A few thoughts on the HCCH Guide to Good Practice on the grave-risk exception (Art. 13(1)(b)) under the Child Abduction Convention, through the lens of human rights (Part II)

Written by Mayela Celis – The comments below are based on the author's doctoral thesis entitled "The Child Abduction Convention – four decades of evolutive interpretation" at UNED (forthcoming)

As indicated in a previous post, the comments on the HCCH Guide to Good Practice on the grave-risk exception (Art. 13(1)(b)) under the Child Abduction Convention (subsequently, Guide to Good Practice or Guide) will be divided into two posts. In a previous post, I analysed the Guide exclusively through the lens of human rights. In the present post, I will comment on some specific legal issues of the Guide but will also touch upon on some aspects of human rights law.

Please refer to Part I. All the caveats mentioned in that post also apply here.

The Guide to Good Practice is available here.

I would like to touch upon three topics in this post: 1) the examples of assertions that can be raised under Article 13(1)(b) and their categorisation; 2) measures of protection and 3) domestic violence.

1) One of the great accomplishments of the Guide to Good Practice is the categorisation of the ***examples of assertions that can be raised under Article 13(1)(b) of the Child Abduction Convention***. While at first sight the categorisation may appear to be too simplistic, it is very well thought through and encompasses a wide range of scenarios.

I include below the assertions as stated in the Guide:

Examples of assertions that can be raised under Article 13(1)(b)
a. Domestic violence against the child and / or the taking parent
b. Economic or developmental disadvantages to the child upon return
c. Risks associated with circumstances in the State of habitual residence
d. Risks associated with the child's health
e. The child's separation from the taking parent, where the taking parent would be unable or unwilling to return to the State of habitual residence of the child
i. Criminal prosecution against the taking parent in the State of habitual residence of the child due to wrongful removal or retention
ii. Immigration issues faced by the taking parent
iii. Lack of effective access to justice in the State of habitual residence
iv. Medical or family reasons concerning the taking parent
v. Unequivocal refusal to return
f. Separation from the child's sibling(s)

Nevertheless, while this categorisation is very comprehensive, there are a few matters that are mentioned only very briefly in the Guide and could have benefited from a more in-depth discussion. One of them is the extensive case law on what constitutes "***zone of war***" ***or a place where there is conflict***. See footnotes 88 and 89 of the Guide under the heading *c. Risks associated with circumstances in the State of habitual residence*.

Perhaps due to political sensitivities, it would be hard to pinpoint in the Guide jurisdictions that have been discussed by the courts as possibly being a "zone of war". Among these are Israel (most of the case law), Monterrey (Mexico – during the war on drugs) and Venezuela. See for example: Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003) [INCADAT reference: HC/E/USf 530] (United States); Kilah v. Director-General, Department of Community Services [2008] FamCAFC 81 [INCADAT reference: HC/E/AU 995] (Australia) and other references in footnotes 88 and 89 of the Guide.

Some of course may argue that "zone of war" is a gloss on the Convention and that as such it should not be analysed. However, one may also describe such situations without labelling them as "zone of war", such as a State where there is conflict, be it military, social, political, etc. Perhaps this could have been expanded under the heading *c. Risks associated with circumstances in the State of habitual residence* of the Guide referred to above.

While the “zone of war” exception has hardly been successful, it would have been beneficial to discuss some of the arguments set forth by the parties such as: the fluctuation of violence throughout the years, terrorist attacks, a negative travel advice by a government concerning the State of habitual residence of the child, the specific place where the family lives and the risks of terrorism, the violence of drug cartels, and the fact of being a political refugee in the State where the child was abducted. The negative travel advice is particularly apposite to our times of Covid-19 as that would have given some guidance to the courts.

Another assertion made under Article 13(1)(b) of the Child Abduction Convention that could have been analysed in more depth by the Guide – perhaps under *a. Domestic violence against the child and/or the taking parent* – is the ***sexual abuse of children***. The Guide includes very brief references to sexual abuse in the glossary, paragraphs 38 and 57, and footnote 76.

Undoubtedly, sexual abuse is a terrible and unbearable experience for children but it is still a taboo to single out this topic, let alone explain the current trends existing in the case law when this issue has been raised. Nevertheless, from my research there seems to be a very clear distinction in the case law: when the sexual abuse has been raised in the State of habitual residence and no action or insufficient action was taken by such authorities, and there is evidence of sexual abuse, the State where the child has been abducted tends to reject the return of the child to his or her State of habitual residence. In cases where this is not the case, the child is ordered back to the State of habitual residence, often with measures of protection. See for example: the multiple-layered decisions in the case of *Danaipour v. McLarey*, see for example the decision Danaipour v. McLarey, 386 F.3d 289 (1st Cir. 2004) [INCADAT reference: HC/E/USf 597] (United States). This brings us to:

2) The second topic of this post: ***measures of protection*** (also referred to as protective measures). The paragraphs dedicated to this topic in the Guide are 43-48. The Guide is absolutely at the forefront of the latest developments and social research on the effectiveness of measures of protection. It has answered the call of many professors/scholars and practitioners, who have cautioned about the indiscriminate use of measures of protection, in particular of undertakings, when the person causing the violence is known to infringe orders and not to heed the warnings of the courts. The Guide is to be commended for this great step forward.

The Guide defines undertakings as follows: "an undertaking is a voluntary promise, commitment or assurance given by a natural person – in general, the left-behind parent – to a court to do, or not to do, certain things. Courts in certain jurisdictions will accept, or even require, undertakings from the left-behind parent in relation to the return of a child. An undertaking formally given to a court in the requested jurisdiction in the context of return proceedings may or may not be enforceable in the State to which the child will be returned." Because undertakings are a voluntary promise, their enforcement is fraught with problems, especially if the left-behind parent refuses to comply once the child has been returned. Where the primary carer (usually the mother) returns with the child to a "domestic violence" situation and it is not possible to enforce undertakings, both the mother and the child may be subject to a grave risk of harm. For more information, see Taryn Lindhorst, Jeffrey L. Edleson. *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention* (Boston: Northeastern University Press, 2012). This leads us to:

3) The third topic of this post: ***domestic violence***. Many claim that domestic violence is a human rights violation. In a wider context, there is indeed a correlation between domestic violence and human rights and this has been recognised by resolutions of the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) and the judgment of the European Court of Human Rights. See for example *AT (Ms) v. Hungary, (Decision) CEDAW Committee* and *Opuz v. Turkey (Application No. 33401/02)*, respectively.

While the issue of domestic violence in the context of Article 13(1)(b) of the Child Abduction Convention was the one topic that sparked concern among the Contracting States to the Child Abduction Convention, as well as judges and the legal profession alike, the Guide only dedicates a few paragraphs to it. See paragraphs 57-59 of the Guide. It also arrives at a conclusion, which raises some doubts.

In particular, the Guide states that "***Evidence of the existence of a situation of domestic violence, in and of itself, is therefore not sufficient to establish the existence of a grave risk to the child***." There are a few problems with such a statement. Domestic violence comes in different shapes and sizes and the level of violence can be high or low. This statement is a "one-size-fits-all" and thus is necessarily flawed. In addition, it does not say what it means by "in and of

itself", does it mean *prima facie*? Also, it does not elaborate on what is necessary to invoke and substantiate domestic violence in order for this assertion to be considered sufficient. It also appears to set a standard of proof when it says that it "is not sufficient", which might perhaps not be appropriate for a soft law instrument, such as a Guide to Good Practice, to do.

Some scholars have analysed and criticised this statement of the Guide. In particular, Rhona Schuz and Merle H. Weiner in the following article "A Small Change That Matters: The Article 13(1)(b) Guide to Good Practice" (Family Law LexisNexis©, January 2020) I refer to their arguments and prefer not to replicate them in this post.

Despite the weakness mentioned above and in Part I of this post, I believe that this Guide would be of great benefit to the legal profession.

Having all the above in mind, I would like to conclude with some words of the renowned American judge Richard Posner: "[t]here is a difference between the law on the books and the law as it is actually applied, and nowhere is the difference as great as in domestic relations." (Van De Sande v. Van De Sande, 431 F.3d 567 (7th Cir. 2005) [INCADAT reference: HC/E/USf 812] (United States)).

Same Region, Two Different Rulings on Fake News at the Internet

Fernando Pedro Meinero

Recently, two criminal court decisions investigating the spread of fake news show the difficulty of determining the scope of national court jurisdiction over the internet.

In Argentina, Google was successful in reversing a decision that determined the deindexation of a person's name from search engines hosted outside the country. In this case, the searcher associated a person's name with crimes of possession of drugs and weapons, something that proved to be false. But in Brazil, Twitter and Facebook were forced to globally block the access of investigated people to their respective accounts. These people are investigated for participating in the dissemination of defamatory publications through these internet platforms against members of the Legislative and Judiciary.

Although these are decisions taken in the context of criminal cases, the issues raised by them reflect difficulties that also arise in civil cases. Both decisions were taken against companies that have branches in the countries where the courts exercise their jurisdiction – Argentina and Brazil, but they see differently the scope of that jurisdiction for the fulfillment of an order outside the territory.

On the one hand, the idea that the imposition of removing content or access implies an obligation to do so outside the national territory. Therefore, this decision, in order to produce effects outside the territory, should pass through the control mechanisms of international cooperation, since otherwise there would be an invasion of foreign jurisdictions. Not to mention the issues that arise from the point of view of the applicable law, according to what each State considers as a defamatory act and what is the limit of freedom of speech.

On the other hand, the understanding that this obligation to comply, imposed on a company with legal personality in the country, based on national legislation, must be fulfilled by that company, regardless of where and how it will become effective. In this way, speculations about an eventual violation of foreign sovereignty are eliminated, as well as with regard to laws that may eventually consider such publications to be non-defamatory and just an exercise of freedom of speech.

This divergence exposes, in essence, issues related to international jurisdiction, applicable law and international legal cooperation, the three traditional pillars of Private International Law, and the challenges that the ubiquity of internet impose to this field of study.

Case no. CPF 8553/2015/4 / CA3 "C., E. – provisional measure – 1st Panel of the Federal Criminal and Correctional Chamber – Argentina

Last June 16, 1st Panel of the Federal Criminal and Correctional Chamber – Argentina – Appeal in Case no. CPF 8553/2015/4 / CA3 "C., E. – provisional measure", decided in favor of Google Inc. in a case concerning fake news.

The giant of the internet appealed a decision that extended a provisional measure determining the removal of the indexation of a content in the search engine. The content – proved to be fake – referred to an alleged arrest of Enrique Santos Carrió in Mexico for drugs and weapons possession. He is the son of Elisa Carrió, an important figure in Argentine politics, currently serving as National Deputy.

The questioned order extended the restriction to domains hosted outside the national territory, namely: www.google.com, www.google.com.es and www.google.mx.

In its allegations, Google argued that, by virtue of the principle of state sovereignty, the implementation of that measure would represent a violation of the sovereignty of other states, which would affect services subject to foreign law. The company understood that the restrictive measure should be directed at the sites that published the fake news, and not at the search engine that, according to the company, is a mere intermediary between the users and the publishers.

Also, according to Google, the removal of the contents of www.google.com would require the deletion of them on global servers, which would represent that an Argentine judge could decide about the information that can be accessed worldwide. In turn, it believes that this type of measure constitutes a serious threat to freedom of expression and the right to seek, receive and disseminate information freely.

The Court, granting the appeal, understood that the categorization of the news as fake is typical of the activity of the intervening court. However, these categorizations cannot be imposed on foreign jurisdictions, except through judicial cooperation mechanisms that do not violate their legal order. In its understanding "the core of this controversy concerns the principle of the territoriality of the law, which prevents the possibility of taking for itself the prerogative to prohibit the global dissemination of certain contents published by the press, whose disclosure would be prohibited under the local regulatory framework, but its circulation may be authorized in the context of another territory, according to the legal provisions and the categorization that this

content could be granted ”(in free translation).

By this basis, the Chamber decided to leave the proposed precautionary measure ineffective, understanding that, if it so wishes, the judge *a quo* may request measures of judicial cooperation from foreign authorities and thus limit the dissemination of such news.

The full text of the decision can be found here (in Spanish).

Criminal Investigation no. 4781 from Distrito Federal – Brazil. Justice Alexandre de Moraes (Monocratic Decision), Supreme Federal Court, Brazil.

On the other hand, we find in Brazil a decision that went in a very opposite direction if compared to the previous one.

In the context of the Criminal Investigation no. 4781 from Distrito Federal – Brazil, the Supreme Federal Court investigates the existence of organized use of accounts on social networks to create, publish and disseminate false information (commonly known as fake news). On May 26, 2020, Alexandre de Moraes, Minister of the Supreme Federal Court, ordered the blocking of Facebook, Twitter and Instagram accounts belonging to a group of allies of Jair Bolsonaro, current President of Brazil. Such profiles would be used to commit crimes against honor in concurrence with criminal association (typified in the Penal Code in arts. 138, 139, 140 and 288) and crimes against national security (typified in Act 7.170/1983, in arts. 18, 22, 23 and 26). Specifically, the investigation refers to attacks to the Supreme Federal Court and the National Congress.

Some of those investigated, however, evaded the order, changing the location settings on the sites, as if they were publishing from other countries. Therefore, on 07/28/2020, the said magistrate provided that the aforementioned social networks must block for access from any IP (Internet Protocol), from Brazil or abroad. To guarantee compliance, he imposed a daily fine of R $ 20,000.00 for each unblocked profile.

Twitter announced that it would comply with that decision, though it would appeal.

Differently, Facebook Serviços Online do Brasil Ltda. stated that it would refuse

to comply with that decision, alleging its illegality. Thus, it would maintain the access of those investigated and the possibility of posting by accessing to the accounts abroad, allowing the viewing of content in the national territory. Facebook argued: “We respect the laws of the countries in which we operate. We are appealing to the Supreme Federal Court against the decision to block the accounts globally, considering that Brazilian law recognizes limits to its jurisdiction and the legitimacy of other jurisdictions”.

In view of this declaration, Minister Alexandre de Moraes issued a new decision, which raised the daily fine to R $ 100,000.00 for unblocked profile.

In his reasons, the Magistrate understood that “like any private entity that carries out its economic activity in the national territory, the social network Facebook must respect and effectively comply with direct commands issued by the Judiciary regarding facts that have occurred or with their persistent effects within the national territory; it is incumbent upon him, if deemed necessary, to demonstrate its non-conformity by means of the resources permitted by Brazilian law”. Then, he understood that “the blocking of social network accounts determined in this case, therefore, is based on the necessity to stop the continuity of the disclosure of criminal manifestations, which, in particular, materialize the criminal offenses found in this investigation and which continue to have its illicit effects within the national territory, including the use of subterfuge permitted by the social network Facebook”. Finally, he argued that “the issue of national jurisdiction over what is posted and viewed abroad is not discussed, but the dissemination of criminal facts in the national territory, through news and commentary by accounts banned.”.

After this decision, Facebook informed the observance of the global blocking of the investigated accounts.

Fernando Pedro Meinero is Professor of Private International Law at the Universidade Federal do Pampa, RS – Brazil.

Portugal joins the CISG

This post is authored by Ana Coimbra Trigo (Associate Lawyer at PLMJ Law Firm; PhD Candidate at NOVA Lisbon Univ.; LL.M. China-EU School of Law (China Univ. Political Science and Law, conferred by Univ. Hamburg); Law Degree from Univ. Coimbra), with contributions from Gustavo Moser.

Today, on 7 August 2020, Decree 5/2020 of the Council of Ministers approved the **United Nations Convention on Contracts for the International Sale of Goods** (CISG or Convention), making Portugal its newest signatory state (link to the official publication here). The Convention will enter into force, in respect of Portugal, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of approval.

Portugal joins the Convention alongside two historic moments. First, this is the year that marks the 40th anniversary of the Convention, and second, the current Secretary General of the UN, António Guterres, is a Portuguese national.

Portugal was in fact active in the preparatory works at UNCITRAL and present at the diplomatic conference that adopted the CISG in 11 April 1980. Although "arriving late to the party", it is foreseen that the CISG will be **advantageous** for Portugal, both at the legal and commercial level.

First, as is well known, the CISG provides a **uniform and neutral regime** for cross-border transactions regarding carriage of goods, and related dispute settlement. The text is based on a common set of remedies inspired by the principle of *favor contractus*and structured to maximize economic benefits of the contract.

Second, the CISG provides for overall **legal certainty**, especially in cases where there is and there is not a (valid) choice of law. It is drafted in plain language and

this is particularly advantageous for small and medium-sized companies.

Third, scholars highlight the balanced system of solutions included in the Convention that allows**efficiencies in transaction costs** and thus more competitive prices for imported and exported goods. This is beneficial for overall trade, but from a Portuguese viewpoint, will also allow Portuguese final users to get more value for their money, and Portuguese exporters to sell their products at lower prices in global markets.

Fourth, the above benefits are emphasized when one considers that the CISG has been ratified already by**93 states**. This includes 24 of 27 EU Member-States (excluding UK, Ireland, Malta and not for long Portugal) and also the United States of America, Canada, Brazil, China, Japan and South Korea. Some of these countries are relevant trade partners of Portugal.

Lastly, Portugal will now benefit from **40 years** of scholarly writings and decisions for guidance, including in the Portuguese language, since Brazil recently became the first Lusophone country to adopt the CISG.

The increased availability of materials on the CISG in Portuguese may boost capacity building and contribute to the affirmation of the CISG in other Lusophone countries.

Scholars and diplomats have clamoured about this potential accession over the years, so we anticipate that this will be viewed positively by the local and international legal community.

Moreover, this can be seen as strategic boost for Portugal in international trade in this demanding international context.

Jurisdiction in relation to hostile trust litigation

In *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] SGCA 62, the Singapore Court of Appeal considered a number of issues: (1) whether a plaintiff could amend its Statement of Claim at the appellate stage to tilt the balance of connecting factors towards Singapore; (2) whether a clause in the trust deed identifying Singapore as the "forum of administration" of the trust was a jurisdiction clause, and if so; (3) whether the clause covered hostile litigation in relation to the trust; and depending on the answers to the previous questions, (4) whether the Singapore proceedings ought to be stayed.

The case concerned Mr Ivanishvili, the former Georgian prime minister, who was a French and Georgian dual national. Mr Ivanishvili had set up the Mandalay Trust which was domiciled in Singapore. The trustee of the Mandalay Trust was Credit Suisse Trust Ltd, a Singapore trust company ("the Trustee"). The trustee's asset management powers were delegated to the Geneva branch of Credit Suisse AG ("the Bank"). The Mandalay Trust suffered losses purportedly due to the actions of one the Bank's employees (Mr Lescaudron) who was the portfolio manager of the Mandalay Trust. Mr Lescaudron was convicted in Swiss criminal proceedings for various forms of misconduct in relation to the Mandalay Trust. At first instance, Mr Ivanishvili and his wife and children, who were the beneficiaries of the Mandalay Trust, sued both the Trustee and the Bank alleging, *inter alia*, breaches of duties of care and skill and misrepresentation. A stay was granted by the court below on the grounds that Switzerland was a more appropriate forum for the action. At the Court of Appeal, Mr Ivanishvili *et al* strategically chose to discontinue proceedings against the Bank to strengthen their argument that Singapore was the appropriate forum for trial of the action and sought to amend their Statement of Claim to this effect. This also entailed reformulating some of the claims against the Trustee to remove references to the Bank. This was allowed by the Court of Appeal on the basis that absent bad faith, the appellants had the freedom of choice to choose its cause of action and to sue the party it wishes to sue.

On the second issue, the relevant clause provided that:

"2. (a) This Declaration is established under the laws of the Republic of Singapore and subject to any change in the Proper Law duly made according to the powers and provisions hereinafter declared the Proper Law shall be the law of the said Republic of Singapore and the Courts of the Republic of Singapore shall be the forum for the administration hereof."

Clause 2(b) granted the Trustee the power to change the proper law and provided that if so, the courts of the jurisdiction of the new proper law would become the "forum for the administration" of the trust. Contrasting clause 2 with the equivalent clause in *Crociani v Crociani* (17 ITELR 624) where the relevant clauses referred to a *country* being the "forum for the administration", the Court of Appeal noted that the references to "forum for the administration" in clause 2 was tied up with a reference to the *courts*. It therefore held that clause 2(a) was a jurisdiction clause. As a point of interest, it should be noted that, generally speaking, it is immaterial whether a jurisdiction clause naming Singapore as a forum is exclusive or non-exclusive in nature after the Court of Appeal's decision in *Shanghai Turbo v Liu Ming* [2019] 1 SLR 779 (previously noted here); as Singapore is a named forum, the "strong cause" test would apply to cases falling within the scope of the jurisdiction clause.

The question which had to be considered next was whether clause 2(a) covered hostile litigation concerning breach of trust issues (such as in the present case) or was confined to litigation over administrative matters. On this, the Court engaged in an extensive review of case law in other off-shore trust jurisdictions. While tentatively observing that "there is no legal rule limiting the meaning of the phrase 'forum for [the] administration' to an administration action in the traditional sense"(at [75]), the Court ultimately followed the reasoning of the Privy Council in *Crociani* and other cases in its wake and held that that the phrase "is intended to refer to the court or jurisdiction which would settle questions arising in the day to day administration of the trust, and to denote the supervisory and authorising court for actions the trustee might need to take which were not specifically by the trust deed or where its terms were ambiguous"(at [76]). Such clauses did not cover hostile litigation between trustees and beneficiaries. The Court observed that: "The trust deed is not a contract between two parties with obligations on both sides – rather, it is a unilateral undertaking by the trustee, and in our view this difference must play a part when we consider whether the

intention of the drafters was to impose a mandatory jurisdiction clause for the resolution of contentious disputes regarding allegations of breach of trust"(at [78]). This suggests that the "strong cause" test, which has as its starting point the upholding of the parties' contractual bargain, is not appropriate in hostile litigation involving beneficiaries to a trust.

In any event, the Court's conclusion on the scope of clause 2(a) meant that whether a stay ought to be granted was to be determined under the *Spiliada* test on *forum non conveniens* rather than the "strong cause" test. On this point, the Court split. A majority of the Court (Menon CJ and Prakash JA), held that the balance of connecting factors pointed towards Singapore and allowed the appeal against the stay. The appellants argued that with the amended claim, the focus was on the Trustee's breaches of trust, all of which occurred in Singapore. The Court was unconvinced of the respondents' argument that most of the relevant witnesses, such as Mr Lescaudron, were located in Switzerland and not compellable to appear before the Singapore court. The location of witnesses was but a weak factor pointing in favour of Switzerland being *forum conveniens* relative to Singapore. The respondents had also argued that Swiss banking secrecy laws meant that disclosure of certain documents could only be ordered by the Swiss court but the Court gave little weight to this, holding that it was not clear that the Trustee could not obtain the requisite documents from the Bank itself. In contrast, the shape of litigation post the re-framing of the actions by the appellants meant that the trust relationship, rather than the banking relationship, was at the forefront of the claims. This pointed towards Singapore being the centre of gravity of the action. Further, Singapore law was the governing law of the Mandalay Trust and the rights of all parties under the Trust Deed: "There is no doubt that the Singapore courts are the most well-placed to decide issues of Singapore trust law, and the Swiss courts, operating in a civil law jurisdiction with no substantive doctrine of trusts, would be far less familiar with these issues"(at [110]). This comment may be to understate the competence of the Swiss courts in this regard, as internal Swiss trusts which are governed by a foreign law are not an uncommon wealth management tool in Switzerland. The Court was also not persuaded by the Trustee's argument that there was a risk of conflicting findings of fact due to related proceedings elsewhere, holding that this was not a "sufficiently real possibility" (at [114]). Thus, a majority of the Court held that, on an overall assessment of the connecting factors, Singapore would be the more appropriate forum vis-à-vis Switzerland.

There was a strong dissent by Chao SJ on the application of the *Spiliada* test. His Honour was of the view that whether the Trustee would be prejudiced by having to defend itself in Singapore formed the crux of the stay issue. In relation to this, His Honour observed that Mr Ivanishvili was a hands-on investor who corresponded directly with the Bank officers. The Trustee was not always copied into Mr Ivanishvili's instructions to the Bank. The alleged losses occurred in Switzerland and the acts and omissions of the Bank and its officers and the role of Mr Ivanishvili himself remained relevant in determining the Trustee's liability. In contrast, the Trustee played a passive role and the operative events in Singapore were merely secondary in nature (at [153]). This belied the appellants' insistence that the Bank's alleged wrongdoing was no longer relevant in the Singapore proceedings given the amended claim. His Honour was concerned about the respondents' ability to defend itself properly in Singapore given that the evidence and witnesses central to defending the claims were mainly located in Switzerland. Chao SJ was therefore of the view that the action had a greater connection with Switzerland than with Singapore "by a significant margin" (at [154]). His Honour went on to say that if he was wrong on stage one of the *Spiliada* test, stage two would also point towards Switzerland. On stage two, Chao SJ agreed with the High Court that the ends of justice would best be met by the Swiss court applying Singapore trust law. This is as the trustee's conduct may only be properly understood against the backdrop of Mr Ivanishvili's relationship with the Bank and the Bank's conduct in relation to its asset management duties (at [154]).

A pdf of the judgment can be downloaded here.

Lord Jonathan Mance on the future relationship between the United Kingdom and Europe after

Brexit

Nicole Grohmann, a doctoral candidate at the Institute for Comparative and Private International Law, Dept. III, at the University of Freiburg, has kindly provided us with the following report on a recent speech by Lord Jonathan Mance.

On Wednesday, 15 July 2020, the former Deputy President of the Supreme Court of the United Kingdom (UKSC), Lord Jonathan Mance, presented his views on the future relationship between the United Kingdom and Europe after Brexit in an online event hosted by the *Juristische Studiengesellschaft Karlsruhe*. This venerable legal society was founded in 1951; its members are drawn from Germany's Federal Constitutional Court, the Federal Supreme Court, the office of the German Federal Prosecutor, from lawyers admitted to the Federal Supreme Court as well as judges of the Court of Appeals in Karlsruhe and the Administrative Court of Appeals in Mannheim. In addition, the law faculties of the state of Baden-Württemberg (Heidelberg, Freiburg, Tübingen, Mannheim, Konstanz) are corporate members. Due to Corona-induced restrictions, the event took place in the form of a videoconference attended by more than eighty participants.

After a warm welcome by the President of the *Juristische Studiengesellschaft*, Dr. Bettina Brückner (Federal Supreme Court), Lord Mance shared his assessment of Brexit, drawing on his experience as a highly renowned British and internationally active judge and arbitrator. In the virtual presence of judges from the highest German courts as well as numerous German law professors and scholars, Lord Mance elaborated – in impeccable German – on the past and continuing difficulties of English courts dealing with judgments of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) and the future legal struggles caused by the end of the transition period on the withdrawal of the United Kingdom from the European Union on 31 December 2020. Lord Mance's speech was followed by an open discussion regarding the most uncertain political and legal aspects of Brexit.

In his speech, Lord Mance highlighted the legal difficulties involved in the withdrawal of his country from the European Union. Since Lord Mance himself tends to picture the British as being traditional and generally pragmatic, he named Brexit as a rare example of a rather unpragmatic choice. Especially with

regard to the role of the United Kingdom as a global and former naval power, Lord Mance considered Brexit a step backwards. Besides the strong English individualism, which has evolved over the past centuries, the United Kingdom did not only act as an essential balancing factor between the global players in the world, but also within the European Union. Insofar, the upcoming Brexit is a resignation of the United Kingdom from the latter position.

Subsequently, Lord Mance focussed on the role of the European courts, the European Court of Justice and the European Court of Human Rights and their judgments in the discussions leading to Brexit. Both European courts gained strong importance and influence in the UK within the first fifteen years of the 21st century. Especially, the ECtHR is of particular importance for the British legal system since the Human Rights Act 1998 incorporated the European Convention on Human Rights into British law. Lord Mance described the Human Rights Act 1998 as a novelty to the British legal system, which lacks a formal constitution and a designated constitutional court. Apart from the Magna Charta of 1215 and the Bill of Rights of 1689, the British constitutional law is mainly shaped by informal constitutional conventions instead of a written constitution such as the German Basic Law. Following the Human Rights Act 1998 and its fixed catalogue of human rights, the British courts suddenly exercised a stricter control over the British executive, which initially gave rise to criticism. Even though the British courts are not bound by the decisions of the ECtHR following the Human Rights Act 1998, the British participation in the Council of Europe soon started a dialogue between the British courts and the ECtHR on matters of subsidiary and the ECtHR's margin of appreciation. The UK did not regard the growing caseload of the ECtHR favourably. Simultaneously, the amount of law created by the institutions of the European Union increased. Lord Mance stressed the fact that in 1973, when the United Kingdom joined the European Economic Community, the impact of the ECJ's decision of 5 February 1963 in *Van Gend & Loos*, C-26/62, was not taken into account. Only in the 1990s, British lawyers discovered the full extent and the ramifications of the direct application of European Union law. The binding nature of the ECJ's decisions substantiating said EU law made critics shift their attention from Strasbourg to Luxembourg.

In line with this development, Lord Mance assessed the lack of a constitutional court and a written constitution as the main factor for the British hesitance to accept the activist judicial approach of the ECJ, while pointing out that Brexit

would not have been necessary in order to solve these contradictions. The EU's alleged extensive competences, the ECJ's legal activism and the inconsistency of the judgments soon became the primary legal arguments of the Brexiteers for the withdrawal from the EU. Especially the ECJ's teleological approach of reasoning and the political impact of the judgments were mentioned as conflicting with the British cornerstone principles of parliamentary sovereignty and due process. Lord Mance stressed that the so-called *Miller* decisions of the Supreme Court in *R (Miller) v Secretary of State* [2017] UKSC 5 and *R (Miller) v The Prime Minister, Cherry v Advocate General for Scotland* (Miller II) [2019] UKSC 41, dealing with the parliamentary procedure of the withdrawal from the EU, are extraordinary regarding the degree of judicial activism from a British point of view. In general, Lord Mance views British courts to be much more reluctant compared to the German Federal Constitutional Court in making a controversial decision and challenging the competences of the European Union. As a rare exception, Lord Mance named the decision in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, in which the UKSC defended the British constitutional instruments from being abrogated by European law. Indeed, Lord Mance also expressed scepticism towards the jurisprudential approach of the ECJ, because inconsistences and the need of political compromise could endanger the foreseeability and practicability of its decisions. Especially with regard to the recent decision of the German Constitutional Court of 5 May 2020 on the European Central Bank and the Court's approach to *ultra vires*, Lord Mance would have welcomed developing a closer cooperation between the national courts and the ECJ regarding a stricter control of the European institutions. Yet this important decision came too late to change Brexiteers' minds and to have a practical impact on the UK.

Finally, Lord Mance turned to the legal challenges resulting from the upcoming end of the transition period regarding Brexit. The European Union (Withdrawal) Acts 2018 and 2020 lay down the most important rules regarding the application of EU instruments after the exit day on 31 December 2020. In general, most instruments, such as the Rome Regulations, will be transposed into English domestic law. Yet, Lord Mance detected several discrepancies and uncertainties regarding the scope of application of the interim rules, which he described as excellent bait for lawyers. Especially two aspects mentioned by Lord Mance will be of great importance, even for the remaining Member States: Firstly, the British courts will have the competence to interpret European law, which continues to

exist as English domestic law, without the obligation to ask the ECJ for a preliminary ruling according to Art. 267 TFEU. In this regard, Lord Mance pointed out the prospective opportunity to compare the parallel development and interpretation of EU law by the ECJ and the UKSC. Secondly, Lord Mance named the loss of reciprocity guaranteed between the Member States as a significant obstacle to overcome. Today, the United Kingdom has to face the allegation of 'cherry picking' when it comes to the implementation of existing EU instruments and the ratification of new instruments in order to replace EU law, which will no longer be applied due to Brexit. Especially with regard to the judicial cooperation in civil and commercial matters and the recast of the Brussels I Regulation, the United Kingdom is at the verge of forfeiting the benefit of the harmonized recognition and enforcement of the decisions by its courts in other Member States. In this regard, Lord Mance pointed out the drawbacks of the current suggestion for the United Kingdom to join the Lugano Convention, mainly because it offers no protection against so-called torpedo claims, which had been effectively disarmed by the recast of the Brussels I Regulation – a benefit particularly cherished by the UK. Instead, Lord Mance highlighted the option to sign the Hague Convention of 30 June 2005 on Choice of Court Agreements which would allow the simplified enforcement of British decisions in the European Union in the case of a choice of court agreement. Alternatively, Lord Mance proposed the ratification of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments. So far, only Uruguay and Ukraine have signed this new convention. Nevertheless, Lord Mance considers it as a valuable option for the United Kingdom as well, not only due to the alphabetical proximity to the other signatories.

Following his speech, the event concluded with a lively discussion about the problematic legal areas and consequences of Brexit, which shall be summarised briefly. Firstly, the President of the German Supreme Court Bettina Limperg joined Lord Mance in his assessment regarding the problem of jurisprudential inconsistency of the ECJ's decisions. However, like Lord Mance she concluded that the Brexit could not be justified with this argument. Lord Mance pointed out that in his view the ECJ was used as a pawn in the discussions surrounding the referendum, since the Brexiteers were unable to find any real proof of an overarching competence of the European Union. Secondly, elaborating on the issue of enforceability, Lord Mance added that he considers the need for an alternative to the recast of the Brussels I Regulation for an internationally

prominent British court, such as the London Commercial Court, not utterly urgent. From his practical experience, London is chosen as a forum mainly for its legal expertise, as in most cases enforceable assets are either located in London directly or in a third state not governed by EU law. Hence, Brexit does not affect the issue of enforceability either way. Finally, questions from a constitutional perspective were raised regarding the future role of the UKSC and its approach concerning cases touching on former EU law. Lord Mance was certain that the UKSC's role would stay the same regarding its own methodological approach of legal reasoning. Due to the long-standing legal relationship, Lord Mance anticipated that the legal exchange between the European courts, UK courts and other national courts would still be essential and take place in the future.

In sum, the event showed that even though Brexit will legally separate the United Kingdom from the European Union, both will still be closely linked for economic and historical reasons. As Lord Mance emphasized, the UK will continue to work with the remaining EU countries in the Council of Europe, the Hague Conference on PIL and other institutions. Further, the discrepancies in the Withdrawal Acts will occupy lawyers, judges and scholars from all European countries, irrespective of their membership in the European Union. Lastly, the event proved what Lord Mance was hoping to expect: The long-lasting cooperation and friendship between practitioners and academics in the UK and in other Member States, such as Germany, is strong and will not cease after Brexit.

The Artist, the Actor and the EEO Regulation; or, how the English Courts and the Spanish Constitutional Court prevented a

cross-border injustice threatened via the EEO Regulation in the litigation concerning Gerardo Moreno de la Hija and Christopher Frank Carandini Lee

Written by Jonathan Fitchen, University of Aberdeen

Introduction

The EEO Regulation (805/2004) was mooted in the mid-1990's to combat perceived failings of the Brussels Convention that were feared to obstruct or prevent 'good' judgment creditors from enforcing 'uncontested' (i.e. undisputable) debts as cross-border debt judgments within what is now the EU. The characterisations 'good' and 'bad' are not employed facetiously; the unreasonable obstruction of a creditor who was assumed to pursue a meritorious debt claim was and remains a central plank of the EEO project: hence the Regulation offers an alternative *exequatur* and public policy free procedure for the cross-border enforcement of such uncontested monetary civil and commercial claims that, until 2002, fell under the quite different enforcement procedures of the Brussels Convention. The 2004 EEO Regulation covers money enforcement titles (judgments, settlements and authentic instruments) that are already enforceable in the Member State of origin and hence are offered an alternative route to cross-border enforcement in the Member State addressed via the successors to the Brussels Convention, first the Brussels I Regulation and now the Brussels Ia Regulation, on an expedited basis due to omitting both an *exequatur* stage and the ability of the Member State addressed to refuse enforcement because of public policy infringements.

As the EEO Regulation was introduced some years *after* the cross-border enforcement provisions of the Brussels Convention had been replaced by those of the Brussels I Regulation, many of the EEO's 'innovations' to remedy 'unnecessary' or abusive delays, caused by either a 'bad' debtor or by an overly

cautious enforcement venue, had already been mitigated three years before it came into force in 2005. This fact and other issues (e.g. a preference among lawyers for the familiar and now streamlined Brussels I Regulation enforcement procedure, the issue of ignorance of the EEO procedures, and a greater than expected willingness for creditors to litigate debt claims directly in foreign venues) contributed to a lower than expected take up of the EEO Regulation in the context of contentious legal proceedings.

Anecdotal evidence of low use of the EEO in contentious matters has led to a view that the EEO Regulation is somewhat redundant. The coming into force of the *exequatur*-free Brussels Ia Regulation and the surveys connected with the IC²BE project have re-enforced this view of its redundancy. An expected recasting for the 2004 Regulation did not however occur in 2012 as the Commission withdrew it. The same year the Commission had received a less than complimentary report from RAND Europe concerning the Regulation (with which it disagreed and continues to disagree). It may be speculated that having lost the argument on restricting or deleting public policy in the course of the re-casting of the Brussels I Regulation, the Commission may have feared that the re-casting of the EEO might tend towards its *de facto*deletion if the Member States were permitted to consider its reliance on control in the Member State of origin and the lack of a public policy exception given examples of national case law that were already suggestive of structural difficulties with the Regulation and its underlying drafting assumptions (e.g. see G Cuniberti's comment on French Cour de cassation chambre civile 2, 6 janvier 2012 N° de pourvoi: 10-23518).

As matters stand, the EEO Regulation continues to apply and continues to cause particular difficulties for debtors (and also creditors, enforcement authorities and the CJEU), whether in the Member State of origin or in the Member State addressed. This assertion is supported by two litigation notes, of which this is the first (and most extraordinary): indeed, it is suggested that the difficulties that arose in the litigation discussed below are at least as significant for European private international law as the infamous case C-7/98 *Krombach v Bamberski*; *Krombach* and *Lee* each indicate the need for the inclusion of an overt public policy exception for those cases in which domestic civil procedure and the norms of European and international civil procedure have malfunctioned to such an extent that EU PIL is in danger of being 'understood' to force the Member State of enforcement to grant cross-border legal effect to a judgment granted

improperly in flagrant breach of European and domestic human rights standards.

Facts

In January 2014 the civil judgment enforcement officials of the English High Court received a European Enforcement Order (EEO) application from a Spanish gentleman's lawyers requesting the actual enforcement of the Spanish judgment and costs recorded by the EEO certificate for €923,000. The enforcement target – who had been contacted officially by a letter from the applicant's lawyers *for the first time in the proceedings* shortly before this application and given 14 days to pay – was the well-known actor Christopher Lee, who was domiciled in the UK and resident in London where he had lived for many years.

Thus began the enforcement stage of a cross-border saga in which the judgment creditor and judgment debtor sought respectively to enforce or resist the enforcement of an EEO certificate that was incomplete (hence defective on its face) and unquestionably should never have been granted because it related to a Spanish judgment that should never have been delivered (or declared enforceable) concerning a debt, that had not been properly established according to Spanish procedural law, and relating to an at best contestable (and at worst fanciful) legal liability alleged to somehow fall upon an actor in a film concerning a subsequent unauthorised use by the DVD distributor of that film of the claimant artist's copyrighted artwork from that film in connection with the European DVD release of that film. The claim under Spanish copyright law was based on proceedings dating from June 2007 commenced before the Burgos Commercial court that unquestionably were never at any time (whether as a process, a summons or a judgment) in the following seven years served properly on the famous and foreign-domiciled defendant in accordance with the service provisions of the EU Service Regulation.

The original claim named three parties: 1) a production company (The Quaid Project Ltd); 2) Mr. Juan Aneiros (who was alleged to have signed a contract pertaining to the artwork for the film with the claimant artist in 2004 and who was the son-in-law of Christopher Lee and who seemingly ran Mr Lee's website) and 3) Christopher Lee himself. The proceedings attempted in Spain however encountered an initial problem of how to serve these 'persons' in or from Spain. The solution selected as far as Lee was concerned did not use the Service Regulation nor did it anticipate the later reasoning of the CJEU in *Case C 292/10*

G v de Visser ECLI:EU:C:2012:142. After not finding Lee resident in Spain, the hopeless fiction of service by pinning the originating process to the noticeboard of the Burgos Commercial Court for a period of time was employed: it was then claimed that this properly effected service in circumstances where it was claimed to be impossible to find or serve a world renowned and famous English actor (or the actor's agent) in Spain (where he did not live).

Such modes of service where the defendant is likely to be domiciled in another state have been condemned as insufficient by the ECJ in cases such as: *Case 166/80 Peter Klomps v Karl Michel [1981] ECR 1593; Case C-300/14 Imtech Marine Belgium NV v Radio Hellenic SA ECLI:EU:C:2015:825; Case C-289/17 Collect Inkasso OU v Aint 2018 EU:C:2018*. These defects in serving Lee as intended defendant, and then as an enforcement target, proved fatal in February 2020 when, after roughly six years of challenges by Lee (and from mid 2015 by his Widow), the Spanish Constitutional Court decided that the consequences flowing from the service violations were sufficiently serious to remit the Spanish proceedings back to square one for noncompliance with Article 24 of the Spanish Constitution by the Spanish civil courts.

Significant aspects of the claim are unclear, in particular, why Lee was regarded as potentially liable for the claim. The various law reports make clear that the claim concerned compensation sought under Spanish copyright law by an artist whose contracted artwork for a film called 'Jinnah' (in which Christopher Lee had starred) had later been used without his permission for the subsequent European DVD release of that film. Though Spanish law permits such a contractual claim by the artist against the relevant party who uses his artwork, it is unclear from the various English and Spanish law reports how, in connection with the DVD release, this party was Christopher Lee. It is stated at para 11 of [2017] EWHC 634 (Ch) that Lee's lawyers told the English court that their client (who was not a producer or seemingly a funder of the original film) did not sign *any* contract with the claimant. It is hence not clear that Lee made (or could make) any decisions concerning the artwork for the film and still less concerning its later use for the European DVD release to breach the claimant's copyright. Such decisions appear to have been made by other natural and legal persons, without any link to Lee capable of making him liable for the compensation claimed.

Though it is doubtful that the issue will ever be resolved, a few statements in the Spanish press (*El Pais,* 22 March 2010) suggest both that the claimant regarded

Lee as having been amongst those who had 'authorised' his original appointment to the film as its artist/illustrator but also, and confusingly, that the artist had not been able to speak to Lee about the issue and did not, subject to what the court might hold, consider him responsible for the misuse. Though it is speculation, it may be that a connection was supposed by the claimant (or his lawyers) analogous to a form of partnership liability between Lee and some of the other defendants who might have been presumed to have been involved in the original decision to employ the artist at the time of the film and hence might possibly have later been involved in the decision to re-use the same artwork (this time without the artist's consent) for the European DVD release. Neither the matter nor the nature of Lee's potential liability is though clear.

Further uncertainty arises from the issue of quantum. Spanish law allows an aggrieved artist to bring a claim for contractual compensation to seek sums representing those revenues that would have accrued to him had there been a reasonable contractual agreement to use his artwork in this manner. One function of the Spanish court in such a claim is to determine the correct quantum of this sum by considering representations from *each* party to the claim: this process could not occur properly in the present case as the service defects meant that only the views of the claimant were ever presented. Why was €710,000 the correct sum? Why not €720,000, €700,000 or €10,000? Trusting the artist's own estimation seems optimistic given that the sum claimed was large and the matter concerned the European DVD release of a film that was many orders of magnitude less well-budgeted or commercially successful than other films in which Christopher Lee had starred (e.g. Star Wars and the Lord of the Rings). Equally, did the artist really have all the data in his possession to allow him to demonstrate unilaterally the proper quantum in a forensic manner?

Despite these uncertainties the suggested liability and quantum were asserted for the purposes of formulating the Spanish claim that led to the *in absentia* judgment granted in March 2009 which, by May 2009, (in default of any appeal by the officially uncontacted Lee) was declared final. In October 2009 the judgment was declared enforceable by yet another notice from the same Burgos court that was again pointlessly fixed to the notice board of the court in default of employing any effective mode of service that should have been used in this context.

The matter was reported (inaccurately) in the UK press and media in 2010, possibly based on not quite understood Spanish newspaper reports, without

however securing any comment from Lee. It is unclear if Lee ever did know unofficially of the Spanish proceedings, but it seems likely that he did as his son-in-law was involved in these. Such unofficial knowledge does not, of course, excuse successive service failures. One point that the UK media did record accurately in 2010 was that no defendant had appeared in the earlier Spanish proceedings.

In 2011, at the request of the claimant, the Burgos court issued him with an EEO certificate. It was seriously incomplete, omitting ticks for the boxes found at: 11.1 (that service had been as per the Service Regulation); 12.1 (ditto the summons); 13.1 (that service of the judgment had been as per the Regulation); 13.3 (that the defendant had a chance to challenge the judgment); and, 13.4 (that the defendant had not so challenged). The judgment on which the EEO certificate was based was claimed in the certificate to be one dated 26 April 2010 (seemingly never produced in the later London enforcement proceedings) while the certificate wrongly gave as Lee's London address as the address of his son-in-law and misspelled Lee's middle name.

In October 2013 the claimant applied to the Spanish courts for the rectification of the 2011 EEO certificate: such rectification was however confined only to correct the misspelled name and to add over €200,000 to the original 'debt' as costs due in part, it may be supposed from the comments of the Constitutional Court, to unsuccessful attempts to pursue the Spanish property of Lee's Spanish son-in-law. Seemingly no rectification was sought for the other serious omissions. The October 2013 EEO certificate was presented in January 2014 in London to Lee and to the English court. Lee's correct address had now been ascertained by the claimant's lawyers instructed to seek the cross-border enforcement of the EEO certificate concerning the 'uncontested' sums apparently due in Spain via its expedited and public policy free procedures.

On finally learning officially of the existence of the earlier Spanish *in absentia* proceedings when met with a lawyer's letter to his address demanding payment of the entire alleged debt within 14 days, Lee instructed his English lawyers and appointed Spanish lawyers to commence challenges to the earlier Spanish proceedings and to secure stays of enforcement in Spain and in the UK (the latter being via Art 23(c) EEO). By reason of a good-faith error, Lee's English lawyers 'jumped-the-gun' and represented to the English court that the Spanish challenge proceedings had already commenced – in fact at that point the Spanish lawyers

had only been *instructed* to bring a challenge – and secured the English Art.23(c) stay some 17 days ahead of the actual commencement of the Spanish challenge proceedings. The creditor, via his lawyers, objected (correctly) to the premature grant and also to the continuation of the stay under Art.23(c) which first required the commencement of the Spanish challenges: this objection led to a Pyric victory when the English court dispensed with the erroneous stay but replaced it, seamlessly, with another stay granted as part of its inherent jurisdiction (rather than via any provision of the EEO Regulation) which it justified as appropriate given the presentation of a manifestly defective and incomplete EEO certificate. The stay was to endure for the duration of the Spanish appeals and all Spanish challenges to enforcement. Lee's death in mid 2015 saw the stay endure for the benefit of his widow.

While the stay proceedings were ongoing in England, the attempts by Lee's lawyers to challenge the earlier Spanish proceedings before the Spanish civil courts and appeal courts went from bad to worse. The said courts all took the astonishing view (summarised in paras 23 – 30 of [2017] EWHC 634 (Ch) (03 April 2017)) that there had been sufficient service and that Lee was now out-of-time to raise objections by civil appeal. All Spanish stay applications were rejected; even the Constitutional Court rejected such a stay application (on an earlier appeal prior to the 2020 case), finding the earlier conclusions of the civil courts that there was no demonstrable irreparable harm for Lee without the stay to be in accordance with the Constitution. Appeal attempts before the civil courts to object to the frankly ridiculous triple failure of service of process, summons and judgment, or to the existence of a viable claim, or to the lack of the quantification stage required by Spanish procedural law, all fell on deaf ears in these courts.

In this sense, because the Spanish civil courts all demonstrated their unwillingness to remedy the successive misapplication of EU laws, the private international law and procedural law of the EU all failed in this case in the Member State of origin. That this failure did not result in immediate actual enforcement against Lee's estate in the Member State addressed was due only to the extemporisation by an English court of an inherent jurisdiction stay in response to an incomplete certificate supporting the application. Without this extemporised stay the enforcement would have proceeded in the UK without any possibility of Lee requesting corrective intervention by English authorities to invoke a missing public policy exception. The English court was clear that had the

empty boxes been ticked, there would have been no basis for the stay and enforcement would have been compelled. So much for the Recital 11 assurances of the EEO Regulation:

“This Regulation seeks to promote the fundamental rights and takes into account the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full respect for the right to a fair trial as recognised in Article 47 of the Charter.”

These events left Lee’s lawyers with only one remaining challenge possibility in Spain, viz. arguing that the Spanish civil courts had violated the Spanish Constitution. These challenges were brought to the Spanish Constitutional Court by lawyers acting first for Lee and then, after his death, acting for his widow. The decision of the Constitutional Court was delivered on 20 February 2020 (see comment by M Requejo Isidro) and found that there had indeed been a significant domestic breach of the Spanish Constitution, specifically, Section 24 para 1 which (in English) reads

“All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defense.”

The Constitutional Court – which necessarily is restricted to a consideration of the matters that go directly to the operation of the Spanish Constitution and hence has no further general appellate competence over the actions of the civil courts – concluded that the initial failure to serve a non-domiciled person, whose address was claimed to be unknown, but would have been very simple to discover, in accordance with the provisions of the relevant EU Service Regulation meant that Christopher Lee, and later his widow, were not adequately protected by the Spanish courts as required by Section 24 of the Spanish Constitution and hence had been deprived impermissibly of the defence that had to be provided. The order of the Constitutional Court annulled the earlier Spanish proceedings and sent the contingency-fee-funded claimant back to square one to recommence any subsequent proceedings properly and with due service concerning his alleged claim against whatever parts of the estate of the late Christopher Lee might now still be located within the UK or the EU.

Reflections on some of the wider issues

Though this litigation was compared above with the cause-celebre that was *Krombach*, it can be argued to represent a greater Member State of origin catastrophe than the earlier case: at least Herr Krombach was officially notified, served, summoned to the proceedings and then notified of the judgment. *Krombach* and *Lee* do both however illustrate why a public policy exception in the Member State addressed is essential. Unfortunately, in *Lee* this illustration is set against the absence of that exception. Thus, *Lee* demonstrates the grim prospects facing the 'debtor of an uncontested sum' (who only has this status due to blatant and successive breaches of service and private international law procedures) in cross-border enforcement procedures if the 'emergency brake' of public policy has been removed by drafters keen to prevent its unnecessary application to facilitate faster 'forward-travel' in circumstances in which the application of the said brake would not be necessary.

Had not the presented EEO certificate been so deficient, the English courts would not have been willing to extemporise a stay and the whole sum would have been enforced against Lee in London long before the civil and constitutional proceedings – all of which *Lee* also had to fund – concluded in Spain. Few ordinary people could have effectively defended the enforcement across two venues for six years when facing a claimant pursuing a speculative claim via a conditional fee arrangement (with its clear significance for the likely recovery of defence costs and a resulting impact upon the need to fund your own lawyers in each jurisdiction). It must be presumed that, despite manifest breaches of EU law and human rights standards, most ordinary persons would simply have had to pay-up. Whether this has already occurred, or occurs regularly, are each difficult to ascertain; what can though be said is that the design and rationale of the EEO Regulation facilitate each possibility.

Lee was fortunate indeed to face an incomplete EEO certificate and to find English judges who, successively, were favourably disposed towards his applications despite a Regulation drafted to dismiss them. Though some may be disposed to regard the judiciary of *that* ex-Member State as 'constitutionally' predisposed to effect such interpretative developments, this would be a mistake, particularly in the present context of applications to the Masters in question (members of the judiciary who deal with incoming foreign enforcement applications). In any case, judicial willingness to extemporise a solution when faced with a defective EEO certificate to avert an immediate cross-border

injustice seems a slender thread indeed from which to hang the conformity of the operation of the EEO Regulation with the basic human rights that should have been, but were not, associated with the treatment of Lee throughout these proceedings.

It is suggested that the circumstances of *Lee* demonstrate the failure of both the EEO Regulation, and of EU PIL in general, to protect the rights of an unserved and officially unnotified defendant to object to a cross-border enforcement despite the grossest of failings in the Member State of origin that, given the existence of Article 24 of the Spanish Constitution, proved astonishingly unsusceptible to Spanish appeal procedures. Had the judgment creditor been compelled to proceed to enforcement under the Brussels I Regulation (or later under the Recast of that Regulation) the service defects would probably have been more evident whether in the assumption of jurisdiction and / or at the point of enforcement outside Spain: the judgment debtor would also have had the option to raise the public policy exception to defend the enforcement proceedings plus better stay options in the enforcement venue.

Further it is suggested that *Lee* indicates that the EEO Regulation is no longer fit for purpose and should be recast or repealed. *Lee,* like *Krombach*, illustrates the danger of relying on the Member State of origin when drafting cross-border procedures of a non-neutral nature, i.e. reflecting assumptions that certified claims sent abroad by the 'creditor' will be 'good'. It is not always correct that all will remain 'fixable' in the Member State of origin such that objections to enforcement in the Member State addressed and a public policy exception are unnecessary. *Krombach* and *Lee* may be exceptional cases, but it is for such cases that we require the equally exceptional use of a public policy exception in the enforcement venue.

The Data Protection Conflict: The EU General Data Protection Regulation 2016 and India's Personal Data Protection Bill 2019

By *Anubhav Das (National University of Advanced Legal Studies, Kochi) and Aditi Jaiswal (Ram Manohar Lohia National Law University, Lucknow)*

The internet brought significant changes in society, leading to a massive collection of data which necessitated legislation to regulate such data collection. The European Union enacted the General Data Protection Regulation, 2016(Hereafter GDPR), replacing the Data Protection Directive, 1995. Meanwhile, India, which currently lacks a separate data protection legislation, is in the process of enacting the Personal Data Protection Bill, 2019 (Hereafter PDP). The PDP has been introduced in the Indian parliament and is currently under the scrutiny of a parliamentary committee. The primary purpose of these legislations is the protection of informational privacy.

Even though GDPR and PDP follow the same set of data protection principles, but, there exists an inevitable conflict between the two. This conflict determines the applicability of the legislation on the data subject. The territorial scope of GDPR and the PDP makes it clear that both overlap each other and this overlap can be used by companies involved in data processing or collection, to circumvent the civil liability arising under the laws. This post analyses the conflict between both the laws and in conclusion, it will suggest a way to overcome such an issue.

Territorial Scope: GDPR and PDP

Article 3 of the GDPR provides for the territorial applicability of the law. The Regulation applies to the processing of personal data by a controller or a processer. According to Article 3(1), any controller or processer that is established in the member state (European Union) shall fall under the scope of the GDPR. In other words, any company which has an office in the European Union shall come within the purview of the GDPR. Article 3(2) states that even if any processer or controller is not established in the European Union, but if they

are offering goods or services irrespective of payment or monitoring behaviour in the European Union, then they will also fall under the scope of GDPR.

On the other hand, the PDP provides for the territorial applicability under Section 2. It applies to the processing of personal data by data fiduciary (similar to the controller under GDPR) and data processer (similar to processer under GDPR). Section 2(A) (a) states that if personal data is collected, disclosed, shared or otherwise processed within the territory of India, then it shall fall under the PDP. Section 2(A) (b), makes it applicable to the State, any Indian company, any citizen of India or any person or body of persons incorporated or created under Indian law. Section 2 (A) (c) makes it applicable to data fiduciary or data processor which are not in India but are processing in connection with any business carried on in India, or any systematic activity of offering goods or services to data principals within the territory of India or any activity concerning the profiling of data principle.

The Overlap of Jurisdiction

The internet has provided a way for companies to operate anywhere without the existence of an entity in a particular country. This also includes those companies which deal with data. In the context of Europe and India, a company doesn't need to have an entity in Europe or India to operate and do business. Thus, an Indian company can easily do business related to data in Europe without any real existence in Europe and vice versa. Consequently, the problem that arises concerning data protection laws is complicated. An Indian company will fall under the purview of the PDP as per Section 2(A) (b) but at the same time if this Indian company also deals with '*personal data for offering goods or services*' in the European Union, then it will also be regulated by the provisions of the GDPR.

Similarly, a European company '*collecting data in India*' will fall under the scope of both PDP and GDPR. It is a matter of fact that judicial courts do not have jurisdiction over foreign land. Hence, no monetary damages can be imposed on companies which operate from Europe by using PDP or companies operating from India by using GDPR.

A European company or an Indian company can also claim that there is proper compliance with GDPR or PDP, respectively. In the context of Europe and India, a company only needs to follow the data protection law of the land from where it

operates even though such an act violates data protection law of the other jurisdiction. This is possible as GDPR and PDP differ from each other on every key and essential aspect such as the very meaning of personal data.

The Difference and its Implications

The primary purpose of GDPR and PDP is the protection of personal data. But, the definition of personal data differs when GDPR is compared with PDP. The reason why such a description is essential is that a substantial part of both laws is based on the processing of personal data. This includes fair consent, purpose limitation, storage limitation, rights of data principle etc. Such aspects, when read with the territorial scope of both the laws, outlines the applicability of its provisions. The table below shows the difference in the definition of personal data.

GDPR	PDP
Personal data means any information relating to an identified or identifiable natural person ('data subject'). An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;	**Personal data** is data about or relating to a natural person who is directly or indirectly identifiable, having regard to any characteristic, trait, attribute or any other feature of the identity of such natural person, whether online or offline, or any combination of such features with any additional information, and shall include any inference drawn from such data for profiling.

Note – Underlined are the parts which show that it is not present in the other law.

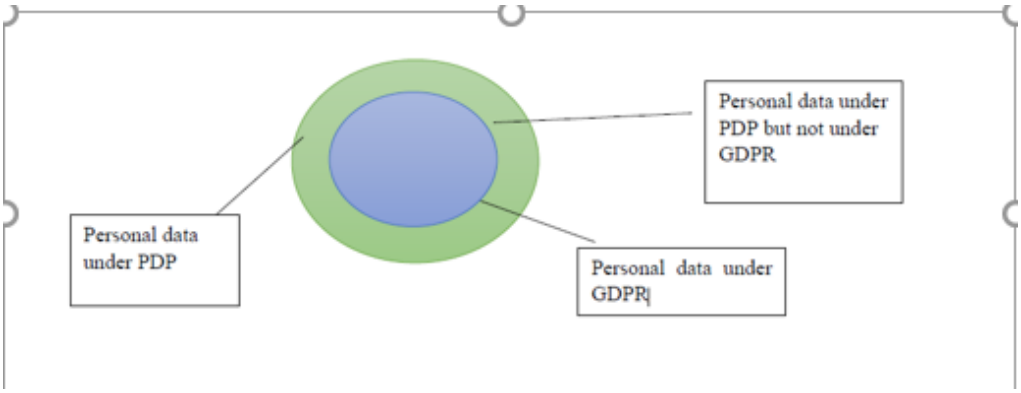
Both GDPR and PDP refer to personal data as information/data relating to

identified/identifiable natural person. At the same time, the nuances of what constitutes an identifiable natural person differ significantly as both use different terminology which creates a diversion in the meaning of the personal data.

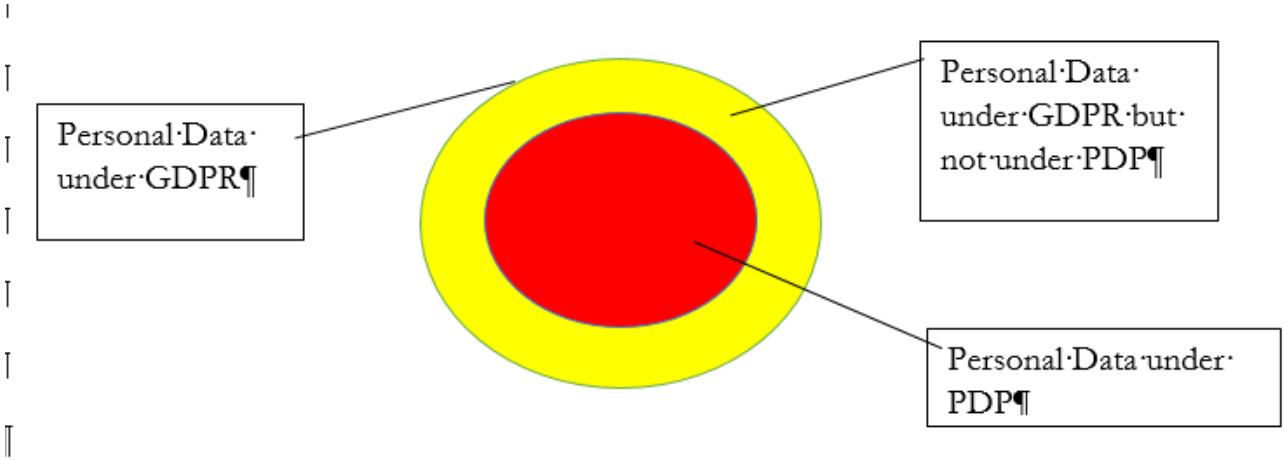
Deviation 1 – PDP provides for words such as '*any other feature of identity, a combination of such feature with other information, any inference drawn for profiling*', in the meaning of an identifiable natural person. These terms can be interpreted more liberally and will probably be explained by courts in India and shall have an evolving meaning. GDPR, on the other hand, provides for specific terms like '*physical, physiological, genetic, mental, economic, cultural, social identity*'. Hence, European Courts will have to interpret personal data by mandatorily considering such terms, making it's scope narrower when compared to PDP in this context.

Deviation 2 – Terms such as '*identification number*' and '*location data*' is mentioned explicitly in GDPR and not in PDP, making PDP narrower in scope here.

This above discussion can be easily understood with the help of the following figure –



Deviation 1 – The green circle represents inference in PDP. The blue circle represents inference in GDPR. The green stripe represents personal data which is covered in PDP and not covered in GDPR.



Deviation 2 – The yellow circle represents personal data in GDPR. The red circle represents personal data in PDP. The yellow stripe represents personal data which is covered in GDPR and not covered in PDP.

In the figure above, in **Deviation 1**, the green strip represents that personal data, which when processed by a company shall not fall under the scope of GDPR even though it shall be under the scope of the PDP. Such a difference implies that companies falling under the territorial ambit of both the laws, can follow one and circumvent the other.

A European company can process personal data represented in the green strip from India, and for that, it doesn't need to comply with GDPR as that data is not personal data under GDPR. Now even though, there is a violation of the provisions under PDP the company can escape liability as Indian courts do not have jurisdiction in Europe, and European Courts cannot adjudge the matter as it falls outside the material scope of GDPR. The vice versa will happen if the case of **deviation two** is considered.

The consequence of such inconsistencies will be faced by data subjects who won't be able to claim damages provided under their respective data protection law. One of the ways to ensure that damages can be claimed is by harmonising the data protection laws which can only be done by international cooperation.

The Need For International Cooperation in Data Protection

The existence of such issues in the framework of GDPR and PDP is not because of the extraterritorial application. Advocating against the extraterritorial application to resolve the problem of overlap in the jurisdiction of data protection laws would only give rise to more infringement of informational privacy of data subjects by

foreign companies. This, in turn, will be detrimental for the very purpose for which data protection legislation is enacted.

The requirement at present is to harmonise the key definitions such as personal data in the data protection legislation. This will ensure that a right of action lies in both GDPR and PDP. Even if a foreign company cannot be dragged to the national court, harmonisation will at least ensure that a data subject has a right to seek damages in the international court.

The aspect discussed in this article is regarding two jurisdictions. However, consider, for instance, the complications that could arise when more than two jurisdictions are involved. To illustrate, an Indian Company having an office in Canada and that office is doing business in data from the European Union. In such cases, the best way to ensure data protection rights is by harmonisation, and this can only be achieved with the help of international cooperation. Thus, data protection in the age of internet needs multilateral international agreements.

Conclusion

The international regime of data protection is complicated in today's world. There is no proper international agreement which governs the data protection legislation across the globe, which resulted in a difference in the critical terms of data protection when GDPR and PDP are compared. This, in – turn can be used by corporates to get away with liability. So, the aim must be not to let anyone violate the data protection principles by using this inconsistency and get away with it. To deal with this and safeguard the privacy of data subject, international cooperation in data protection is essential.

A Dangerous Chimera: Anti-Suit Injunctions Based on a "Right to be Sued" at the Place of Domicile under the Brussels Ia Regulation?

This post introduces my case note titled 'A Dangerous Chimera: Anti-Suit Injunctions Based on a "Right to be Sued" at the Place of Domicile under the Brussels Ia Regulation?' which appeared in the July 2020 issue of the *Law Quarterly Review* at page 379. An open access version of the case note is available here.

In *Gray v Hurley* [2019] EWCA Civ 2222, the Court of Appeal (Patten LJ, Hickinbottom LJ and Peter Jackson LJ), handed down the judgment on the claimant's appeal in *Gray v Hurley* [2019] EWHC 1972 (QB). The appellant appealed against the refusal of an anti-suit injunction.

The appellant (Ms Gray) and respondent (Mr Hurley) had been in a relationship. They acquired property in various jurisdictions using the appellant's money, but held it in either the respondent's name or in corporate names. The relationship ended and a dispute commenced over ownership of some of the assets and properties. The appellant was domiciled in England; the respondent lived in New Zealand after the relationship ended and was no longer domiciled in England. He initiated proceedings there for a division of the property acquired by the couple during the relationship. The appellant issued proceedings in England seeking a declaration that she was entitled absolutely to the assets. She also applied for an anti-suit injunction to restrain the defendant from continuing with proceedings in the courts of New Zealand. Lavender J held that England was the appropriate forum for the trial of the appellant's claims but that the respondent's New Zealand claim could not be determined in England. He rejected her argument that Article 4(1) of the Brussels Ia Regulation obliged him to grant an anti-suit injunction to prevent the respondent from litigating against her in a non-EU state.

The appellant argued that *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723, [2007] 2 All E.R. (Comm) 813 and *Petter v EMC Europe Ltd* [2015] EWCA Civ 828, [2015] C.P. Rep. 47 were binding authority that

Article 4(1) provided her with a right not to be sued outside England, where she was domiciled, obliging the court to give effect to that right by granting an anti-suit injunction.

The Court of Appeal considered that the issue was not *acte claire* and sent a preliminary reference to the CJEU (pursuant to Article 267 TFEU) asking whether Article 4(1) of the Brussels Ia Regulation provided someone domiciled in England with a right not to be sued outside England so as to oblige the courts to give effect to that right by granting an anti-suit injunction.

The case note examines the Court of Appeal's decision in *Gray v Hurley* [2019] EWCA Civ 2222. It offers a pervasive critique of the argument that the general rule of jurisdiction under the Brussels Ia Regulation gives rise to a substantive right to be sued only in England and that this right is capable of enforcement by an anti-suit injunction. It is argued that the previous decisions of the Court of Appeal in *Samengo-Turner v J&H Marsh & McLennan (Services) Ltd* [2007] EWCA Civ 723 and *Petter v EMC Europe Ltd* [2015] EWCA Civ 828 were themselves wrongly decided. In light of this, it will be even more difficult to justify the broader application of a similar result in the present case.

Indeed, the law would take a wrong turn if the present case is allowed to build on the aberrational foundations of the developing law on anti-suit injunctions based on rights derived from the Brussels Ia Regulation. Essentially, a chimerical remedy based on a fictitious right would not only infringe comity but would also deny the respondent access to justice in the only available forum. The note also anticipates the CJEU's potential findings in this case.

An open access version of the case note is available here.

Uber Arbitration Clause

Unconscionable

In 2017 drivers working under contract for Uber in Ontario launched a class action. They alleged that under Ontario law they were employees entitled to various benefits Uber was not providing. In response, Uber sought to stay the proceedings on the basis of an arbitration clause in the standard-form contract with each driver. Under its terms a driver is required to resolve any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process requires up-front administrative and filing fees of US$14,500. In response, the drivers argued that the arbitration clause was unenforceable.

The Supreme Court of Canada has held in *Uber Technologies Inc. v. Heller*, 2020 SCC 16 that the arbitration clause is unenforceable, paving the way for the class action to proceed in Ontario. A majority of seven judges held the clause was unconscionable. One judge held that unconscionability was not the proper framework for analysis but that the clause was contrary to public policy. One judge, in dissent, upheld the clause.

A threshold dispute was whether the motion to stay the proceedings was under the *Arbitration Act, 1991*, S.O. 1991, c. 17 or the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sch. 5. Eight judges held that as the dispute was fundamentally about labour and employment, the ICAA did not apply and the AA was the relevant statute (see paras. 18-28, 104). While s. 7(1) of the AA directs the court to stay proceedings in the face of an agreement to arbitration, s. 7(2) is an exception that applies, *inter alia*, if the arbitration agreement is "invalid". That was accordingly the framework for the analysis. In dissent Justice Cote held that the ICAA was the applicable statute as the relationship was international and commercial in nature (paras. 210-18).

The majority (a decision written by Abella and Rowe JJ) offered two reasons for not leaving the issue of the validity of the clause to the arbitrator. First, although the issue involved a mixed question of law and fact, the question could be resolved by the court on only a "superficial review" of the record (para. 37). Second, the court was required to consider "whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge" (para. 45). If so, the court is to decide the issue. This is rooted in concerns about access to justice (para. 38). In the majority's view, the

high fees required to commence the arbitration are a "brick wall" on any pathway to resolution of the drivers' claims.

The majority then engaged in a detailed discussion of the doctrine of unconscionability. It requires both "an inequality of bargaining power and a resulting improvident bargain" (para. 65). On the former, the majority noted the standard form, take-it-or-leave-it nature of the contract and the "significant gulf in sophistication" between the parties (para. 93). On the latter, the majority stressed the high up-front costs and apparent necessity to travel to the Netherlands to raise any dispute (para. 94). In its view, "No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it" (para. 95). As a result, the clause is unconscionable and thus invalid.

Justice Brown instead relied on the public policy of favouring access to justice and precluding an ouster of the jurisdiction of the court. An arbitration clause that has the practical effect of precluding arbitration cannot be accepted (para. 119). Contractual stipulations that prohibit the resolution of disputes according to law, whether by express prohibition or simply by effect, are unenforceable as a matter of public policy (para. 121).

Justice Brown also set out at length his concerns about the majority's reliance on unconscionability: "the doctrine of unconscionability is ill-suited here. Further, their approach is likely to introduce added uncertainty in the enforcement of contracts, where predictability is paramount" (para. 147). Indeed, he criticized the majority for significantly lowering the hurdle for unconscionability, suggesting that every standard-form contract would, on the majority's view, meet the first element of an inequality of bargaining power and therefore open up an inquiry into the sufficiency of the bargain (paras. 162-63). Justice Brown concluded that "my colleagues' approach drastically expands the scope of unconscionability, provides very little guidance for the doctrine's application, and does all of this in the context of an appeal whose just disposition requires no such change" (para. 174).

In dissent, Justice Cote was critical of the other judges' willingness, in the circumstances, to resolve the issue rather than refer it to the arbitrator for decision: "In my view, my colleagues' efforts to avoid the operation of the rule of systematic referral to arbitration reflects the same historical hostility to

arbitration which the legislature and this Court have sought to dispel. The simple fact is that the parties in this case have agreed to settle any disputes through arbitration; this Court should not hesitate to give effect to that arrangement. The ease with which my colleagues dispense with the Arbitration Clause on the basis of the thinnest of factual records causes me to fear that the doctrines of unconscionability and public policy are being converted into a form of ad hoc judicial moralism or "palm tree justice" that will sow uncertainty and invite endless litigation over the enforceability of arbitration agreements" (para. 237). Justice Cote also shared many of Justice Brown's concerns about the majority's use of unconscionability: "I am concerned that their threshold for a finding of inequality of bargaining power has been set so low as to be practically meaningless in the case of standard form contracts" (para. 257).

The decision is lengthy and several additional issues are canvassed, especially in the reasons of Justice Cote and Justice Brown. The ultimate result, with the drivers not being bound by the arbitration clause, is not that surprising. Perhaps the most significant questions moving forward will be the effect these reasons have on the doctrine of unconscionability more generally.

The end of fostering outdated injustice to children born outside marriage through reparation of Nazi-expatriation acts: Ruling of the German Constitutional Court of 20 May 2020 (2 BvR 2628/18)

Marie-Luisa Loheide is a doctoral candidate at the University of Freiburg who writes her dissertation about the relationship between the status of natural

persons in public and private international law. She has kindly provided us with her thoughts on a recent ruling by the German Constitutional Court.

According to Article 116 para. 2 of the German Basic Law *(Grundgesetz – GG)*, every descendant of former German citizens of Jewish faith who have been forcibly displaced and expatriated in a discriminatory manner by the Nazi-regime is entitled to attain German citizenship upon request. This rule has been incorporated in the Basic Law since 1949 as part of its confrontation with the systematic violations of human rights by the Nazi-regime and is therefore meant to provide reparation by restoring the *status quo ante*.

Descendants *("Abkömmlinge")* as referred to in Article 116 para. 2 are children, grandchildren and all future generations without any temporal constraint. Regardless of their parents' choice of citizenship, they have a personal right to naturalisation which is exercised upon request by reactivation of the acquisition of citizenship *iure sanguinis*. This very wide scope is legitimated by the striking injustice done by the Nazi-regime. Yet, according to the settled case law of the Federal Administrative Court, it had been limited by a strict "but-for" test: in order to solely encompass those people affected by this specific injustice. This meant that the descendant must hypothetically have possessed German citizenship according to the applicable citizenship law at the time of its acquisition which is usually the person's birth. To put it more clearly, one had to ask the following hypothetical question: Would the descendant be a German citizen if his or her ancestor had not been expatriated by the Nazis?

Exactly this limiting prerequisite was the crucial point of the matter decided upon by the German Constitutional Court on 20 May 2020. In the underlying case, the hypothetical question described above would have had to be answered in the negative: Until its revocation in 1993, German citizenship law stated that children of an unmarried German father and a mother of other citizenship did not acquire the German citizenship of their father but only that of their mother, contrary to today's principle of *ius sanguinis*-acquisition. As *in casu* the daughter of a forcibly displaced and expatriated former German emigrant of Jewish faith and a US-American mother was born outside marriage in 1967, she was denied the acquisition of the German citizenship. Whereas this was not criticised by the administrative courts seised, the German Constitutional Court in its ruling classified the denial as an obvious violation of the principle of equal treatment of children born within and outside marriage underlying Article 6 para. 5 GG as well

as the principle of equal treatment of women and men according to Article 3 para. 2 GG, as alleged by the plaintiff. In its reasoning, the Court emphasised that an exception from the principle of equal treatment of children born outside marriage could only be made if absolutely necessary. This corresponds to the case-law of the European Court of Human Rights on Article 14 of the ECHR that a difference in treatment requires “very weighty reasons”. The former non-recognition of the family relationship between an unmarried father and his child, however, did obviously contradict the stated constitutional notion without being justified by opposing constitutional law. Out of two possible interpretations of “descendant” as referred to in Article 116 para. 2 GG the court must have chosen the one that consorts best with the constitution. According to the Constitutional Court, the more generous interpretation of descendant also prevents a perpetuation of the outdated notion of inferiority of children born outside marriage through Article 116 para 2 GG and corresponds to its purpose of reparation.

As the notion of inferiority of children born outside marriage has fortunately vanished, a clarifying judgment was highly overdue and is therefore most welcome. It is not acceptable that outdated notions are carried to the present through a provision of the Basic Law that is meant to provide reparation of Nazi crimes. Especially in post-Brexit times, the question dealt with has become more and more urgent with respect to people reclaiming their German citizenship in order to maintain their Union citizenship and the rights pertaining to it (see here).

In regard to conflicts law, this clarification of a key question of citizenship law is relevant to the determination as a preliminary issue (incidental question or *Vorfrage)* when nationality is used as a connecting factor. The judgment is likely to lead to more cases of dual citizenship that are subject to the ambiguous conflicts rule of Art. 5 para. 1 sentence 2 EGBGB.