months" shall be replaced by the words "within a period of four months".*

Article 8(3)

> *"Article 4 of this Protocol shall enter into force following the expiration of a period of six months after the date of entry into force of this Protocol. Article 4 of this Protocol shall not apply to applications in respect of which the final decision within the meaning of Article 35, paragraph 1 of the Convention was taken prior to the date of entry into force of Article 4 of this Protocol" (our emphasis).*

This is perhaps a reaction to the increasing workload of the Court, which seems to be of serious concern to the States Parties. In particular, the Brighton declaration has noted that "the number of applications made each year to the Court has doubled since 2004. Very large numbers of applications are now pending before all of the Court's primary judicial formations. Many applicants, including those with a potentially well-founded application, have to wait for years for a response." Undoubtedly, this may compromise the effectiveness and reliability of the ECtHR. Nevertheless, this reduction of the filing time may also leave out cases that are well founded but during which the parties were late in realising that such recourse / legal challenge was available.

Lastly, I would like to highlight the removal of the right of the parties to object to the relinquishment of jurisdiction to the Grand Chamber in certain circumstances, such as when a case pending before a Chamber raises a serious question affecting the interpretation of the ECHR or its protocols (art. 3 of the Protocol and art. 30 ECHR). In my view, this is an improvement and avoids delays as it allows the Chamber to make that call. It also provides consistency to the case law of the ECtHR. As to its entry into force, article 8(2) of the Protocol sets out the following:

> *"The amendment introduced by Article 3 of this Protocol shall not apply to any pending case in which one of the parties has objected, prior to the date of entry into force of this Protocol, to a proposal by a Chamber of the Court to relinquish jurisdiction in favour of the Grand Chamber"*

Conversations on transnational surrogacy and the ECtHR case Valdís Fjölnisdóttir and Others v. Iceland (2021)

Comments by Ivana Isailovic & Alice Margaria

The case of *Valdís Fjölnisdóttir and Others v. Iceland* brings to the attention of the European Court of Human Rights (ECtHR) the no longer new, yet persistently complex, question of the determination of legal parenthood following international surrogacy arrangements. Similar to previous cases, such as *Mennesson v France*, *Labassee v France*, and*Paradiso and Campanelli v Italy*, this complaint originated from the refusal of national authorities to recognise the parent-child relationship established in accordance with foreign law on the ground that surrogacy is prohibited under national law. *Valdís Fjölnisdóttir and Others* is the first case of this kind involving a married same-sex couple who subsequently divorced. Like the applicants in the case of *Paradiso and Campanelli v Italy*, Ms Valdís Glódís Fjölnisdóttir and Ms Eydís Rós Glódís Agnarsdóttir are not biologically linked to their child, who was born in California.

Ivana Isailovic & Alice Margaria's comments answer three questions:

1) What's new in this case?

2) What are the legal effects of this decision?

3) What are alternative legal framings and ideas?

1. Were you surprised by this ruling? Is there anything new in this case?

Alice: This judgment is emblematic of the ECtHR's generally cautious and minimalistic approach to assessing the proportionality of non-recognition *vis-à-vis* unconventional parent-child relationships. It is widely agreed (e.g., Liddy 1998; Stalford 2002; Choudhry and Herring 2010) that the Court has over time expanded the boundaries of what constitutes 'family life' and supported the adoption of more inclusive and diverse conceptions of 'family' through its dynamic interpretation of Article 8 ECHR. Yet, as I have argued elsewhere, this conceptual expansion has not translated into the same protection of the right to respect for family life for all unconventional families. *Valdís Fjölnisdóttir and Others* is a further manifestation of this trend. The Court has indeed no difficulty in qualifying the bonds existing between the two women and their child as 'family life'. As far as the applicability of the 'family life' limb of Article 8 is concerned, the quality and duration of the relationship at stake trump biological unrelatedness. Yet when it comes to assessing the proportionality of the interference of non-recognition with the applicants' right to respect for family life, the Court is satisfied with the *de facto* preservation of the family ties existing between the applicants, and diminishes the disadvantages created by lack of recognition of their parent-child relationship – just as it did in *Mennesson*. Icelandic authorities had taken steps to ensure that the applicants could continue to enjoy their family ties in spite of non-recognition by placing the child in the foster care of the two women and making these arrangements permanent. This had – from the Court's perspective – alleviated the distress and anguish experienced by the applicants. In addition, the child had been granted Icelandic citizenship by a direct act of Parliament, with the effect of making his stay and rights in the country regular and secure. As a result, according to the Court, non-

recognition had caused the applicants only limited practical hindrances to the enjoyment of their family life. As in *Mennesson*, therefore, the Court finds that there is family life among the three applicants, but no positive obligation on the part of the State to recognise the parent-child relationships in accordance with the California birth certificate. Whilst it is true that, in the case at hand, the family ties between the applicants had indeed been afforded some legal protection through foster care arrangements (unlike in previous cases), it seems that the unconventional nature of the family at stake – be it due to the lack of a biological link, the fact that it involves two mothers, or because they resorted to surrogacy – continues to hold back the Court from requiring the State to recognise the existing ties *ab initio* and through filiation. This is also line with the Advisory opinionof 10 April 2019 (request no. P16-2018-001), where the Grand Chamber clarified that States have the obligation to provide 'only' *some* form of legal recognition – e.g., adoption – to the relationship between a child born from surrogacy and their non-genetic mother.

Whilst not setting a new jurisprudential trajectory on how to deal with the determination of legal parenthood following international surrogacy, *Valdís Fjölnisdóttir and Others* brings two novel elements to bear. The first is encapsulated in para 64, where the Court determines the Supreme Court's interpretation of domestic provisions attributing legal motherhood to the woman who gives birth to be 'neither arbitrary nor unreasonable' and, accordingly, considers that the refusal to recognise the family ties between the applicants and the child has a 'sufficient basis in law'. In this passage, the Court takes a clear stance on the rule *mater semper certa est*, which, as this case shows, has the potential to limit the recognition of contemporary familial diversity (not only in the context of surrogacy but also in cases of trans male pregnancies, see e.g. *OH and GH v Germany*, Applications no. 53568/18 and 54941/18, communicated on 6 February 2019). Second, and in contrast, Judge Lemmens' concurring opinion takes one important step towards demystifying and problematising the relevance of biological relatedness in regulating legal parenthood following international surrogacy. He points out that the negative impact of non-recognition is equal for all children born from surrogacy abroad who find themselves in legal limbo, regardless of whether they are biologically connected to their parents or not. He further adds that, whilst adoption is an alternative means of recognition, it does not always provide a solution to all difficulties a child might be experiencing. In the case at hand, for instance, adoption would have benefited only one parent-

child relationship: the couple had indeed divorced through the national proceedings and, therefore, a joint adoption was no longer a possibility for them. This concurring opinion therefore moves towards questioning and potentially revising the terms of the debate between, on the one hand, preventing illegal conduct by intended parents and, on the other hand, tolerating legal limbo to the detriment of children.

Ivana: On the one hand, there is nothing new in this decision. Like in Mennesson (2014) and Paradiso & Campanelli (2017), the Court continues to "constitutionalize" domestic PIL rules. As many PIL scholars argued, this reflects the transformations of conflict of laws rules and methods, as the result of human rights field's influence. Following the ECHtR and the CJEU case law, conflicts of laws rules became subordinate to a proportionality test which implies weighing various interests at stake. In this case, it involves balancing applicants' rights to private and family life, and the interests of the state in banning commercial surrogacy.

Second, like in its previous decisions on surrogacy, by recognizing the importance of the *mater semper est* principle, the ECtHR continues to make the biological link preeminent when defining the scope of human rights protection

On the other, it seems that there is a major rupture with previous decisions. In Mennesson (para 81 & 99), and the advisory opinion requested by the French Cour de cassation (2019) (para 37-38), the ECtHR emphasized child's right to a recognition of their legal relationship with their intended parents (part of the child's right to private and family life). This has in turn influenced the Court's analysis of the scope of states' margin of appreciation.

In the case however, the Court pays lip service to child's interests in having their legal relationship with their intended parents recognized (besides pointing out that, under domestic law, adoption is open to one of the two women, par. 71, and that the State took steps to preserve the bond between the (intended) parents and their child).

Without the legal recognition of the parent-child relationship, however, the child—who is placed in foster care—is left in a vulnerable legal position that is hardly in line with the protection of children's rights. It is unclear what explains

this shift in the Court's reasoning, and Judge Lemmens' concurring opinion that tries to make sense of it is unconvincing.

2. What are the effects of this decision in terms of the regulation of global surrogacy?

Ivana: There are at least two legal consequences for PIL. First, the decision legitimizes a flawed, biological and marginalizing understanding of legal parenthood/motherhood. Second, it legitimizes feminists' anti-surrogacy arguments that dovetail with conservative anti-LGBTQ transnational movements' positions.

According to the Court, *mater semper certa est*—the notion that the woman who gives birth to the child is the legal mother of that child— which justifies Iceland's refusal to recognize the foreign parent-child link, is neither "arbitrary nor manifestly unreasonable" (para 69)

But *mater semper certa est* has consistently been a bit more than an incantation.

In France, scholars showed that the Civil Code from 1804 originally allowed and promoted the constitution of families which didn't reflect biological bonds, as it was enough to prove marriage to infer kinship. In addition, the *mater semper certa est* principle has been continuously eroded by assisted reproductive technology, which today enables multiple individuals to be genetic parents.

Motherhood has always been stratified, and *mater semper est* has operated differently in relation to class, race and gender. Research shows how in the US during slavery, African American women were not considered to be the legal mothers of children they gave birth to, and how today, the state monitors and polices the lives of women of color and poor women (see for instance the work by Angela Davis and Dorothy Roberts). On this side of the Atlantic, between 1962-1984, the French state forcefully deported thousands of children from poor families from Réunion (a former French colony now an oversees territory) to metropolitan France. Finally, this principle penalizes those who do not identify with gender binaries, or with female identity, while being able to give birth, or those who identify as women/mothers, but are unable/unwilling to give birth.

Second, the decision in some respects illustrates the mainstreaming within law of feminists' anti-surrogacy arguments, which overlap with ant- feminist, conservative, anti-LGBTQ movements' discourses. Iceland' s argument that surrogacy is exploitative of surrogates, mirrors affluent anti-surrogacy networks' positions that anti-surrogacy feminist groups adopted in the 1980s. These lobbies argue that surrogacy constitutes the exploitation of women, and that surrogacy severs the "natural maternal bonding" and the biological link between the mother and the child.

This understanding of surrogacy promoted by feminists came to overlap with the one adopted by transnational conservative, pro-life, anti-feminist, anti-LGBTQ groups, and it is interesting that some of the arguments adopted by the Court correspond to those submitted by the conservative institute *Ordo Iuris*, which intervened in the case. Another example of this overlap, is the EU lobby group *No Maternity Trafficking*, which includes right-wing groups, such as *La Manif pour tous,* that organized protests against the same-sex marriage reform in France in 2013.

Here is how the emphasis on the biological link in relation to the definition of legal parenthood may overlap with anti-LGBTQ discourses. As I argued elsewhere, in France, private lawyers, feminists, psychoanalysts, and conservative groups such as *La Manif pour tous* defended the biological understanding of legal filiation, to oppose the same-sex marriage reform which also opened adoption to same-sex couples, because, according to them, biological rules sustain a "symbolic order" which reflects the "natural order" and outside that order a child will become "psychotic." This understanding of legal filiation is however relatively recent in France and is in contradiction with the civil law approach to filiation based on individual will. In fact, different actors articulated these arguments in the 1990s, when queer families started demanding that their families be legally protected and recognized.

Alice: This decision confirms the wide, yet not unlimited, freedom States enjoy in regulating surrogacy and the legal consequences of international surrogacy in their territories and legal systems. In so doing, it legitimises the preservation and continuing operation of traditional filiation rules, in particular the *mater semper certa est* rule, which anchors legal motherhood to the biological processes of

pregnancy and birth. It follows that the public order exception can still be raised. At the same time, however, authorities are required to ensure that *some* form of recognition be granted to *de facto*parent-child relationships created following international surrogacy through alternative legal routes, such as foster care or adoption. In a nutshell, therefore, the regulatory approach to international surrogacy supported by this decision is one of *accommodation*, as opposed to *recognition*, of familial diversity. Parental ties created following surrogacy arrangements abroad have to be *granted* some form of legal recognition, to be given some standing in the national legal order, but do not necessarily have to be *recognised* in their original version, i.e., as legal parental ties *ab initio*.

3. If not this legal framing, which one should we (scholars, courts or activists) adopt to think about transnational surrogacy?

Alice: Conflicts of laws in this context can result in two opposing outcomes: openness to familial and other types of diversity, but also – as this case shows – attachment to conventional understandings of parenthood, motherhood and ways of creating and being a family. If we imagine a continuum with the abovementioned points as its extremes, the Court seems to take an intermediary position: that of *accommodating* diversity. The adoption of such an intermediary position in *Valdís Fjölnisdóttir and Others* was facilitated by the existence of foster care arrangements and the uninterrupted care provided by the first and second applicants to their child since his birth. In the Court's eyes, therefore, the child in this case was not left in 'complete' legal limbo to the same extent as the children in *Mennesson*, nor put up for adoption as in the case of *Paradiso and Campanelli*.

To address the question 'which framing shall we adopt?', the answer very much depends on who 'we' is. If 'we' is the ECtHR, then the margin for manoeuvring is clearly more circumscribed than for activists and scholars. The Court is bound to apply some doctrines of interpretation, *in primis* the margin of appreciation, through which it gains legitimacy as a regional human rights court. The application of these doctrines entails some degree of 'physiological' discretion on the part of the Court. Determining the width of the margin of appreciation is never a mechanical or mathematical operation, but often involves drawing a balance between a variety of influencing factors that might concur simultaneously

within the same case and point to diametrically opposed directions. Engaging in this balancing exercise may create room for specific moral views on the issue at stake – i.e., motherhood/parenthood – to penetrate and influence the reasoning. This is of course potentially problematic given the 'expressive powers' of the Court, and the role of standard setting that it is expected to play. That being said, if regard is given to the specific decision in *Valdís Fjölnisdóttir and Others*, despite the fact that the outcome is not diversity-friendly, the reasoning developed by the Court finds some solid ground not only in its previous case law on surrogacy, but more generally in the doctrinal architecture that defines the Court's role. So, whilst scholars advocating for legal recognition of contemporary familial diversity – including myself – might find this decision disappointing in many respects (e.g., its conventional understandings of motherhood and lack of a child-centred perspective), if we put *Valdís Fjölnisdóttir and Others* into (the Strasbourg) context, it would be quite unrealistic to expect a different approach from the ECtHR. What can certainly be hoped for is an effort to frame the reasoning in a manner which expresses greater sensitivity, especially towards the *emotional and psychological* consequences suffered by the applicants as a result of non-recognition, and thus gives more space to their voices and perceptions regarding what is helpful and sufficient 'to substantially alleviate the uncertainty and anguish' they experienced (para 71).

Ivana: In some respects, this decision mirrors dominant PIL arguments about surrogacy. For some PIL scholars, surrogacy challenges traditional ("natural") mother-child bond, when historically legal motherhood has always been a stratified concept. Other PIL scholars argue that surrogacy raises issues of *(over)exploitation* of surrogates and that women are *coerced* into surrogacy, but never really explain what these terms mean under patriarchy, and in a neoliberal context.

Like many economic practices in a neoliberal context, transnational surrogacy leads to abuses, which are well documented by scholars. But, understanding what law can, cannot or should do about it, requires, questioning the dominant descriptions of and normative assumptions about surrogacy that inform PIL discourses.

Instead of the focus on *coercion*, or on a narrow understanding of what

womanhood is, like the one adopted by relational feminism, I find queer and Marxist-feminists' interventions empirically more accurate, and normatively more appealing.

These scholars problematize the distinctions between nature/ technology, and economy/ love which shape most of legal scholars' understanding of surrogacy (and gestation). As Sophie Lewis shows in her book Full Surrogacy Nowprocreation was never "natural" and has always been "technologically" assisted (by doctors, doulas, nurses, nannies..) and gestation is *work*. Seeing gestation as *work* seeks to upend the capitalist mode of production which relies on the unpaid work around social reproduction. Overall, these scholars challenge the narrow genetic understanding of kinship, argue for a more capacious definition of *care*, while also making space for the recognition of surrogates' reproductive work, their voices and their needs.

Legally recognizing the reproductive labor done by surrogates, may lead to rethinking how we (scholars, teachers, students, judges, activists…) understand the public policy exception/ recognition in PIL, and the recent proposals to establish binding transnational principles, and transnational monitoring systems for regulating transnational surrogacy in the neoliberal exploitative economy.

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Alice Margaria is a Senior Research Fellow in the Law & Anthropology Department at the Max Planck Institute for Social Anthropology. Her current research focuses on fatherhood, cultural/religious diversity and human rights. She teaches 'Gender and Diversity in the International Context' at Freie Universität (Berlin).

CJEU on the EU-third State child abduction proceedings under article 10 of the Brussels IIA Regulation

This post was written by Vito Bumbaca, PhD candidate/ Assistant Lecturer, University of Geneva

The EAPIL blog has also published a post on this topic, click here.

Introduction:

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) still applies to the United Kingdom in EU cross-border proceedings dealing with parental responsibility and/ or child civil abduction commenced prior to the 31 December 2020 (date when 'Brexit' entered into force). Moreover, the Court of Justice of the European Union (CJEU) is entitled to exercise its jurisdiction over such proceedings involving the UK.

The decision of the High Court of England and Wales (Family Division, 6 November 2020, EWHC 2971 (Fam)), received at the CJEU on 16 November 2020 for an urgent preliminary ruling (pursuant to article 19(3)(b) of the Treaty of the European Union, art. 267 of the Treaty of the Functioning of the European Union, and art. 107 of the Rules of Procedure of the Court of Justice), and the CJEU judgment (*SS v. MCP*, C-603/20, 24 march 2021) are taken as reference in this analysis.

Question for a CJEU urgent preliminary ruling:

'Does Article 10 of [Regulation No 2201/2003] retain jurisdiction, without limit of

time, in a Member State if a child habitually resident in that Member State was wrongfully removed to (or retained in) a non-Member State where she, following such removal (or retention), in due course became habitually resident?'

Contents of the EWHC (Family Division) judgment:

This judgment involved an Indian unmarried couple with a British daughter, born in England (2017), aged more than three (almost four at the time of the CJEU proceedings). Both parents held parental responsibility over their daughter, the father being mentioned as such in the birth certificate. The mother and the child left England for India, where the child has lived continuously since 2019. The father applied before the courts of England and Wales seeking an order for the return of the child and a ruling on access rights. The mother contested the UK jurisdiction (EWHC 2971, § 19).

The father claimed that his consent towards the child's relocation to India was temporary for specific purposes, mainly to visit the maternal grandmother (§ 6). The mother contended that the father was abusive towards her and the child and, on that basis, they moved to India (§ 8). Consequentially, she had requested an order (Form C100 'permission to change jurisdiction of the child', § 13). allowing the child's continuous stay in India. Accordingly, the mother wanted their daughter to remain in India with her maternal grandmother, but also to spend time in England after the end of the pandemics.

In the framework of article 8, Brussels IIA, the Family Division of the Court of England and Wales held that the habitual residence assessment should be fact-based. The parental intentions are not determinative and, in many circumstances, habitual residence is established against the wishes of the persons concerned by the proceedings. The Court further maintained, as general principles, that habitual residence should be stable in nature, not permanent, to be distinguished from mere temporary presence. It concluded that, apart from British citizenship, the child did not have factual connections with the UK. Therefore, according to the Court, the child was habitually resident in India at the time of the proceedings concerning access rights initiated in England (§ 16).

The Family Division extended its analysis towards article 12(3) of the Regulation concerning the prorogation of jurisdiction in respect of child arrangements, including contact rights. For the Court, there was no express parental agreement

towards the UK jurisdiction, as a prerogative for the exercise of such jurisdiction, at the time of the father's application. It was stated that the mother's application before the UK courts seeking the child's habitual residence declaration in India could not be used as an element conducive to the settlement of a parental agreement (§ 32).

Lastly, the Court referred to article 10 of Brussels IIA in the context of child abduction while dealing with the return application filed by the father. In practice, the said provision applies to cross-border proceedings involving the EU26 (excluding Denmark and the United Kingdom (for proceedings initiated after 31 December 2020)). Accordingly, article 10 governs the 'competing jurisdiction' between two Member States. The courts of the Member State prior to wrongful removal/ retention should decline jurisdiction over parental responsibility issues when: the change of the child's habitual residence takes place in another Member State; there is proof of acquiescence or ultra-annual inaction of the left-behind parent, holding custody, since the awareness of the abduction. In these circumstances, the child's return would not be ordered in principle as, otherwise provided, the original jurisdiction would be exercised indefinitely (§ 37).

In absence of jurisdiction under Brussels IIA, as well as under the Family Law Act 1986 for the purposes of inherent jurisdiction (§ 45), the High Court referred the above question to the CJEU.

CJEU reasoning:

The Luxembourg Court confirmed that article 10, Brussels IIA, governs intra-EU cross-border proceedings. The latter provision states that jurisdiction over parental responsibility issues should be transferred to the courts where the child has acquired a new habitual residence and one of the alternative conditions set out in the said provision is satisfied (*SS v. MCP*, C-603/20, § 39). In particular, the Court observed that article 10 provides a special ground of jurisdiction, which should operate in coordination with article 8 as a ground of general jurisdiction over parental responsibility (§ 43, 45).

According to the Court, when the child has established a new habitual residence in a third State, following abduction, by consequently abandoning his/ her former 'EU habitual residence', article 8 would not be applicable and article 10 should

not be implemented (§ 46-50). This interpretation should also be considered in line with the coordinated activity sought between Brussels IIA and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (§ 56).

Ultimately, the Court maintained that article 10 should be read in accordance with recital 12 of the Regulation, which provides that, as one of its fundamental objectives, parental responsibility issues should be decided by the courts that better suit the principle of factual proximity in the child's best interests (§ 58). Accordingly, the courts that are closest to the child's situation should exercise general jurisdiction over parental responsibility. To such an extent, article 10 represents a balance between the return procedure, avoiding benefits in favour of the abductor parent, and the evoked proximity principle, freezing jurisdiction at the place of habitual residence.

The Court further held that if the courts of the EU Member State were to retain jurisdiction unconditionally, in case of acquiescence and without any condition allowing for account to be taken concerning the child's welfare, such a situation would preclude child protection measures to be implemented in respect of the proximity principle founded on the child's best interests (§ 60). In addition, indefinite jurisdiction would also disregard the principle of prompt return advocated for in the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (§ 61).

The Court concluded that insofar as the child's habitual residence changes to a third State, which is thus competent over parental responsibility, and article 12 of the Regulation is not applicable, the EU courts seised of the matter should apply the rules provided in the bilateral/multilateral instruments in force between the States in question or, on a subsidiary basis, the national Private International Law rules as indicated under article 14, Brussels IIA (§ 64).

Comment:

Considering the findings of fact, the CJEU reasoning and, prior to it, the EWHC judgment, are supported in that the daughter's habitual residence at the time of the parental *de facto* separation (EWHC 2971, § 6-10) was in India; and remained there at the relevant date of the father's application for return and access rights.

If we assume, as implicitly reported in the decisions, that the child was aged less than one at the time of the first relocation from England to India, and that she lived more than two years (18 months between 2017-2018 and almost fully 2019-2020, (EWHC 2971, § 25)) within the maternal family environment in India, including prior to the wrongful act, her place of personal integration should be located in India at the above relevant date. Such a conclusion would respect the factual proximity principle enshrined in recital 12 of Brussels IIA, according to which habitual residence is founded on the child's best interests. Recital 12 constitutes a fundamental objective applicable to parental responsibility, including access rights, and child abduction proceedings. As a result, the courts of the EU26 should be bound by it as a consequence of the Brussels IIA direct implementation.

The CJEU has not dealt with specific decisive elements that, in the case under analysis, would determine the establishing of the child's habitual residence in India at a relevant time (the seisin under art. 8 and the period before abduction under art. 10 of the Regulation). Considering the very young age (*cf.* CJEU, *SS v. MCP*, C-603/20, § 33: 'developmentally sensitive age') of the daughter at the time of the relocation, the child's physical presence corresponding to the mother's and grandmother's one as the primary carers prior to the wrongful act (retention) and to the return application, as well as the Indian social and family environment at the time of the seisin, highlighted by the EWHC, should be considered determinative (*cf.* CJEU, *UD v. XB*, C-393/18, 17 October 2018, § 57) – the Family Division instead excluded the nationality of the child as a relevant factor. The regularity of the child's physical presence at an appreciable period should be taken into account, not as an element of *temporal* permanent character, but as an indicator of *factual* personal stability. In this regard, the child's presence in one Member State should not be artificially linked to a limited duration. That said, the appreciable assessment period is relevant in name of predictability and legal certainty. In particular, the child's physical presence after the wrongful act should not be used as a factor to constitute an unlawful habitual residence (Opinion of Advocate General Rantos, 23 February 2021, § 68-69).

Again, in relation to the child's habitual residence determination in India, the child's best interests would also play a fundamental role. The father's alleged abuse, prior to the relocation, and his late filing for return, following the wrongful retention, should be considered decisive elements in excluding the English family

environment as suitable for the child's best interests. This conclusion would lead us to retain India as the child-based appropriate environment for her protection both prior to the wrongful retention, for the return application, as well as at the seisin, for access rights.

In sum, we generally agree with the guidance provided by the CJEU in that factual proximity should be considered a fulfilling principle for the child's habitual residence and best interests determination in the context of child civil abduction. In this way, the CJEU has confirmed the principle encapsulated under recital 12, Brussels IIA, overcoming the current debate, which is conversely present under the Hague Convention 1980 where the child's best interests should not be assessed [comprehensively] for the return application (HCCH, Guide to Good Practice Child Abduction Convention: Part VI – Article 13(1)(b); a *contrario*, European Court of Human Rights, *Michnea v. Romania*, no. 10395/19, 7 October 2020). However, it is argued (partly disagreeing with the CJEU statement) that primary focus should be addressed to the mutable personal integration in a better suited social and family environment acquired within the period between the child's birth and the return application (*cf.* CJEU, *HR*, C-512/17, 28 June 2018, § 66; *L v. M*, 2019, EWHC 219 (Fam), § 46). The indefinite retention of jurisdiction, following abduction, should only be a secondary element for the transfer of jurisdiction in favour of the child's new place of settlement after the wrongful removal/ retention to a third State. In practice, it is submitted that if the child had moved to India due to forced removal/ retention by her mother, with no further personal integration established in India, or with it being maintained in England, founded on the child's best interests, the coordinated jurisdictional framework of articles 8 and 10 (and possibly article 12.4) of the Brussels IIA Regulation might have still been retained as applicable (*cf.* Opinion of Advocate General Rantos, § 58-59; as a comparative practice, see also *L v. M*, and to some extent Cour de cassation, civile, Chambre civile 1, 17 janvier 2019, 18-23.849, 5°). That said, from now on the CJEU reasoning should be binding for the EU26 national courts. Therefore, article 10 shall only apply to intra-EU26 cross-border proceedings, unlike articles 8 and 12 governing EU26-third State scenarios.

European Commission: Experts' Group on the Recognition of Parenthood between EU Member States

The European Commission (EC) has issued a call for experts to join an Experts' Group on the Recognition of Parenthood between the Member States of the European Union (EU).

Families are increasingly mobile as they move and travel between the Member States of the EU. Yet, given the differences in Member States' substantive and conflict of laws rules on parenthood, families may face obstacles in having the parenthood of their children recognised when crossing borders within the Union.

The EC is preparing a legislative initiative on the recognition of parenthood between the Member States of the European Union. The goal of this initiative is to ensure that children will maintain their rights in cross-border situations, in particular where families travel or move within the Union.

In this context, the EC seeks **experts to advise it in the preparation of this legislative initiative**. Experts must have proven and relevant competence and experience at EU and / or international level in areas relevant to the recognition of parenthood between EU Member States. In particular, the members of the Expert Group must be experts in one or more of the following areas:

- private international law on family matters;
- Member States' law, and comparative law, on the establishment and recognition of parenthood;
- Union case law on free movement, name and nationality;
- fundamental rights and related case law, in particular under the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR) on or affecting parenthood and nationality; and / or
- the rights of the child and related case law.

The members of the Expert Group will be appointed in their personal capacity to

represent the public interest. The call is not limited to experts with the nationality of one of the EU Member States.

The call for experts will run **until 23 April 2021.** Details about the call can be found at the following here.

this information was provided by Ms Lenka Vysoka, EC.

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

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

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

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

Treaty)

Neither Article 6a of Rome II nor the proposal for an EU Directive are isolated initiatives. A so-called draft Treaty on Business and Human Rights ("*Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*") is currently being prepared by an *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, established in 2014 by the United Nation´s Human Rights Council. Just like it is the case with the EP´s proposal, the 2nd revised UN draft Treaty (dated 6th August 2020) (for comments on the applicable law aspects of the 1st revised draft, see Claire Bright´s note for the BIICL here) contains provisions on international jurisdiction (Article 9, "*Adjudicative Jurisdiction*") and choice of law (Article 11, "*Applicable law*").

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

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

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

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

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

A second sense in which the EP´s choice-of-law approach is to be welcomed is its bold stance in trying to overcome some classic "business & human rights" conundrums by including an ambitious connecting factor, the domicile of the parent company, amongst the possibilities the victim can choose from. Indeed, I personally find this insertion in suggested Art. 6a Rome II very satisfying from a substantive justice (*favor laesi*) point of view: inserting that very connecting factor in Art. 7 Rome II (environmental torts) is one of the main *de lege ferenda* suggestions I considered in my PhD dissertation (*Private International Environmental Litigation before EU Courts: Choice of Law as a Tool of Environmental Global Governance*, Université Catholique de Louvain & Universidad de Granada, 2017. An edited and updated version will be published in 2021 in Hart´s "Studies in Private International Law"), in order to correct some of

the shortcomings of the latter. While not being the ultimate solution for all the various hurdles victims may face in transnational human-rights or environmental litigation, in terms of content-orientedness this connecting factor is a great addition that addresses the core of the policy debate on "business & human rights". Consequently, I politely dissent with Chris Thomale´s assertion that this connecting factor "*has no convincing rationale*". Moreover, I equally dissent from the contention that a choice between the *lex loci damni* and the *lex loci delicti commissi* is already possible via "*a purposive reading of Art. 4 para 1 and 3 Rome II*". For reasons I have explained elsewhere, I do not share this optimistic reading of Art. 4 as being capable of filling the transnational human-rights gap in Rome II. And even supposing that such interpretation was correct, as draft Art. 6a would make explicit what is contended that can be read into Art. 4, it would significantly increase legal certainty for victims and tortfeasors alike (as otherwise some courts could potentially interpret the latter Article as suggested, while others would not).

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

P.I.E.-Peter Lang, 2005, pp. 241-243).

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

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

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

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

threshold (or, rarely, by individuals) come within Art. 7?

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

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

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

There may be ways to try to (artificially) delineate the scopes of Articles 7 and 6a in order to preserve a certain *effet utile* to the current Art. 7, such as those suggested above (geographical location of the tortious result, size or nature of the tortfeasor, type of environmental damage involved), or even on the basis of

whether situations at stake “trigger” any of the environmental dimensions of ECHR-enshrined rights. But, all in all, I would argue towards using the proposed text as a new Art. 7 which would comprise both non-environmentally-related human-rights torts and, comprehensively, all environmental torts.

Art. 7 is dead, long live Article 7.