First impressions from Kirchberg on the EAPO Regulation – Opinion of AG Szpunar in Case C-555/18

Written by Carlos Santaló Goris

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I. Introduction

Less than three years after Regulation 655/2014 establishing a European Account Preservation Order ("the EAPO Regulation") entered into force, the Court of Justice of the European Union ("CJEU") released its first Opinion on this instrument. This regulation established a uniform provisional measure at the European level, which permits creditors the attachment of bank accounts in cross-border pecuniary claims. In many senses, the EAPO regulation represents a huge step forward, particularly in comparison to the *ex-ante* scenario regarding civil provisional measures in the Area of Freedom, Security and Justice. It is no accident that in the first line of the Opinion, AG Szpunar refers to the landmark case *Denilauler.* Besides the concrete assessment of the preliminary reference, he found a chance in this case to broadly analyse the EAPO Regulation as such, contextualizing it within the general framework of the Brussels system.

II. Facts of case

The main facts of this case were substantiated before the First Instance Court of Sofia (Bulgaria). Upon the request of a creditor, this court granted a national order for payment against two debtors. The order for payment was sent to the debtors' domicile as it appeared in the national population register. Since the notification was returned without an acknowledgment of receipt, the debtors were also informed by the posting of a public notice on the door of their "official" domicile. They did not respond to this notification either. In accordance with Bulgarian law, in such occasions, if the creditor does not initiate declaratory

proceedings on the substance of the case to ascertain the existence of a debt, any order for payment would be annulled *o*. In the present case, before proceeding in that manner, the creditor requested an European Account Preservation Order ("EAPO") before the First Instance Court of Sofia, to freeze the debtors' bank accounts in Sweden. This court informed the creditor that he must initiate declaratory proceedings in order to avoid the nullification of the payment order. In the court's view, since the order for payment was not yet enforceable, it could not be considered an authentic instrument. Therefore, based on Article 5(1) of the EAPO, the creditor had to initiate the declaratory proceedings on which he would rely on when applying for the EAPO. Conversely, the President of Second Civil Section of the same court considered that the non-enforceable order for payment was an authentic instrument pursuant to Article 4(10), and thus there was no need for separate proceedings. These different understandings of the regulation led the First Instance Court of Sofia to refer the following questions to the CJEU:

1. *Is a payment order for a monetary claim under Article 410 of the Grazhdanski protsesualen kodeks (Bulgarian Civil Procedure Code; GPK) which has not yet acquired the force of res judicata an authentic instrument within the meaning of Article 4(10) of Regulation (EU) No 655/2014 1 of the European Parliament and of the Council of 15 May 2014?*

2. *If a payment order under Article 410 GPK is not an authentic instrument, must separate proceedings in accordance with Article 5(a) of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 be initiated by application outside the proceedings under Article 410 GPK?*

3. *If a payment order under Article 410 GPK is an authentic instrument, must the court issue its decision within the period laid down in Article 18(1) of Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 if a provision of national law states that periods are suspended during judicial vacations?*

III. "Fitting in" in the autonomous concept of authentic instrument

Firstly, AG Szpunar examined if the payment order fell within the autonomous concept of 'authentic instrument'. Article 4(10) of the EAPO Regulation establish three prerequisites that a document has to satisfy in order to be considered an

authentic instrument: (1) it has to be an authentic instrument in a Member State; (2) the authenticity relates to the signature and the content of the instrument; (3) the authenticity has been established by a public authority or other authority empowered for that purpose.

The AG stated that, whereas the first and the third prerequisites were duly satisfied, the second condition, concerning the authenticity of the content, was not fulfilled. Under Bulgarian law, when creditors apply for a payment order, they do not have to provide the court with any documentary evidence, they simply indicate the basis of their claim and the amount due. Therefore, the judge who grants a preservation order is merely confirming the obligation to pay a debt, but without "authenticating" the content of that obligation. Consequently, in the AG's view, the order for payment would not be an authentic instrument under the regulation. *Obiter dictum*, he considered the payment order to be a judgment under the EAPO Regulation (at para. 46).

IV. Enforceable or not enforceable, that is the question

Retaking and reformulating the original question, AG Szpunar proceeded to analyse if titles other than authentic instruments (e.g. judgments and court settlements), are enforceable for the purposes of the EAPO Regulation (at para. 59). This question is not superfluous. As AG Szpunar remarked, the EAPO Regulation establishes two different regimes: one for creditors without a title, and one for creditors with a title. Creditors who lack a title are subject to stricter conditions when they apply for an EAPO (at para. 53). They have to prove their likelihood of success on the substance of the claim (art. 7.2), and the provision of a security becomes mandatory, unless the court decides to dispense of this requirement if it finds it inappropriate in the particular circumstances of the case (art. 12.1). Furthermore, the court has ten days to render the decision on the EAPO application (art. 18.1), instead of the five working days when the creditor has a title (art. 18.2).

Regarding this question, the European Commission suggested examining whether "enforceability" as a prerequisite for other titles is present under different European civil procedural instruments, particularly in regards to the European Enforcement Order Regulation ("EEO Regulation"), the Maintenance Regulation, and the Brussels I bis Regulation (at para. 51). AG Szpunar declined drawing any comparisons with other regulations due to the "provisional" nature

of the EAPO Regulation. These other instruments are mainly focus on facilitating the enforcement of final decisions on the substance of a claim, thus, the concept of title would have a different understanding (at para. 51). On this basis, AG Szpunar considered it more appropriate to elaborate an "individualized" analysis of the EAPO Regulation and proceeded with a literal, systemic, historical and teleological interpretation of this instrument:

- In the literal and systemic analysis, AG Szpunar found several provisions referring to the different types of title. In particular, he referred to Article 6 (jurisdiction); Article 7 (material prerequisites); Article 12 (security); Article 14 (information mechanism); and Article 18 (time-limits to render the decision on the EAPO application) (at paras. 55 – 59). None of these provisions, except Article 14(1), specify whether the title has to be enforceable or not. Article 14(1) is the sole provision which distinguishes between enforceable and non-enforceable titles. This provision contains the prerequisites that creditors have to satisfy if they want to request information on debtors' bank accounts. Creditors with a non-enforceable title can apply for bank account information, but under a stricter regime than those who have an enforceable title (at para. 64). AG Szpunar considered that this is an exception, in which creditors without an enforceable title are recognized. For the other cases, these creditors would be placed under the same status as creditors without any kind of title (at para. 66).
- The historical interpretation was based on the Commission Proposal of the EAPO Regulation (at paras. 74 -79). This text still operated under an *exequatur* Unlike the current version of the EAPO Regulation, it systematically distinguished between two different regimes, one applied to creditors without an enforceable title or a title enforceable in the Member State of origin; another applied to creditors whose titles were already declared enforceable in the Member State of enforcement. Within the first regime, there were also differences between creditors with an enforceable title and creditors without. Creditors with an enforceable title did not have to prove the *boni fumus iuris.* After the Council reviewed the Commission Proposal, the *exequatur* was removed along with the distinction between enforceable title in the Member State of origin and in the Member State of enforcement. In AG Szpunar's view, both "enforceable" titles would then have been subsumed into the more

generic term of “title”, which did not expressly refer to the enforceability (at para. 79).

- Perhaps the strongest point of the AG’s Opinion was the teleological argument. In AG Szpunar’s view, including non-enforceable titles within the concept of title would impair the balance between the claimants’ and defendants’ rights (at para. 68). As stated above, creditors with a title do not have to prove the existence of the *boni fumus iuri*. This barrier is also a prevention against fraudulent requests of an EAPO. An enlargement of the concept of title would facilitate access to the EAPO, undermining one of the protections against abusive behaviour.

Based on the above reasoning, AG Szpunar concluded that any title for the purposes of the EAPO has to be enforceable.

V. Beyond the preliminary reference: casting light on the EAPO Regulation

The preliminary reference made by the Bulgarian court is a good example of the problems that might arise out of the intersection between domestic procedural law and the uniform procedural rules of the EAPO Regulation. Indeed, observing the questions, they implicitly require a certain analysis (and interpretation) of the domestic procedural system, an inquiry that is not for the CJEU to carry out. This might also be one the reasons why AG Szpunar opted for a more general interpretation of the EAPO Regulation, especially in the second part of the Opinion. It is in this more general overview where we can find the most interesting insights of his analysis. There are three relevant points that I would like to highlight:

- The first one is the distinction made between the EAPO Regulation and other civil procedural instruments based on its provisional nature. Indeed, this is the very first uniform provisional measure at European level, whereas the other instruments to which AG Szpunar referred are mainly focused on the recognition and enforcement decisions of the merits of a claim (with the exception of some jurisdictional rules on provisional measures). One might speculate that, eventually, the CJEU might adopt a different interpretation of the EAPO Regulation, taking into account elements that it shares with other civil procedural instruments.
- The second point is on the dividing line between the two regimes existing

within the EAPO Regulation. The bulk of AG Szpunar's analysis focused on the distinction between the two different regimes implicitly reflected in the EAPO Regulation. This question is fundamental, not only for creditors who might have to satisfy different prerequisites when they apply for an EAPO, but also for the debtors. Neither the systemic nor the literal interpretation of the regulation seem conclusive. Only in the Spanish version is it mentioned that the authentic instruments have to be enforceable ("documento público con fuerza ejecutiva"). Nonetheless, it seems to have been erroneously transposed from the EEO Regulation. The historical interpretation could lead to different conclusions. The suppression of an express reference to the "enforceability" of the title in the final version of the EAPO Regulation could also be understood as the willingness of the European legislator to include non-enforceable titles. Thus, it seems that the only decisive interpretative tool was the teleological one, which leads to the third and final point.

- The last point relates to a pro-defendant interpretation of the EAPO Regulation. By restricting the most lenient regime to those creditors with an enforceable title, the regulation indirectly protects the defendant's position or at least, maintains the *status quo* between both parties. From the debtor's perspective, the EAPO Regulation could be perceived as too "aggressive". Some authors have labelled it as too "creditor-friendly" and this was one of the grounds raised by the United Kingdom when they refused to opt-in to the EAPO Regulation. Despite all the safeguards given to the debtor, this criticism does not come without reason. The regulation operates *inaudita altera parte*, so debtors can only contest the EAPO once it is already enforced. The *fumus boni iuris* discourages abusive and fraudulent behaviour. For that reason, a broad interpretation of "title", encompassing those that are non-enforceable, would allow more creditors to circumvent this prerequisite. In this respect, the AG's approach attempts to maintain the existing fragile equilibrium between both parties.

It is unlikely that in the final judgement the CJEU will reproduce AG Szpunar's extensive analysis of the EAPO Regulation. Nevertheless, this is a good starting point for an instrument that provokes plenty of inquiries and, for the time being, has seen little application by domestic courts. This will not be the last time that an Advocate General confronts a preliminary reference concerning the EAPO

Regulation.

Arbitrating Corporate Law Disputes: A Comparative Analysis of Turkish, Swiss and German Law

Written by Cem Veziroglu

Cem Veziroglu, doctoral candidate at the University of Istanbul and research assistant at Koc University Law School has provided us with an abstract of his paper forthcoming in the European Company and Financial Law Review.

Arbitrating Corporate Law Disputes: A Comparative Analysis of Turkish, Swiss and German Law

The resolution of corporate law disputes by arbitration rather than litigation in national courts has been frequently favoured due to several advantages of arbitration, as well as the risks related to the lack of judicial independence, particularly in emerging markets. While the availability of arbitration appears to be a major factor influencing investment decisions, and there is a strong commercial interest in arbitrating corporate law disputes, the issue is unsurprisingly debated in respect of certain characteristics of the joint stock company as a legal entity. Hence the issue comprises a series of legal challenges related to both corporate law and arbitration law.

In a paper forthcoming in the European Company and Financial Law Review, I tackle *the arbitrability of corporate law disputes* and *the validity of arbitration clauses stipulated in the articles of association* ("AoA") of joint stock companies. The study compares Turkish law with that of Germany and Switzerland and in particular tries to shed light on the current position of Turkish law with respect to

(i) arbitrability of corporate law disputes, such as validity of general assembly resolutions and requests for corporate dissolution, (ii) validity and binding nature of an arbitration clause provided in the AoA. The paper also suggests practicable legislative recommendations as well as a model arbitration clause.

Arbitrability of Corporate Law Disputes

Under Turkish law corporate law disputes are, in principle, considered to be arbitrable, whereas disputes concerning the *validity of general assembly resolutions* and *corporate dissolution* are still heavily debated. I argue that both types of disputes are arbitrable, albeit judicial dissolution requests accommodate practical hurdles due to the magnitude of remedial power granted to judges by law. Moreover, I suggest that arbitral awards should be granted an *erga omnes* effect (the effects exceeding the parties to the dispute), as long as the interested third parties are provided with the necessary procedural protection. These procedural mechanisms may include the pending and consolidation of all actions filed before the arbitral tribunal and collective – or impartial – selection of arbitrators in multy-party arbitral proceedings.

It seems that the case law has thus far followed the distinction adopted by the orthodox doctrine in general terms; namely disputes concerning the validity of general assembly resolutions and corporate dissolution are deemed inarbitrable. However, considering the ever-growing pro-arbitration tendency in Turkey –in parallel with many other jurisdictions– it would not be surprising if a more flexible approach is eventually adopted in case law as well.

Place of the Arbitration Clause: Articles of Association or Shareholders Agreement?

It is necessary to provide an arbitration clause in the AoA of the company, rather than a shareholders' agreement ("SHA"), in order to (**i**) prevent contradicting judgments handed down in parallel proceedings, (**ii**) be able to request claims peculiar to corporate law and (**iii**) ensure the binding effect *vis-à-vis* the company, board members and new shareholders as well as the current shareholders.

Validity of an Arbitration Clause Provided in the AoA

There is no rule under Turkish corporate law that restricts contractual freedom within the AoA of privately held joint stock companies that has the effect of

restraining arbitration clauses. An arbitration clause can, therefore, be validly provided either in the original AoA or by way of an amendment thereof by way of a unanimous vote. However, the binding effect of the arbitration clause in question depends on its legal nature, namely, 'corporative' or 'formal' (contractual).

Addressing this issue, the paper proposes to adopt a two-step test and concludes that if an arbitration clause stipulated in the AoA is deemed corporative in nature, the company, the board members, the new shareholders, and the current shareholders are bound by such an arbitration clause. In the event that the arbitration clause in question is deemed to be a formal provision, it may still remain effective only among the parties as a purely contractual term.

Policy Recommendations

The arbitrability of corporate law disputes, the validity of arbitration clauses stipulated in the AoAs and the procedural standards to protect third parties' interests should be clarified by an explicit legal provision. In fact, Article 697n of the Swiss Draft Code of Obligations dated 23 November 2016[1] and Italian Legislative Decree of 17 January 2003 No. 5 Articles 34-37 may offer motivating examples in this respect.

According to German Federal Court's decision in 2009[2], an arbitration clause in the AoA is valid, provided that the protections and the opportunity of shareholders to participate in the proceedings comparable to those in national court proceedings are respected. Therefore Turkish courts should examine the arbitration clause in question in terms of the protection provided to shareholders, rather than applying an outright ban on such clauses in the AoA.

The leading arbitration institutions should draft and publish rules for corporate law disputes as annexes to their existing rules of arbitration. These should consider the issues peculiar to corporate law disputes. Hence, they should provide such mechanisms as the pending and consolidation of actions filed before the arbitral tribunal; collective -or impartial- selection of arbitrators so as to provide the minimum legal procedural protection granted to shareholders. A comprehensive example is the German Arbitration Institution's 'DIS-Supplementary Rules for Corporate Law Disputes 09'[3].

With a view to facilitating the incorporation of applicable and valid arbitration

clauses into the AoA, a model arbitration clause for corporate law disputes should be published by leading arbitration institutions. Such a model clause may be inspired by the draft model clause found in the paper referenced above.

[1] https://www.admin.ch/opc/fr/federal-gazette/2017/625.pdf.

[2] BGH, 6 April 2009, II ZR 255/08, BGHZ 180, 221.

[3] The said rules can be found at: http://www.disarb.org/en/16/rules/dis-supplementary-rules-for-corporate-law-disputes-09-srcold-id15.

CJEU confirms that an actio pauliana is a matter relating to a contract: Case C-722/17 Reitbauer et al v Casamassima

Written by Michiel Poesen

Less than a year after its decision in Case C-337/17 Feniks (discussed here), the Court of Justice had another opportunity to consider the extent to which the Brussels Ia Regulation provides a head of special jurisdiction for an actio pauliana*. In Case C-722/17 Reitbauer (decided last Wednesday but still not available in English), the Court confirmed its decision in* Feniks*, according to which such an action falls under Art 7(1) Brussels Ia if it is based on a contractual right.* ***Michiel Poesen****, PhD candidate at KU Leuven, has been so kind as to share his thoughts on the decision with us in the following post.*

Earlier this week, the Court of Justice of the European Union found that an *actio pauliana* is subject to jurisdiction in matters relating to a contract, contained in Article 7(1) Brussels Ia (Case C-722/17 *Reitbauer*).

In general terms, the *actio pauliana* is a remedy that allows a creditor to have an act declared ineffective, because said act was carried out by a debtor with the purpose of diminishing its assets by passing them on to a third party (see Opinion of AG Bobek, C-337/17 *Feniks*, [35]). This blogpost will briefly summarise the Court's ruling and its wider impact.

Facts

The facts leading to the ruling are quite complex. Mr Casamassima and Ms Isabel C., both resident in Rome, lived together at least until the spring of 2014. In 2010, they purchased a house in Villach, Austria. While Mr Casamassima apparently funded the transaction, Isabel C. was registered in the land register as the sole owner.

Ms Isabel C. – with the 'participation' of Mr Casamassima – entered into contracts for extensive renovation works of the house with Reitbauer and others (the applicants in the preliminary reference proceedings, hereinafter referred to as 'Reitbauer'). Because the costs of the renovation far exceeded the original budget, payments to Reitbauer were suspended. From 2013 onwards, Reitbauer were therefore involved in judicial proceedings in Austria against Ms Isabel C. Early 2014, the first of a series of judgments was entered in favour of Reitbauer. Ms Isabel C. appealed against those judgments.

On 7 May 2014 before a court in Rome, Ms Isabel C. acknowledged Mr Casamassima's claim against her with respect to a loan agreement which was granted by the latter in order to finance the acquisition of the house in Villach. Ms Isabel C. undertook to pay this amount to the latter under a court settlement. In addition, she agreed to have a mortgage registered on the house in Villach in order to secure Mr Casamassima's claim.

On 13 June 2014 a (further) certificate of indebtedness and pledge certificate was drawn up in Vienna by a notary to guarantee the above settlement ('the pledge'). With this certificate, the pledge on the house in Villach was created on 18 June 2014.

The judgments in favour of Reitbauer did not become enforceable until after this date. The pledges on the house of Ms Isabel C. held by Reitbauer, obtained by way of legal enforcement proceedings, therefore ranked behind the pledge in favour of Ms Casamassima.

In order to realise the pledge, Mr Casamassima applied in February 2016 to the referring court (the District Court in Villach, Austria) for an order against Ms Isabel C., requiring a compulsory auction of the house in Villach. The house was auctioned off in the autumn of 2016. The order of entries in the land register shows that the proceeds would go more or less entirely to Mr Casamassima because of the pledge.

With a view to preventing this, Reitbauer brought an action for avoidance (*'Anfechtungsklage'*) in June 2016 before the Regional Court in Klagenfurt, Austria, against Mr Casamassima and Ms Isabel C. The action was dismissed by that court due to a lack of international jurisdiction, given Casamassima's and Isabel C's domicile outside of Austria.

At the same time, Reitbauer filed an opposition before the district court of Villach, Austria, in the course of the proceedings regarding distribution of the proceeds from the compulsory auction, and subsequently brought opposition proceedings against Mr Casamassima. In these opposition proceedings, Reitbauer sought a declaration **1)** that the decision regarding the distribution to Mr Casamassima of the proceeds of the action was not legally valid for reasons of compensation between Ms Isabel C.'s claims and those of Mr Casamassima, and **2)** that the pledge certificate was drawn up to frustrate Reitbauer's enforcement proceedings with regard to the house in Villach. Essentially, the second part of Reitbauer's action was based on the allegation that Ms Isabel C. had acted with fraudulent intent, therefore being a form of *actio pauliana*.

Decision

The Court of Justice had to consider first whether jurisdiction in proceedings that have as their object rights *in rem* in immovable property or tenancies of immovable property, provided in Article 24(1) Brussels Ia, was applicable. To trigger this ground of jurisdiction, Reitbauer and others alleged that their action was closely related to the house in Villach.

In reaching its conclusion, the Court reiterated that Article 24(1) Brussels Ia does not encompass all actions concerning rights *in rem* in immovable property, but only those which both come within the scope of th Regulation and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide

the holders of those rights with protection for the powers which attach to their interest (Case C-722 *Reitbauer*, [44]; see also Case C?417/15 *Schmidt*, [30])

This definition implies that an action was based on rights *in rem*, not on rights *in personam*. The part of the action alleging compensation between Casamassima's and Isabel C.'s claims does not satisfy this requirement, as it aims at contesting the existence of the Mr Casamassima's right *in personam* that was the cause of the enforcement proceedings.

The second part of the action, the *actio pauliana*, does not fit within *in rem* jurisdiction either. The Court found that such an action does not involve the assessment of facts or the application of rules and practices of the *locus rei sitae* in such a way as to justify conferring jurisdiction on a court of the State in which the property is situated (Case C-722 *Reitbauer*, [48]; see also C-115/88 *Reichert I*, [12]).

Having come to this conclusion, the Court decided that jurisdiction over the actions brought by Reitbauer and others was not subject to Article 24(5) Brussels Ia either – which contains a special ground of jurisdiction "in proceedings concerned with the enforcement of judgments". According to the Court, this bespoke ground of jurisdiction is to be understood as englobing proceedings that may arise from "recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments" (Case C-722 *Reitbauer*, [52]; see also Case C?261/90 *Reichert II*, [28]) .

Reitbauer and others' actions were clearly not related to the enforcement of the judgment but to the substantive rights underlying the pledge which was being enforced. For that reason, enforcement jurisdiction was to remain inapplicable.

Having reached the conclusion that no exclusive ground of jurisdiction could apply, the Court went on to consider Art 7(1) Brussels Ia – jurisdiction in matters relating to a contract. Following a short motivation (Case C-722 *Reitbauer*, [56]–[62]) the Court confirmed that the part of Reitbauer and others' action amounting to an *actio pauliana* was a matter relating to a contract. As in the *Feniks* ruling, the reason cited is that the action aims at preserving Reitbauer and others' contractual rights by setting aside the creditor's allegedly fraudulent acts (Case C-722 *Reitbauer*, [58]–[59]; Case C-337/17 *Feniks*, [43]–[44]).

As a consequence, Art 7(1)(b) Brussels Ia allocates jurisdiction to the place of performance of the allegedly defrauded contract, being Villach since Reitbauer and others delivered their renovation services in that location (see Case C-337/17 *Feniks*, [46]).

The Purpose and Role of Art 7(1) Brussels Ia

As far as the exclusive grounds of jurisdiction in Art 24(1) and 24(5) Brussels Ia are concerned, the decision can hardly be considered surprising. Reitbauer and others tried to plead their actions as relating to a matter covered by exclusive jurisdiction, with the aim of suing the Italian domiciled defendants in Austria instead of Italy (which would be the outcome of the default rule of jurisdiction of Art 4(1) Brussels Ia). This attempt was bound to fail.

More interestingly, the Court confirmed that an *action pauliana* can be a matter relating to a contract. This emerging line of case law is met with criticism. One of the points raised was that a defendant may be ignorant of the contract it allegedly helped to defraud. In such a situation, applying contract jurisdiction would trigger a forum that is unforeseeable for the defendant (an outcome that the Court rightly attempted to avoid in Case C-26/91 *Handte*, [19]). A response to this criticism would be not to apply contract jurisdiction to an *actio pauliana* altogether, as suggested earlier by AG Bobek (Opinion of AG Bobek, C-337/17 *Feniks*, [62]–[72]). There, the AG opined that an *actio pauliana* is too tenuously and too remotely linked to a contract to be a matter relating to a contract for the purpose of Art 7(1) Brussels Ia. Alternatively, AG Tanchev opined that the defendant's knowledge should be taken into account (Opinion in Case C-722/17):

> *[84] … knowledge of a third party should act as a limiting factor: … the third party needs to know that the legal act binds the defendant to the debtor and that that causes harm to the contractual rights of another creditor of the debtor (the applicants).*
>
> *[92] … the defendant's knowledge of the existence of the contract(s) at issue is important.*

Instead of realigning the *Feniks* ruling with the principle of foreseeability, the decision in *Reitbauer* confirmed that an *actio pauliana* fits squarely within jurisdiction in matters relating to a contract, the driving factor seemingly being

the hope to offer the claimant an additional forum that presumably has a close connection to the dispute (Case C-722 *Reitbauer*, [60]: Case C-337/17 *Feniks*, [44]–[45]).

Looking beyond the *actio pauliana*, the case law begs the question what other types of remedies – however remotely linked to a contract – could be subject to Art 7(1) Brussels Ia. An action for wrongful interference with contract, for example, regarded to be tortious in nature (e.g. *Tesam Distribution Ltd v Schuh Mode Team GmbH and Commerzbank AG* [1990] I.L.Pr. 149), would be a matter relating to a contract by the standard applied in *Feniks* and *Reitbauer*. It is doubtful whether such a broad construction of jurisdiction in matters relating to a contract complies with the limited role of Art 7(1) Brussels Ia within the Regulation (Recital (15) Brussels Ia).

A Resurrection of Shevill? – AG Szpunar's Opinion in Glawischnig-Piesczek v Facebook Ireland (C-18/18)

Written by Anna Bizer

Anna Bizer, doctoral candidate at the University of Freiburg, has kindly provided us with her thoughts on AG Szpunar's opinion in the case of Glawischnig-Piesczek v Facebook Ireland (C-18/18).

Since the EP-proposal from 2012, the European Union has not shown any efforts to fill the gap still existing in the Rome II Regulation regarding violations of personality rights (Article 1(2)(g)). However, Advocate General Szpunar has just offered some thoughts on the issue in his opinion on the case of *Eva Glawischnig-Piesczek v Facebook Ireland Limited* (C-18/18) from 18 June 2019.

Eva Glawischnig-Piesczek, an Austrian politician, claimed that a Facebook user had violated her personality right by posting a defamatory comment on the social network. She sued Facebook Ireland for the removal of the publication in question as well as other identical and/or equivalent publications. The commercial court in Vienna granted a corresponding injunction and Facebook Ireland did indeed disable access to the publication – but only in Austria by means of geo-blocking. Hereafter, the Austrian Supreme Court referred various questions to the CJEU regarding the interpretation of Article 15(1) of the e-Commerce Directive (Directive 2000/31) which prohibits the imposition of a general monitoring obligation on host providers. While the details of the responsibility of host providers regarding their users' activities are certainly interesting, this comment focuses on the territorial dimension of the provider's obligation to delete certain online content. So, the crucial question is whether an Austrian court may oblige Facebook Ireland to make a user's comment globally inaccessible or whether the injunction is limited to the respective state of the court.

First of all, the AG addresses the issue of jurisdiction by referring to the CJEU's *eDate* decision (C-509/09, C-161/10): *„the court of a Member State may, as a general rule, adjudicate on the removal of content outside the territory of that Member State, as the territorial extent of its jurisdiction is universal. A court of a Member State may be prevented from adjudicating on a removal worldwide not because of a question of jurisdiction but, possibly, because of a question of substance."* (para. 86) This statement is, in fact, convincing as the CJEU decided in *Bolagsupplysningen* (C-194/16, para. 48) that the removal of content is a single and indivisible application which can only be made by a court with "universal" jurisdiction (see our earlier posts here and here).

AG Szpunar further states that the territorial dimension of an injunction cannot be determined by Articles 1, 7 and 8 of the Charter of Fundamental Rights because the original claim was not based on EU law and was therefore outside the scope of the Charter (para. 89). In addition, neither did the claimant invoke the European law on data protection (para. 90) nor does the Brussels I*bis* Regulation require that an injunction issued by the court of a Member State also has effects in third states (para. 91). Thus, the AG's – convincing – result is that EU law does not regulate the question of the territorial scope of an injunction regarding the violation of personality rights (para. 93).

However – and now the interesting part begins – AG Szpunar elaborates on the

question of assessing cross-border violations of personality rights in case the CJEU did not agree with the inapplicability of EU law (para. 94-103). These considerations are not based on any legal text as, according to the AG, the question is not regulated by EU law.

Generally, AG Szpunar is not comfortable with a worldwide obligation to remove an online publication, "*because of the illegality of that information established under an applicable law,* [such an obligation] *would have the consequence that the finding of its illegality would have effects in other States. In other words, the finding of the illegal nature of the information in question would extend to the territories of those other States*" (para. 80). To avoid this effect, a worldwide obligation of removal could only be justified when all potentially applicable laws agree. Of course, this leads to disadvantages: "*should a claimant be required, in spite of the practical difficulties, to prove that the information characterised as illegal according to the law designated as applicable under the conflict rules of the Member State in which he brought the action is illegal according to all the potentially applicable laws?*" (para. 97). AG Szpunar leaves this question unanswered and continues to focus on the freedom of information: „*the legitimate public interest in having access to information will necessarily vary, depending on its geographic location, from one third State to another. Thus, as regards removal worldwide, there is a danger that its implementation will prevent persons established in States other than that of the court seised from having access to the information*." (para. 99)

To avoid this conflict between the freedom of information and personality rights, AG Szpunar recommends the following: "*However, owing to the differences between, on the one hand, national laws and, on the other, the protection of the private life and personality rights provided for in those laws, and in order to respect the widely recognised fundamental rights, such* ***a court must****, rather,* ***adopt an approach of self-limitation****. Therefore, in the interest of international comity […] that court should, as far as possible, limit the extraterritorial effects of its junctions concerning harm to private life and personality rights. The implementation of a removal obligation should not go beyond what is necessary to achieve the protection of the injured person. Thus, instead of removing the content, that court might, in an appropriate case, order that access to that information be disabled with the help of geo-blocking*." (para. 100) "*Those considerations cannot be called into question by the applicant's argument that the*

geo-blocking of the illegal information could be easily circumvented by a proxy server or by other means." (Rz. 101)

First, it is noteworthy that the AG strongly emphasizes the freedom of information. So far, this aspect has been rather neglected in the discussion on violations of personality rights compared to freedom of speech and freedom of the press. However, including freedom of information in the balancing of interest reflects that a publication necessarily requires to be noted by at least one other person to have defamatory effects.

Second, the AG sees the solution in geo-blocking. This solution can of course be considered worthy to be debated further as geo-blocking is already a popular means used amongst host providers. However, it is not clear from the AG's statement why the risk of circumvention should not be considered, although any order by a court to protect personality rights ought to be effective. In any case, this approach conflicts with the efforts of the European Union to restrict geo-blocking within the internal market (Regulation (EU) 2018/302) and should thus not be supported.

Third, the AG's approach leads to a rather unsatisfactory result for the claimant. One should not forget how the internet generally and social media especially operate: interesting content will be shared and disseminated again and again. These new publications, however, will not be restricted by geo-blocking unless the host provider actively intervenes.

Fourth, it is doubtful if the AG's approach is fit for reality: the idea of an approach of self-limitation for the courts based on the question "What is really necessary?" appears rather vague and not helpful for the deciding judges. This question is of a fundamental nature and requires an evaluative assessment. In order to achieve legal certainty, this crucial question of necessity should be answered by the legislature or at least the CJEU and should not be decided on a case-by-case-basis.

Fifth, one has to consider the effects of this proposal in the context of conflict of laws in a technical sense: if a claimant wanted Facebook to delete a publication globally and a court had "universal" jurisdiction according to *eDate* and *Bolagsupplysningen*, the court – in accordance with the suggestion of the AG – would have to apply the laws of each state from which the publication is still accessible. To make a long story short: Adopting the AG's proposal means

resurrecting the mosaic approach in conflict of laws! This appears to be a step backwards. Not only are the disadvantages of the mosaic principle in times of the internet commonly known, but also this approach contradicts the CJEU's rejection of the mosaic principle regarding the question of jurisdiction in actions for the removal of publications (*Bolagsupplysningen*).

Finally, the question of the direct consequences of this opinion remains. It is likely that the CJEU will follow the first proposal of AG Szpunar that the question of the territorial dimension of an injunction for the violation of personality rights is not regulated by EU law and can thus not be decided by the CJEU. However, the AG's opinion offers a new and interesting perspective on the issue of cross-border violations of personality rights which might give a boost to achieve international harmonisation.

Conclusion of the HCCH Judgments Convention: The objectives and architecture of the Judgments Convention, a brief overview of some key provisions, and what's next?

Prepared by Cara North, external consultant to the Permanent Bureau of the Hague Conference on Private International Law (HCCH). This post reflects only personal views.

Today marks a momentous occasion (in the private international law world at least): the conclusion of the Diplomatic Session on the *HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters* ("Judgments Convention"). A Convention that, as noted by the Secretary

General of the Hague Conference on Private International Law ("HCCH") during his opening remarks for the Session, will be a "*gamechanger for cross-border dispute settlement and an apex stone for global efforts to improve real and effective access to justice*."

The origins of the Judgments Convention date back to the early 1990s with a proposal from the United States of America for a mixed convention dealing with the exercise of jurisdiction and the recognition and enforcement of foreign judgments. After many years of hard work on a draft instrument, it was decided that such an instrument was indeed too ambitious, and it was preferable for the HCCH to focus on more specific projects that fell within the remit of that work. The HCCH refocussed its energies on an instrument concerning exclusive choice of court agreements and, with the benefit of the hard work undertaken in the early 1990s, the *Convention on Choice of Court Agreements* ("Choice of Court Convention") was concluded in 2005. That Convention entered in to force in 2015 with Mexico and the European Union becoming Contracting Parties. Since then, Singapore and Montenegro have followed suit and a few other States have either signed the Convention or otherwise indicated their intention to become party to the Convention.

Following the successful conclusion of the Choice of Court Convention, the HCCH once again took stock of potential future projects. In 2012, the train was set in motion for work and negotiations on the Judgments Convention to commence. At first it was decided that the work on the recognition and enforcement of foreign judgments would be undertaken alongside work on regulating international jurisdiction in civil or commercial matters. However, it was then decided that work would first proceed on drafting an instrument on the recognition and enforcement of judgments, with work on international jurisdiction to follow thereafter.

Some seven years and many meetings later, the Judgments Convention has been concluded. Sharing in the enthusiasm for this long-standing project Uruguay signed the Convention today.

The Objectives and Architecture of the Judgments Convention

Broadly speaking, like the Choice of Court Convention, the objectives of the Judgments Convention are (i) enhancing access to justice and (ii) facilitating

cross-border trade and investment by reducing the costs and risks associated with cross-border dealings.

Building on the hard work undertaken in the early 2000s to complete the Choice of Court Convention and with the intention of the Judgments Convention operating as a sister instrument to the Choice of Court Convention, the Judgments Convention took, where appropriate, the basic structure and provisions of the Choice of Court Convention as its starting point. The working method adopted was to depart from the provisions of the Choice of Court Convention only where there was good reason to do so.

With that basic structure and working method in mind, work then focussed on the circumstances in which it would be largely uncontroversial for a civil or commercial judgment rendered in the courts of one Contracting State to be recognised and enforced in the courts of another Contracting State.

A comprehensive overview of the provisions in the Judgments Convention will be found in the forthcoming Explanatory Report to the Judgments Convention. This blog post serves to highlight just some of the key provisions.

A Brief Overview of Some Key Provisions

The Convention is separated into four chapters. **Chapter I** concerns the scope and definitions. Articles 1 and 2 provide the scope of the Convention (*i.e.*, civil or commercial matters) and Article 2 of the Convention provides a number of exclusions from scope. ***In some respects, these exclusions mirror the exclusions found in the Choice of Court Convention. There are, however, some notable differences including the exclusion of privacy matters and the exclusion of intellectual property matters (a topic which was the subject of a considerable amount of consultation and discussion), as well as some notable inclusions such as certain tort matters, judgments ruling on rights* in rem *in immovable property and tenancies of immovable property as well as a very limited number of anti-trust (competition) law matters*** (emphasis added). Article 3 provides a number of important definitions, including the definition of "judgment". The Convention provides for the circulation of final judgments, this includes both money and non-money judgments. This is of particular importance because while some jurisdictions recognise and enforce money judgments under national law, the traditional

approach under others (*e.g.*, under the common law system) is to decline to enforce non-money judgments.

Chapter II contains several core provisions. Most importantly, it identifies the judgments that are eligible for recognition and enforcement and sets out the process for the recognition and enforcement of those judgments. In this respect, Article 4 contains the core obligation under the Convention. It provides that "*a judgment given by a court of a Contracting State shall be recognised and enforced in another Contracting State in accordance with [Chapter 2 of the Convention].*" Article 5 then sets out the categories of judgments that are eligible for recognition and enforcement. It contains an exhaustive list of indirect grounds of jurisdiction. These grounds fall into three broad categories based on (i) the connection between the State of origin and the defendant (*e.g.*, habitual residence in the State of origin), (ii) jurisdiction based on consent (*e.g.*, express consent to the court of origin in the course of proceedings) or (iii) a connection between the claim and the State of origin (*e.g.*, place of performance of the contract). Some of these grounds are commonly found in regional instruments concerning the recognition and enforcement of judgments in civil or commercial matters and/or are under the national law of many jurisdictions, for other jurisdictions the provisions will significantly broaden the basis on which courts will be obliged to recognise and enforce foreign judgments. At this juncture, it should be noted that the Convention, with one exception, does not limit recognition and enforcement under national law in any way. Article 15 of the Convention provides that, subject to Article 6, the Convention does not prevent the recognition or enforcement of judgments under national law. Article 6 contains one exclusive basis of jurisdiction concerning rights *in rem* in immovable property. It provides that where a judgment ruled on rights *in rem* in immovable property, that judgment will be recognised and enforced under the Convention if and only if the State of origin is the State in which the property is situated. Article 7(1) contains the specific grounds on which recognition or enforcement *may* be refused. There are two categories of grounds (i) based on the way the proceedings took place in the State of origin (*e.g.*, improper notice); or (ii) based on the nature and content of the judgment (*e.g.*, where the judgment is inconsistent with a judgment given by a court of the State in which enforcement is sought).

Articles 8 to 11 provide for specific issues concerning the interpretation and application of the Convention and Articles 12 to 14 concern the process for

recognition and enforcement of judgments under the Convention and largely mirror the relevant Choice of Court Convention provisions. As noted above, Article 15 – the last Article in Chapter II – is an important provision in that it cements the basic premise of the Judgments Convention *i.e.*, that it sets the minimum standards for the recognition and enforcement of judgments among Contracting States.

Chapter III deals with general clauses and importantly includes a number of permissible declarations such as (i) declarations with respect to specific matters (Article 18) which enables a State to declare that it will not apply the Convention to a specific matter where that State has a strong interest in doing so (the same provision is found in Article 21 of the Choice of Court Convention); and (ii) declarations with respect to judgments pertaining to States (Article 19). Article 19 enables a State to make a declaration excluding the application of the Convention to judgments which arose from proceedings to which a State was a party, even where the judgment relates to civil or commercial matters.

Finally, **Chapter IV** of the Convention deals with final clauses, which concern important matters such as the process for ratification of the Convention and the establishment of treaty relations between Contracting States.

What's next?

With the successful conclusion of the Judgments Convention, the HCCH can once again look to future projects in the area of international civil and commercial litigation. So, what's next for the work programme of the HCCH in this space?

First, the HCCH is set to resume work on matters relating to jurisdiction. The 2019 Conclusions and Recommendations following the meeting of the Council on General Affairs and Policy (the governing body that sets the work programme of the HCCH) provide that in February 2020 the Experts' Group will resume its work "*addressing matters relating to jurisdiction with a view to preparing an additional instrument*".

Second, as a decision was made to exclude intellectual property matters from the scope of the Convention, the Diplomatic Session invited "*the Council on General Affairs and Policy to consider, at its 2020 meeting, what, if any, further work it wishes the HCCH to undertake on the intersection between private international law and intellectual property*". This decision was recorded in the Final Act of the

Judgments Convention.

Decades since work commenced in this area, the conclusion of the Judgments Convention is a significant milestone for the HCCH. But more importantly, with the exponential growth in international trade since the commencement of the Judgments Project, and the consequential corresponding increase in the number of transnational commercial disputes, it is now more important than ever for parties engaged in cross-border disputes to have effective access to justice. Once widely ratified, the Convention will go a long way toward enhancing access to justice and facilitating cross-border trade and investment.

DONE! An important day for global justice and the Hague Conference on Private International Law

Posted for the Permanent Bureau of the Hague Conference on Private International Law (HCCH)

Today, the delegates of the 22nd Diplomatic Session of the HCCH signed the Final Act of the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters – the birth of new treaty and an important day for global justice as well as for the HCCH.

The signing of the Final Act took place during a ceremony in the Great Hall of Justice in the Peace Palace in the presence of the Minister of Foreign Affairs of the Kingdom of the Netherlands, Mr Stef Blok.

The Minister emphasised that the new Convention: “enhances the legal certainty and predictability that is so important in international legal matters…”.

This new Convention will be essential to reducing transactional and litigation costs in cross-border dealings and to promoting international access to justice. It will increase certainty and predictability, promote the better management of transaction and litigation risks, and shorten timeframes for the recognition and enforcement of a judgement in other jurisdictions, providing better, more effective, and cheaper justice for individuals and businesses alike. A true gamechanger in international dispute resolution.

The Secretary General of the HCCH, Dr Christophe Bernasconi, stressed that the 2019 Judgments Convention fills an important gap in private international law. He also reminded delegates that with the signing of the Final Act, the work of promoting the 2019 Judgments Convention has only just begun. Professor Paul Vlas, President of the 22nd Diplomatic Session, echoed this sentiment and reiterated that the fast, wide and effective uptake of the Convention by the international community is its next milestone.

After the signing of the Final Act, Uruguay signed as first State the new 2019 Judgments Convention.

The text of the 2019 Judgments Convention, the HCCH's 40th global instrument, will be available shortly on www.hcch.net.

A new HCCH Convention … almost here.

Posted for the Permanent Bureau of the Hague Conference on Private International Law:

Today, the HCCH finalised the text for a new multilateral treaty: the 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

The 2019 HCCH Judgments Convention will be a single global framework, enabling the free circulation of judgments in civil or commercial matters across borders. It will be essential to reducing the transactional and litigation costs in cross-border dealings and to promoting international access to justice. It will provide a legal regime that further increases certainty and predictability in cross-border dealings, promotes the better management of transaction and litigation risks, and which shortens timeframes for the recognition and enforcement of a judgement in other jurisdictions.

The 2019 HCCH Judgments Convention will provide better, more effective, and cheaper justice for individuals and businesses alike – a gamechanger in international dispute resolution.

The Final Act will be signed during a ceremony which will take place tomorrow, 2 July 2019, in the Great Hall of Justice in the Peace Palace.

Follow the HCCH on this journey with #2019HCCHDS and #2019HCCHJudgments

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The thing that should not be: European Enforcement Order bypassing acta jure imperii

In a dispute between two Cypriot citizens and the Republic of Turkey concerning the enforcement of a European Enforcement Order issued by a Cypriot court, the Thessaloniki CoA was confronted with the question, whether the refusal of the Thessaloniki Land Registry to register a writ of control against property of the Turkish State located in Thessaloniki was

in line with the EEO Regulation.

I. THE FACTS

The dispute began in 2013, when two Cypriot citizens filed a claim for damages against the Republic of Turkey before the Nicosia Disctrict Court. The request concerned compensation for deprivation of enjoyment of their property since July 1974 in Kyrenia, a city occupied by the Turkish military forces during the 1974 invasion on the island. The Kyrenia District Court **(***Eparchiakó Dikastírio Kerýneias*), which operates since July 1974 in Nicosia, issued in May 2014 its ruling, granting damages to the claimants in the altitude of 9 million €. Almost a year later, the latter requested the same court to issue a certificate of European Enforcement Order. The application was granted. Within the same year, the claimants filed an application before the Athens Court of first Instance for the recognition and enforcement of the Cypriot judgment. Prima facie it seems to be a useless step, however there was a rationale behind it; I will come back to the matter later on. The Athens court granted exequatur (Athens CFI 2407/2015, unreported).

Following almost a year of inactivity, the claimants decided to proceed to the execution of their title by attaching property of the Turkish State in Thessaloniki. Pursuant to domestic rules, the enforcement agent serves the distraint order to the debtor; afterwards, (s)he requests the order to be registered at the territorially competent land registry. Both actions are imperative by law. At this point, the chief officer of the land registry refused to proceed to registration, invoking Article 923 Greek Code of Civil Procedure (CCP) which reads as follows: *Compulsory enforcement against a foreign State may not take place without a prior leave of the Minister of Justice*. The claimants challenged the registrar's refusal by filing an application pursuant to Article 791 CCP, which aims at the obligation of the registrar to proceed to registration by virtue of a court order. The Thessaloniki 1. Instance court dismissed the application (Thessaloniki CFI 8363/2017, unreported). The claimants appealed.

II. THE RULING

The Thessaloniki CoA dismissed the appeal, confirming the first instance ruling in its entirety. It began from the right of the land registrar to a review of legality, thus the right to examine the request beyond possible formality gaps. It then referred to Articles 6.1 ECHR, 1 of the 1. Additional Protocol to the ECHR, and Articles 2.3 (c) and 14 of the 1966 International Covenant on Civil and Political Rights, in order to support the right to enforcement against a foreign State. The appellate court continued by analyzing Article 923 CCP and its importance in the domestic legal order. It emphasized the objective of the provision, i.e. to estimate potential repercussions and to avoid possible tensions with the foreign State in case of execution. The court founded its analysis on two ECHR rulings, i.e. the judgments in the *Kalogeropoulou and* Others *v. Greece and* Germany (59021/00), and *Vlastos v. Greece* (28803/07) cases, adding two rulings of the Full Bench of the Greek Supreme Court from 2002. Finally, the court concluded that there has not been a violation of the EEO Regulation, stating that the process under Article 923 CCP is not to be considered as part of *intermediate proceedings needed to be brought in the Member State of enforcement prior ro recognition and enforcement*; hence, the rule in Article 1 of the EEO Regulation is not violated.

III. COMMENTS

In general terms, one has to agree with the outcome of the case. Nevertheless, there are a number of issues to be underlined, so that the reader gets the full picture of the dispute.

- The claim before the Kyrenia District Court bears some similarities with the ruling of the ECJ in the *Apostolidis/Orams* case: The Court decided then that: *The suspension of the application of the acquis communautaire in those areas of the Republic of Cyprus in which the Government of that Member State does not exercise effective control, provided for by Article 1(1) of Protocol No 10 on Cyprus to the Act concerning the conditions of accession [to the European Union] … does not preclude the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to a judgment which is given by a Cypriot court sitting in the area*

of the island effectively controlled by the Cypriot Government, but concerns land situated in areas not so controlled. In both cases, the property under dispute was located in the Kyrenia district. The difference lies in the defendants: Unlike the *Orams* case, the respondent here was a foreign State. Article 4 Brussels I Regulation grants the right to claimants to avail themselves of domestic rules of jurisdiction, which is presumably what the claimants did in the case at hand.

- The issue of the EEO certificate seems to run contrary to Article 2.1 EEO Regulation. The matter was not examined by the Thessaloniki courts, which focused on the subject matter, i.e. the refusal of the land registrar on the grounds of Article 923 CCP.
- The exequatur proceedings in Greece seem to be superfluous, given that a EEO may be enforced without the need for a declaration of enforceability (Article 5 EEO Regulation). One reason which possibly triggered additional exequatur proceedings might have been the fact that, unlike the EEO Regulation, the acta iure imperii clause was not included in the Brussels I Regulation (see Article 1.1). Still, the matter was examined in the *Lechouritou* case even before the entry into force of the Brussels I bis Regulation. Hence, it would not have made a difference in the first place.
- The appellate court focused on the compatibility of Article 923 CCP with the EEO Regulation. However, the claimants carried out the execution in Greece on the grounds of the Cypriot judgment, not the EEO certificate.

Finally, two more points which should not be left without a comment.

- Throughout the proceedings, the Turkish State demonstrated buddhistic apathy. There was not a single remedy brought forward, neither in Cyprus nor in Greece. It was a victory in absentia. A reason for this stance was surely the following: The property of the Turkish state in Thessaloniki hosts one of its General Consulates in Greece. This is not just another Turkish Consulate around the globe: It is built upon the place where the father of the Turkish Republic (Mustafa Kemal Atatürk) was born. It also includes the house where he was raised.
- The Thessaloniki CoA emphasized that a potential refusal of the Greek Minister of Justice to grant leave for execution would not harm the essence of the Cypriot judgment: Enforceability and res iudicata remain

> untouched; hence, the claimants may seek enforcement of the judgment in the foreign country, i.e. Turkey… The argument was 'borrowed' by the ruling of the ECJ in the *Krombach* case (which is cited in the text of the decision); therefore, it is totally alien to the case at hand. Even if the claimants were to find any assets of the Turkish Republic in the EU, like the Villa Vigoni in Italy, the ruling of the ICJ in the case *Germany v. Italy: Greece intervening)* would serve as a tool to grant jurisdictional immunity to the Turkish state.

IV. CONCLUSION

Article 923 CCP is the first line of defence for foreign states in Greece. In the unlikely event that the Greek Minister of Justice grants leave for execution, a judgment creditor will be confronted with a second hurdle, if (s)he's aiming at the seizure of property similar to the case discussed here: the maxim ne impediatur legatio (ad hoc see Greek Supreme Court, 29 November 2017, decision no. 1937/2017, reported in English here). Hence, the chances to capitalize on the enforceable title are close to zero.

Rethinking COMI in the Age of Multinational, Digital and Glocal Enterprises

Written by Renato Mangano, Professor of Commercial Law at the University of Palermo (Italy).

Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings failed to provide a definition of COMI (centre of main interests), either in Article 2, which was specifically devoted to definitions, or in Article 3, which regulated international jurisdiction.

For its part, Article 3(1) merely provided that "the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings". Article 3(1) further stipulated that "in the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

Recital 13 specified that "the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties", but different views have been expressed as regards, in particular, the relation between the concept of 'administration' and the concept of 'ascertainability by third parties'.

As a result, Article 3 of Regulation No 1346/2000 gave rise a number of disputes and was the object of several requests to the European Court of Justice (ECJ) for preliminary rulings, with *Eurofood* being the first case in point.

Eventually, Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (Recast) laid down new rules on COMI — a definition of COMI was introduced; the presumption aiming at better ascertaining COMI was extended to individuals as well; the judicial rule of thumb that evaluated negatively a debtor who had moved his/her/its COMI shortly before the request to open insolvency proceedings was incorporated into a mandatory rule; and eleven recitals, aiming at making this framework clearer and more easily applicable, were introduced (Recitals 25 to 34, and 53).

However, one may doubt whether these efforts have succeeded. The many disputes involving NIKI Luftfahrt GmbH are illuminating. NIKI was an insolvent company under Austrian law incorporated in Austria. However, NIKI was also a subsidiary of the Air Berlin PLC & Co. Luftverkehrs KG, better known as Air Berlin. This is a company under German law incorporated in Germany.

Therefore, the crucial question was: which Member State had jurisdiction to open main insolvency proceedings against NIKI? Did Austria or Germany have jurisdiction? The question was clear-cut but the answers to this question were various and contradictory. The NIKI dispute has at long last been settled, but the dynamic of the NIKI case is intriguing because it demonstrates that the new COMI rules still give rise to doubts as regards both the relation between the two

elements constituting the COMI definition (*i.e.*between "the place where the debtor conducts the administration of its interests on a regular basis" and the place "which is ascertainable by third parties"), and the relation between the definition of COMI and the presumptions that are provided to make it easier to apply this definition.

Moreover, some legal counsels maintain that the new COMI rules could facilitate fraudulent COMI relocations. A company could move its registered office to another Member State which is less favourable towards its creditors; make the transfer public,*e.g.*by using the new address in correspondence; await the expiration of the three-month period laid down by the time limit to the presumption; and apply for a fraudulent, but a 'legally authorized' opening of insolvency proceedings in the new jurisdiction.

Mutatis mutandis, a similar idea is proposed as regards individuals. To our knowledge there is no evidence of cases where these proposals have facilitated fraudulent COMI relocations. However, the proposal to circumvent the new COMI rules deserves attention because it leverages some prescriptions which were conceived precisely to prevent a debtor from circumventing the COMI rules.

The problems with the new COMI rules do not end here, as I have demonstrated in a recent paper titled *The Puzzle of the New European COMI Rules: Rethinking COMI in the Age of Multinational, Digital and Glocal Enterprises*.

In fact, sometimes the investigation about 'ascertainability by third parties' could prove problematic. The more complex a business organization is, the more often this situation arises. This is because the more complex a business organization is, the easier it becomes for a firm to be split into many 'units' (the term is intentionally non-technical) which, on the one hand, are located in different countries and, on the other hand, are in contact with different groups of creditors: case by case, these groups of creditors may have differing perceptions as to where the firm is located.

Undoubtedly, problems of this nature may arise when insolvency occurs within a group of companies – Recital 53 of Regulation 2015/848 allows one single court to open one single set of insolvency proceedings concerning several companies belonging to the same group. But the investigation about 'ascertainability by third parties' could prove equally challenging when a firm conducts its relationships

with suppliers and customers through digital networks, and even more so if this firm runs a business which is glocal, in the sense that it is characterized by both global and local considerations. The domain name ".com" gives no indication as to where a business is located and, even where the domain name uses a country code such as ".de" or ".fr", there is no guarantee that the firm is established in that country, since it is relatively common practice to keep web servers geographically separated from the actual location of the enterprise.

It is highly probable that these shortcomings will result again in requests for preliminary rulings; it is also highly desirable that the ECJ provide an interpretation of the COMI rules which would prove crucial in resolving those specific issues that gave rise to such requests.

Arguably, this situation is less serious as regards the flaw affecting the rules which lay down the time limits to the applicability of the COMI presumptions – this flaw could probably be fixed by means of interpretation. However – as regards the flaw concerning the prerequisite of 'ascertainability by third parties'– it is highly improbable that the ECJ will be able to solve this problem at the roots and, consequently, prevent subsequent litigation.

Even the most enthusiastic supporters of ECJ activism must admit that the European Court is not allowed to interpret the new COMI rules in a way that proves to be against both the letter and the spirit of the legal framework, for this power belongs to the regulator alone. To be more precise, this statement implies that the ECJ will be unable either to rule that the prerequisite 'ascertainability by third parties' would be unnecessary whenever this presence was de facto incompatible with that of 'administration on a regular basis', or to rule that the application of the COMI presumptions might disregard the COMI definition. Both rulings would infringe not only the letter of the new COMI rules but also the clearly traceable intention of the regulator.

Further, the ECJ might certainly rule that the COMI of a company X is located in a country Y by putting the COMI of that company into a system of relations with some elements which are considered as relevant to the case. However, since ascertainment of the COMI is case-sensitive and since the one-to-one relation between these factors and the debtor's exact location cannot be established in a universal way, this ruling will not provide the interpreter with a general criterion that would hold good for any future cases.

US Supreme Court has granted certiorari in a case concerning the determination of habitual residence under the Child Abduction Convention: Monasky v. Taglieri

On 10 June 2019, the US Supreme Court granted certiorari in the case of Monasky v. Taglieri. By doing so, the US Supreme Court will finally resolve the split in the US Circuits regarding the standard of review and the best approach to follow in determining the habitual residence of a child under the *HCCH Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Child Abduction Convention).

The questions presented are:

1. Whether a district court's determination of habitual residence under the Hague Convention should be reviewed de novo, as seven circuits have held, under a deferential version of de novo review, as the First Circuit has held, or under clear-error review, as the Fourth and Sixth Circuits have held.
2. Where an infant is too young to acclimate to her surroundings, whether a subjective agreement between the infant's parents is necessary to establish her habitual residence under the Hague Convention.

Regarding the first question, it is important to note that findings of facts are reviewed for clear error and issues of law are reviewed de novo. This is of crucial importance as this would determine the extent to which the decision of the US district court can be reviewed by the US court of appeals, as these standards confer greater deference for findings of fact. The question then arises as to

whether the determination of habitual residence is a mixed question of law and fact or only a question of fact.

The second question deals with the case of newborn or young infants and whether a subjective agreement between the parents is necessary to establish a habitual residence under the Child Abduction Convention. Despite its simplicity, the Court may also take the opportunity to address the current split in the US circuits regarding the extent to which courts can rely on the parents' last shared intent or the child's acclimatization or both in determining the habitual residence of a child.

This is well summed up by the Seventh Circuit Court of Appeals in *Redmond v. Redmond* (2013): "In substance, all circuits – ours included – consider *both* parental intent *and* the child's acclimatization, differing only in their emphasis. The crux of disagreement is how much weight to give one or the other, especially where the evidence conflicts."

In my personal opinion, the hybrid approach, that is relying on *both* shared parental intent and the child's acclimatization (without placing more emphasis on one or the other, except perhaps for the case of newborns or very young infants), as well as looking to all other relevant considerations arising from the facts of the particular case, is the right approach to follow. This would avoid that parents create artificial jurisdictional links in a State and thus engage in forum shopping. The flip side of this argument is that this would necessarily mean less party autonomy in these matters. By following this approach, the United States would align itself to case law in Canada (*Balev* case – Canadian Supreme Court, see our previous post here), the European Union (*Mercredi v. Chaffe*, confirmed in *O.L.v. P.Q.*) and the United Kingdom (*A. v. A. (Children: Habitual Residence)*).

To conclude with the words of the *Balev* case: "[…] the hybrid approach to habitual residence best conforms to the text, structure, and purpose of the *Hague Convention*. There is no reason to decline to follow the dominant trend in *Hague Convention* jurisprudence. The hybrid approach should be adopted in Canada".