Just released: HCCH Documentary on the Adoption of the 2019 HCCH Judgments Convention.

The HCCH just released a short documentary on the adoption of the 2019 HCCH Judgments Convention.

Shot during the 22nd Diplomatic Session of the HCCH, which took place in June / July 2019, this documentary gives unprecedented insights into the finalisation of the negotiations of this game changing treaty. Follow the delegates during the negotiations and join them at the ceremonial signing of the Convention on 2 July 2019.

This documentary is also a unique opportunity to hear the Secretary General, Dr Christophe Bernasconi; the Chair of the Commission of the Diplomatic Session on the Judgments Convention, David Goddard QC; as well as H. E. Maria Teresa Infante, Ambassador of the Republic of Chile to the Kingdom of the Netherlands; and Professor Elizabeth Pangalangan, University of the Philippines, share first hand their experiences and impressions during the Diplomatic Session, and explain the key elements of the 2019 HCCH Judgments Convention as well as the benefits it will offer.

The video is now available on the HCCH's YouTube channel (https://youtu.be/DTlle58s64s).

A Short History of the Choice-of-

Law Clause

Written by John Coyle, the Reef C. Ivey II Distinguished Professor of Law, Associate Professor of Law at the University of North Carolina School of Law

The choice-of-law clause is now omnipresent. A recent study found that these clauses can be found in 75 percent of material agreements executed by large public companies in the United States. The popularity of such clauses in contemporary practice raises several questions. When did choice-of-law clauses first appear? Have they always been popular? Has the manner in which they are drafted changed over time? Surprisingly, the existing literature provides few answers.

In this post, I try to answer some of these questions. The post is based on my recent paper, *A Short History of the Choice-of-Law Clause,* which will be published in 2020 by the Colorado Law Review. The paper seeks, among other things, to determine the *prevalence* of choice-of-law clauses in U.S. contracts at different historical moments. The paper also attempts to determine how the *language* in these same clauses has evolved over time.

Prevalence

The paper first traces the rise of the choice-of-law clause in the United States over the course of the 19th and 20th centuries. It shows how these clauses were first adopted in the late 19th century by companies operating in a small number of industries – life insurance companies, transportation companies, and mortgage lenders – doing extensive business across state lines. These clauses soon migrated to other types of agreements, including prenuptial agreements, licensing agreements, and sales agreements. One can find examples of clauses in each of these types of agreements in cases decided between 1900 and 1920. It is challenging, however, to estimate what percentage of *all* U.S. contracts contained a choice-of-law clause at points in the distant past. To calculate this number accurately, one would need to know, first, the total number of contracts executed

in a given year, and second, how many of these contracts contained choice-of-law clauses. From the vantage point of 2019, it is simply not possible to gather this information.

It is possible, however, to obtain a rough sense for the prevalence of such clauses by looking to books of form contracts. In an era before photocopiers – let alone computers and word processors – lawyers would routinely consult form books containing samples of many different types of contracts when called upon to draft a particular type of agreement. General form books typically contained hundreds of agreements, organized by type, that could be quickly and cost-effectively deployed by the contract drafter when the need arose. Since these books provide a historical record of what provisions were typically included from specific types of agreements at a particular time, they offer a potential means by which scholars can get a general sense for the prevalence of the choice-of-law clause in a particular era. One need only select a well-known form book from a given year, count the number of contracts in the form book, and determine what percentage of those contracts contain choice-of-law clauses.

Using this approach, I reviewed more than two dozen form books with the aid of several research assistants. The earliest form book dated to 1860. The contracts in that book contained not a single choice-of-law clause. The most recent form book dated to 2019. Sixty-nine percent of the contracts in this book contained a choice-of-law clause. The bulk of our time and attention was spent on form books published between these years. With respect to each book, we recorded the total number of contracts contained therein as well as the number of those contracts that contained a choice-of-law clause. When our work was done, it became clear that the choice-of-law clauses were infrequently used until the early 1960s, as demonstrated on the following chart.

While the clause was *known* to prior generations of contract drafters, it was not widely *used* until 1960. This is the year in which the clause truly began its long

march to ubiquity.

There are many possible explanations for why the choice-of-law clause gained traction at this particular historical moment. One possibility is that the enactment of the Uniform Commercial Code (UCC) spurred more parties to write choice-of-law clauses into their agreements. Significantly, the draft UCC contained a provision that specifically directed courts to enforce choice-of-law clauses in commercial contracts when certain conditions were met. Although the UCC was first published in 1952, it was substantially revised in 1956 and was not enacted by most states until the early 1960s. It may not be a coincidence that one sees an uptick in the number of choice-of-law clauses appearing in form books at the same moment when many states were in the process of enacting a statute that directed their courts to enforce these provisions.

Language

The second part of the paper chronicles the changing language in choice-of-law clauses. This inquiry also presents certain methodological challenges. It is obviously impossible to review and inspect every choice-of-law clause used in the tens of millions of U.S. contracts that entered into force over the past 150 years. In order to overcome these challenges, I turned to a somewhat unusual source – published cases. Over a period of several years, I worked with more than a dozen research assistants to comb through such cases in search of choice-of-law clauses. Whenever we found a clause referenced in a case, we inputted that clause – along with the year the contract containing the clause was executed and the type of contract at issue – to a spreadsheet. When the work was complete, I had collected 3,104 choice-of-law clauses written into contracts between 1869 and 2000 that selected the law of a U.S. jurisdiction. We then set about analyzing the language in these clauses. In conducting this analysis, I ignored the choice of jurisdiction (e.g., New York or England). I was concerned exclusively with the other words in the clause (e.g., made, performed, interpreted, construed, governed, related to, conflict-of-laws rules, etc.).

This inquiry generated a number of interesting insights. First, I found that the Conflicts Revolution in the United States had little to no impact on the way that choice-of-law clauses were drafted. The proportion of clauses referencing the place where the contract was made or the place where it was to be performed remained constant between 1940 and 2000. Second, I found that while the proportion of clauses containing the words "interpreted" or "construed" similarly remained constant during this same time frame, the proportion of clauses that containing the word "governed" rose from 40 percent in the 1960s to 55 percent in the 1970s to 68 percent in the 1980s to 73 percent in the 1990s. It is likely that this increase was driven in part by court decisions rendered in the late 1970s suggesting that the word "govern" was broader than the word "interpret" or "construe" in the context of a choice-of-law clause.

Third, I found that it can be extremely difficult to predict when contract drafters will revise their choice-of-law clauses. In contemporary practice, one routinely comes across clauses that carve out the conflicts law of the chosen jurisdiction. ("This Agreement shall be governed by the laws of the State of New York, *excluding its conflicts principles*.") This addition constitutes a relatively recent innovation; the earliest example of such a provision appears in a case decided in 1970. In the 1980s, roughly 8 percent of the clauses in the sample contained this language. By the 1990s, the number had risen to 18 percent. While there is no real harm in adding this language to one's choice-of-law clause, the overwhelming practice among U.S. courts is to read this language into the clause even when it is absent. Its relatively rapid diffusion is thus surprising.

Conversely, very few contract drafters revised their clauses during this same time period to select the tort and statutory law of the chosen jurisdiction. This omission is baffling. U.S. courts have long held that contracting parties have the power to select the tort and statutory law of a particular jurisdiction in their choice-of-law clauses. It stands to reason that large corporations (and other actors in a position to dictate terms) would have raced to add such language to their clauses to lock in a wider range of their home jurisdiction's law to be

invoked in future disputes. The clauses in the sample, however, indicate that the proportion of clauses containing such language held constant at 1 percent to 2 percent throughout the 1970s, 1980s, and 1990s. The failure of this particular innovation to catch on during the relevant time period is likewise surprising.

Conclusion

The foregoing history looks to contract practice as it relates to choice-of-law clauses in the United States. There is no reason, however, why scholars in other nations could not deploy some of the same research methods to see if the choice-of-law clauses in their local contracts exhibit a similar trajectory. (Among other things, my paper contains a detailed discussion of methods.) Most well-resourced law libraries contain old form books that could be productively mined to determined when these provisions came into vogue across a range of jurisdictions. A review of such books could shed welcome light on the evolution of the choice-of-law clause over time across many different jurisdictions.

[This post is cross-posted at Blue Sky Blog, Columbia Law School's Blog on Corporations and the Capital Markets]

The long tentacles of the Helms-Burton Act in Europe

By Nicolás Zambrana-Tévar LLM(LSE), PhD(Navarra), KIMEP University

On 2 September, the First Instance Court number 24 of Palma de Mallorca (Spain) issued an *auto* (interlocutory decision) staying proceedings commenced against Meliá Hotels International S.A., one of the biggest Spanish hotel chains, on grounds of immunity from jurisdiction, act of state doctrine and lack of international jurisdiction.

The claimant was Central Santa Lucía L.C., a US company which considers itself the successor of two Cuban corporations: Santa Lucía Company S.A. and Sánchez Hermanos. These two legal entities owned a sugar plantation and other pieces of land in Cuba. Following the revolution of 1959 in this country, those properties were expropriated by Law 890 of 1960. The expropriated land under discussion – known as *Playa Esmeralda* – is now owned by Gaviota S.A. a corporation of the Cuban State. The Cuban Government authorized Meliá to manage and exploit the land for touristic purposes and Meliá now owns two hotels on that landplot. The claimants contended that Meliá was conscious of the illegitimacy of the expropriation but had nevertheless sought to profit from it. This is apparently the first such claim in Europe and the decision staying the proceedings can still be appealed.

The claim was based on the argument that, since what the claimant describes as "confiscation" had been contrary to international law, it was null and void and the US company – as successor of the original Cuban proprietors – should still be considered the rightful owner of the land. Meliá was now in possession of the land and was profiting from it in bad faith, conscious of the illegitimacy of the property title of the Cuban state. The claimant contended that under article 455 of the Spanish Civil Code, possessors in bad faith must hand over not only the profits of their illegitimate exploitation but any other fruits that the legitimate possessor could have obtained.

This claim filed by the US company was against a legal entity domiciled in Spain. Therefore and under normal circumstances, the Spanish court would have had jurisdiction. However, the Spanish court understood that it did not. First of all, article 21 of the Spanish Judiciary Law (*Ley Orgánica del Poder Judicial*) and article 4 of Organic Law 16/2015 on immunities of foreign states establish that Spanish courts shall not have jurisdiction against individuals, entities and assets which enjoy immunity from jurisdiction, as provided by Spanish law and Public International Law. The Cuban State and the property owned by its company – Gaviota – were therefore and in principle protected by the rules on immunity but

the Cuban State had actually not been named as a respondent in the claim and its object was not the expropriated property itself but the profits from its exploitation. The decision does not explain why the property of a commercial corporation owned by the Cuban State – as opposed to the State itself – also enjoys immunity.

The decision goes on to say that Spain subscribes to a limited understanding of immunity from jurisdiction (articles 9 to 16 of Organic Law 16/2015), so that claims arising from the commercial relations between Gaviota and Meliá for the touristic development of the land – *acta iure gestionis* – might not be covered by immunity. Nevertheless, the Spanish court understood that the true basis for the claim were not the relations between Gaviota and Meliá – commercial or otherwise – but the alleged illegitimacy of the expropriation – *acta iure imperii* –, the property title that Cuba now has over the land and any responsibility incurred by Meliá for illegitimately profiting from the situation. Santa Lucía could only have a right to the illegitimate profits if it was considered the rightful owner and this entailed a discussion about a truly sovereign act: the expropriation.

Therefore, it can be said that the court's rationale is actually more akin to the act of state doctrine of English and US law, whereby courts should refuse to hear cases where they are called to question the conduct of foreign governments or acts of any sovereign entity within their own territory. For a finding that Meliá had illegitimately profited from Santa Lucía's disgrace, not only the knowledge of the expropriation by the Spanish company but the illegality of the expropriation itself would have had to be discussed before the Mallorca court.

Additionally, the court explains that Spanish courts do not have jurisdiction to hear claims concerning property rights – ownership or possession, in this case – over immovable assets located outside Spain. The court wrongly considers that EU Regulation 1215/2012 is applicable to this case. However, the immovable property under discussion is located outside the EU, so the Regulation actually does not apply. Similarly and as indicated above, the court considers that article 455 of the Spanish Civil Code is applicable, notwithstanding the fact that article 10.1 of the same norm establishes that the law applicable to property rights will be the law of the place where they are located.

This decision and this claim by Cubans "exiled" in the US arrives after the US announced the end of the suspension of Title III of the 1996 Cuban Liberty and

Democratic Solidarity (Libertad) Act of 1996 (aka Helms–Burton Act), which effectively opens the door to lawsuits in the US by providing a right of action for all US nationals (i.e. including naturalized Cubans and their descendants) whose property was taken by the Cuban Government after the revolution. Such claims can be directed against anybody – regardless of nationality – who "profits" from, "traffics" with or otherwise has an "interest" in such property.

European Union officials have recently voiced their concern for these potential lawsuits against European investors in Cuba and have reminded that some countermeasures were already foreseen when the law was passed in 1996. Several members of the European Commission have also warned the US Government that the EU may launch a case before the WTO and that it already has in place a "blocking statute" which bans the recognition and enforcement of any of the resulting US judgements against European companies and that also allows them to recover in EU courts any losses caused by claims under Title III, against assets that US claimants may have in the EU. The Spanish Government has also set up a special committee to study these risks, given the important commercial interests of Spanish companies in the Caribbean island. In this regard, Miami lawyers confirm that many families of Cuban origin are now requesting legal advice. The swift way in which the Spanish case here discussed has been decided may be an incentive for those families to claim in the US – and not in Europe – under the newly activated Helms-Burton act.

Update on the case Monasky v. Taglieri on the determination of habitual residence under the

Hague Child Abduction Convention currently before the US Supreme Court

Written by Mayela Celis

For those of you who are interested in the case Monasky v. Taglieri currently before the US Supreme Court, please note that an extremely useful amicus curiae brief was filed this week by Reunite International Child Abduction Centre (as stated on its website Reunite is the "leading UK charity specialising in parental child abduction and the movement of children across international borders"). This brief will certainly help put things into perspective with regard to the weight that should be given to parental intent when determining the habitual residence of the child under the Hague Child Abduction Convention (but it only answers the second question presented).

Other amicus curiae briefs have also been filed this week (incl. the one for the United States, which addresses accurately, in my view, the first question presented with regard to the standard of review of the district court's determination of habitual residence; such determinations should be reviewed on appeal for *clear error* – and ***not*** de novo, which is more burdensome-). This reasoning is in line with the Balev case of the Canadian Supreme Court (2018 SCC 16, 20 April 2018).

For more information on this case, see my previous post here.

I include some excerpts of the brief of Reunite below (p. 18):

"It can therefore be seen that, while still important, parental intention is not necessarily given greater weight in English and Welsh law than any other factor when determining a child's habitual residence. Further, the court evaluates parental intention in relation to the nature of the child's stay in the country in question (by way of example, whether it was for a holiday, or some other temporary purpose, or whether it was intended to be for a longer duration).

"In that way, parental intention is treated as one factor within a broad factual

enquiry, rather than as separate and, perhaps, determinative enquiry that precedes or is separate from an evaluation of the child's circumstances. Within such an enquiry, the factors that are relevant to the habitual residence determination will vary in terms of the weight that they are given depending on the circumstances of the case. Lord Wilson's judgment in Re B provides an example of how those facts might be weighed up against each other."

New Article on Non-Party Access to Court Documents and the Open Justice Principle

Written by Ana Koprivica Harvey

Ms Ana Koprivica Harvey (Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law) recently posted a new paper in the MPILux Research Paper Series, titled Non-Party Access to Court Documents and the Open Justice Principle: The UK Supreme Court Judgment in Cape Intermediate Holdings Ltd v Dring. Below is an overview provided by the Author.

This article analyses the eagerly awaited the UK Supreme Court judgment in *Cape Intermediate Holdings Ltd v Dring*, unanimously delivered on 29th July 2019. Broadly speaking, the case concerned the scope and operation of the constitutional principle of open justice. More precisely, the questions before the Supreme Court were how much of the written material placed before a court in a civil action should be accessible to persons other than the parties to the proceedings, and how such access should be facilitated.

Case Background

The documents to which access was sought related to a lengthy trial in product

liability proceedings against Cape Intermediate Holdings, a company involved in the manufacture and supply of asbestos. Following the settlement of the proceedings, the Asbestos Victims Support Groups Forum UK (the Forum), which was not a party to the dispute, applied to the court under Rule 5.4C of Civil Procedure Rules (CPR) for access to all documents used at or disclosed for the trial, including trial bundles and transcripts. The relevant Rule 5.4C CPR provides that a person who is not a party to proceedings may obtain from the court records copies of a statement of case and judgment or orders made in public, and, if the court gives permission, 'obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person'. In first instance, it was held that jurisdiction to grant the order sought existed either under Rule 5.4C or at common law. Following the appeal by Cape, the Court of Appeal limited the originally broad disclosure to the Forum to (i) statements of case held by the court pursuant to Rule 5.4C; (ii) provision by Cape of witness statements, expert reports and written submissions, and (iii) an order that the application for further disclosure be listed before the trial judge or another High Court judge to decide whether any other documents had lost confidentiality and had been read out in court or by the judge, or where inspection by the Forum was necessary to meet the principle of open justice. Neither Cape nor the Forum were satisfied with this decision and decided to bring their appeal and cross-appeal, respectively, before the Supreme Court. In essence, the appeal considered the powers of the court pursuant to the Civil Procedure Rules or its inherent jurisdiction to permit access to documents used in litigation to which the applicant was not a party, and contested the scope of such powers. The Supreme Court unanimously dismissed the appeal and cross-appeal.

Supreme Court Judgment

Notably, the Supreme Court clarified that the scope of the court's power to order access to materials to non-parties is not informed by "the practical requirements of running a justice system" (referring thereby to the keeping of records of the court, as laid down in Rule 5.4C), but the principle of *open justice*. In other words, according to the Court, the CPR are not exhaustive of the circumstances in which non-parties could be given access to court documents. On the contrary, they are considered a "minimum in addition to which the court had to exercise its inherent jurisdiction under the constitutional principle of open justice".

Furthermore, the Court held that pursuant to the open justice principle, the

default position – as previously established in *Guardian News and Media Ltd* – was that the public should be allowed access not only to the parties' written submissions and arguments, but also to the documents which had been placed before the court and referred to during the hearing.

As there seems no realistic possibility of the judge making a more limited order than the Court of Appeal, the Supreme Court upheld the orders for access already made by the Court of Appeal, with one change. It ordered that the balance of the application be listed before the judge in the original proceedings to determine whether the court should require Cape to provide a copy of any other document placed before the judge and referred to in the course of the trial to the Forum, at the Forum's expense, in accordance with the principles laid down in the Supreme Court's judgment.

Assessment

This judgment is significant for at least two reasons. On the one hand, it provides an extensive analysis of the court's power to allow third parties access to court documents under the constitutional principle of open justice. In so doing, the judgment revisits the contents of the open justice principle and its application in the context of modern, predominantly written-based, civil proceedings. On the other, the judgment provides certain guidance on the circumstances in which a third party may obtain access to court documents and, to some extent, clarifies the type of documents that may in principle be obtained. As a result, the judgment provides broad third party access to the court files that have previously been under the exclusive purview of the court and the parties.

The present article provides an assessment of the Court's findings, focusing on the interpretation of the open justice principle in relation to non-party access to court documents. In doing so, the article analyses the judgment in both comparative and the internal, UK legal context.

Seen from a comparative law perspective, the present judgment is a reminder of just how drastically different the approaches to the application of the open justice principle may be. In the context of third-party access to documents before courts this is particularly visible. These differences may be explained by the recent practice of exclusive reliance of the UK Supreme Court on the common law principle of open justice where non-party access to court documents is concerned.

In other words, it is argued that, by employing the “common law exclusivity” approach, the Supreme Court has over time further developed the principle of open justice which has come to encompass a broader non-party access to court documents.

Observed within a broader context of the developments within the UK judicial system, the Supreme Court judgment may be understood as a reaction to the increasingly expressed concerns regarding the privatisation of civil justice. This is all the relevant so given the fact that the case at hand was settled out of court before the open judgment could be rendered. From a practitioner’s point of view, the judgment may potentially influence the parties and their counsels’ decision as to the type and number of documents they wish to file in a given case.

It is concluded that the Supreme Court judgment represents a point of departure for future applications for access to court documents. The judgment is not the end of the road, neither for the parties to the present dispute, nor with regard to future applications for access to documents. For the purposes of *Cape Intermediate Holdings v Dring*, the judgment requires the High Court to now consider whether further access should be granted pursuant to the open justice principle as interpreted by the Supreme Court. It remains to be seen how the High Court will now decide this case.

Service of Process abroad: Lost in Translation

Written by Benedikt Windau

Benedikt Windau, Judge at the Oldenburg District Court (Landgericht Oldenburg), runs a very interesting blog (in German), focusing on German Civil Procedure. In one of his recent postings, he presented a very interesting judgment of the Frankfurt CoA, related to the Service Regulation. Upon my request, he prepared an English version of his post for our blog.

A recent ruling of the Frankfurt Court of Appeals (Docket No. 13 U 210/17) will potentially shake up the (German) law of cross-border service quite a bit, as it imposes new, hence unknown obligations on the plaintiff – and its legal counsel accordingly.

THE FACTS

The plaintiff, a German insolvency administrator, sued the defendant, who is located in France, before the Darmstadt district court (Landgericht). The statement of claim arrived at the court on December 15, 2015; the period of limitation ended on December 31, 2015 (at least that is what the district court and the court of appeals assumed).

In the statement of claim he asked for it to be translated by the court on his costs into French before being served upon the defendant. Yet the court could not find a translator for quite a period of time (yes, that French quite frequently spoken in the EU…) and thus the statement of claim was not translated before October 24, 2016. It was finally served on December 9, 2016.

German law provides, that the limitation period is suspended by *inter alia* the bringing of an action for performance (Sec. 204 (1) No. 1 German Civil Code). It furthermore provides that if service is made in order to have the period of limitations suspended in this respect, the receipt of the corresponding application or declaration by the court shall already have this effect provided service is made "demnächst" (Sec. 167 Code of Civil Procedure). "Demnächst" (which means something like "soon" or "in the near future"), in this respect is roughly understood as "not with undue delay caused by the plaintiff".

The district court considered the service to be "demnächst", as the court, not the plaintiff was to be blamed for the delay. It thus held that the service in December 2016 suspended the period of limitations despite the fact that almost a year passed between the ending of the period of limitation and the service.

THE RULING

On the defendant's appeal, the Frankfurt Court of Appeal held that the period of limitations was not suspended retroactively and thus dismissed the claim.

It first discusses whether there is an absolute time limit to "demnächst" that

might have been exceeded in this case. But according to the court, this need not be decided, as there was undue delay caused by the plaintiff.

The court states, that under the Service Regulation (Regulation (EC) No. 1393/2007) documents do not have to be translated before being served. Without translation the addressee is protected by its right to refuse acceptance of the document (Art. 5, 8 Service Regulation). Furthermore, a translation under the Service Regulation need not comply with any requirements regarding its form and thus could be provided by the parties.

It then argues that according to Art. 5 (1) Service Regulation it had been upon the plaintiff to decide whether the statement of claim would be translated prior to service. So, if the plaintiff here chose the statement of claim to be translated, it would have been upon him to provide a translation along with the statement of claim. Had he done so, the statement would probably have been served within six weeks, thus not later than February 2016. Under these circumstances, the service in December 2016 could not be seen as "demnächst".

COMMENTS

1. The Court of Appeals is absolutely right in stating the obvious (but widely quite unknown), that a) documents do not have to be translated under the Service Regulation, and b) the translation can be provided by the plaintiff as there is no certain form required (just as under the Hague Service Convention).

The defendant is sufficiently protected by his right to refuse acceptance of service (Art. 8 Service Regulation) – and by Art. 45 (1) lit. (b) of the Brussels I bis Regulation, if the quality of the translation is insufficient.

2. Thus the plaintiff could (and maybe should) have chosen the statement of claims to be served without translation in the first place, which would have been faster and probably cheaper. Had the defendant then refused to accept the service, he could still have provided a translation (or asked the court to provide a translation) and this service would still have suspended the period of limitations (see Art. 8 (3) Service Regulation). Alternatively, he could have proven that the defendant does in fact understand the language of the document and therefore the refusal of acceptance was without justification. That would make the statement of claim deemed to be served under German Law (see Sec. 179 Code of Civil Procedure).

3. However I’m not convinced, that under German Law a plaintiff is obliged to provide a translation himself for purposes of cross-border-service, even more so without an explicit request by the court (cf. Sec. 139 Code of Civil Procedure). Such an obligation is neither provided for in the ZRHO (“Rechtshilfeordnung für Zivilsachen”, the German administrative regulation governing *inter alia* cross-border-service), nor can such an obligation be found in the Service Regulation, especially in light of the wording in Art. 5 (2).

4. Plaintiffs’ counsel will now often find themselves “lost in translation”: On the one hand the Frankfurt Court of Appeals‘ judgment requires the parties to provide translations themselves. On the other hand, the parties‘ right to provide translations themselves may be unkonwn to some courts and therefore require some discussions. A little help in these discussions may be an article by Dr. Philine Fabig (and myself) in the Neue Juristische Wochenschrift (NJW 2017, 2502 et seq.).

OUTLOOK

The only good news is that the plaintiff appealed the judgement; the case is now pending before the Federal Court of Justice (Bundesgerichtshof) under Docket-No. IX ZR 156/19. So maybe the Bundesgerichtshof will find some final and fog-lifting words on the subject.

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

Written by Carlos Santaló Goris

Carlos Santaló Goris is a researcher at the Max Planck Institute Luxembourg for

International, European and Regulatory Procedural Law, and Ph.D. candidate at the University of Luxembourg. He offers a summary and an analysis of AG Spuznar's Opinion on the Case C-555/18, K.H.K. v. B.A.C., E.E.K.

I. Introduction

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

II. Facts of case

The main facts of this case were substantiated before the First Instance Court of Sofia (Bulgaria). Upon the request of a creditor, this court granted a national order for payment against two debtors. The order for payment was sent to the debtors' domicile as it appeared in the national population register. Since the notification was returned without an acknowledgment of receipt, the debtors were also informed by the posting of a public notice on the door of their "official" domicile. They did not respond to this notification either. In accordance with Bulgarian law, in such occasions, if the creditor does not initiate declaratory proceedings on the substance of the case to ascertain the existence of a debt, any order for payment would be annulled *o*. In the present case, before proceeding in that manner, the creditor requested an European Account Preservation Order ("EAPO") before the First Instance Court of Sofia, to freeze the debtors' bank accounts in Sweden. This court informed the creditor that he must initiate declaratory proceedings in order to avoid the nullification of the payment order. In the court's view, since the order for payment was not yet enforceable, it could not be considered an authentic instrument. Therefore, based on Article 5(1) of the EAPO, the creditor had to initiate the declaratory proceedings on which he would

rely on when applying for the EAPO. Conversely, the President of Second Civil Section of the same court considered that the non-enforceable order for payment was an authentic instrument pursuant to Article 4(10), and thus there was no need for separate proceedings. These different understandings of the regulation led the First Instance Court of Sofia to refer the following questions to the CJEU:

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

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

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

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

Firstly, AG Szpunar examined if the payment order fell within the autonomous concept of 'authentic instrument'. Article 4(10) of the EAPO Regulation establish three prerequisites that a document has to satisfy in order to be considered an authentic instrument: (1) it has to be an authentic instrument in a Member State; (2) the authenticity relates to the signature and the content of the instrument; (3) the authenticity has been established by a public authority or other authority empowered for that purpose.

The AG stated that, whereas the first and the third prerequisites were duly satisfied, the second condition, concerning the authenticity of the content, was not fulfilled. Under Bulgarian law, when creditors apply for a payment order, they do not have to provide the court with any documentary evidence, they simply

indicate the basis of their claim and the amount due. Therefore, the judge who grants a preservation order is merely confirming the obligation to pay a debt, but without "authenticating" the content of that obligation. Consequently, in the AG's view, the order for payment would not be an authentic instrument under the regulation. *Obiter dictum*, he considered the payment order to be a judgment under the EAPO Regulation (at para. 46).

IV. Enforceable or not enforceable, that is the question

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

Regarding this question, the European Commission suggested examining whether "enforceability" as a prerequisite for other titles is present under different European civil procedural instruments, particularly in regards to the European Enforcement Order Regulation ("EEO Regulation"), the Maintenance Regulation, and the Brussels I bis Regulation (at para. 51). AG Szpunar declined drawing any comparisons with other regulations due to the "provisional" nature of the EAPO Regulation. These other instruments are mainly focus on facilitating the enforcement of final decisions on the substance of a claim, thus, the concept of title would have a different understanding (at para. 51). On this basis, AG Szpunar considered it more appropriate to elaborate an "individualized" analysis of the EAPO Regulation and proceeded with a literal, systemic, historical and teleological interpretation of this instrument:

- In the literal and systemic analysis, AG Szpunar found several provisions referring to the different types of title. In particular, he referred to Article

6 (jurisdiction); Article 7 (material prerequisites); Article 12 (security); Article 14 (information mechanism); and Article 18 (time-limits to render the decision on the EAPO application) (at paras. 55 – 59). None of these provisions, except Article 14(1), specify whether the title has to be enforceable or not. Article 14(1) is the sole provision which distinguishes between enforceable and non-enforceable titles. This provision contains the prerequisites that creditors have to satisfy if they want to request information on debtors' bank accounts. Creditors with a non-enforceable title can apply for bank account information, but under a stricter regime than those who have an enforceable title (at para. 64). AG Szpunar considered that this is an exception, in which creditors without an enforceable title are recognized. For the other cases, these creditors would be placed under the same status as creditors without any kind of title (at para. 66).

- The historical interpretation was based on the Commission Proposal of the EAPO Regulation (at paras. 74 -79). This text still operated under an *exequatur* Unlike the current version of the EAPO Regulation, it systematically distinguished between two different regimes, one applied to creditors without an enforceable title or a title enforceable in the Member State of origin; another applied to creditors whose titles were already declared enforceable in the Member State of enforcement. Within the first regime, there were also differences between creditors with an enforceable title and creditors without. Creditors with an enforceable title did not have to prove the *boni fumus iuris.* After the Council reviewed the Commission Proposal, the *exequatur* was removed along with the distinction between enforceable title in the Member State of origin and in the Member State of enforcement. In AG Szpunar's view, both "enforceable" titles would then have been subsumed into the more generic term of "title", which did not expressly refer to the enforceability (at para. 79).
- Perhaps the strongest point of the AG's Opinion was the teleological argument. In AG Szpunar's view, including non-enforceable titles within the concept of title would impair the balance between the claimants' and defendants' rights (at para. 68). As stated above, creditors with a title do not have to prove the existence of the *boni fumus iuri*. This barrier is also a prevention against fraudulent requests of an EAPO. An enlargement of the concept of title would facilitate access to the EAPO, undermining one

of the protections against abusive behaviour.

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

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

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

- The first one is the distinction made between the EAPO Regulation and other civil procedural instruments based on its provisional nature. Indeed, this is the very first uniform provisional measure at European level, whereas the other instruments to which AG Szpunar referred are mainly focused on the recognition and enforcement decisions of the merits of a claim (with the exception of some jurisdictional rules on provisional measures). One might speculate that, eventually, the CJEU might adopt a different interpretation of the EAPO Regulation, taking into account elements that it shares with other civil procedural instruments.
- The second point is on the dividing line between the two regimes existing within the EAPO Regulation. The bulk of AG Szpunar's analysis focused on the distinction between the two different regimes implicitly reflected in the EAPO Regulation. This question is fundamental, not only for creditors who might have to satisfy different prerequisites when they apply for an EAPO, but also for the debtors. Neither the systemic nor the literal interpretation of the regulation seem conclusive. Only in the Spanish version is it mentioned that the authentic instruments have to be enforceable ("documento público con fuerza ejecutiva"). Nonetheless, it seems to have been erroneously transposed from the EEO Regulation. The

historical interpretation could lead to different conclusions. The suppression of an express reference to the "enforceability" of the title in the final version of the EAPO Regulation could also be understood as the willingness of the European legislator to include non-enforceable titles. Thus, it seems that the only decisive interpretative tool was the teleological one, which leads to the third and final point.

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

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

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

Written by Cem Veziroglu

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

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

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

In a paper forthcoming in the European Company and Financial Law Review, I tackle *the arbitrability of corporate law disputes* and *the validity of arbitration clauses stipulated in the articles of association* ("AoA") of joint stock companies. The study compares Turkish law with that of Germany and Switzerland and in particular tries to shed light on the current position of Turkish law with respect to (i) arbitrability of corporate law disputes, such as validity of general assembly resolutions and requests for corporate dissolution, (ii) validity and binding nature of an arbitration clause provided in the AoA. The paper also suggests practicable legislative recommendations as well as a model arbitration clause.

Arbitrability of Corporate Law Disputes

Under Turkish law corporate law disputes are, in principle, considered to be

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

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

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

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

Validity of an Arbitration Clause Provided in the AoA

There is no rule under Turkish corporate law that restricts contractual freedom within the AoA of privately held joint stock companies that has the effect of restraining arbitration clauses. An arbitration clause can, therefore, be validly provided either in the original AoA or by way of an amendment thereof by way of a unanimous vote. However, the binding effect of the arbitration clause in question depends on its legal nature, namely, 'corporative' or 'formal' (contractual).

Addressing this issue, the paper proposes to adopt a two-step test and concludes that if an arbitration clause stipulated in the AoA is deemed corporative in nature,

the company, the board members, the new shareholders, and the current shareholders are bound by such an arbitration clause. In the event that the arbitration clause in question is deemed to be a formal provision, it may still remain effective only among the parties as a purely contractual term.

Policy Recommendations

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

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

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

With a view to facilitating the incorporation of applicable and valid arbitration clauses into the AoA, a model arbitration clause for corporate law disputes should be published by leading arbitration institutions. Such a model clause may be inspired by the draft model clause found in the paper referenced above.

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

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

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

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

Written by Michiel Poesen

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

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

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

Facts

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

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

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

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

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

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

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

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

Decision

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

In reaching its conclusion, the Court reiterated that Article 24(1) Brussels Ia does not encompass all actions concerning rights *in rem* in immovable property, but only those which both come within the scope of th Regulation and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest (Case C-722 *Reitbauer*, [44]; see also Case C?417/15 *Schmidt*, [30])

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

the enforcement proceedings.

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

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

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

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

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

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

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

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

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

Instead of realigning the *Feniks* ruling with the principle of foreseeability, the decision in *Reitbauer* confirmed that an *actio pauliana* fits squarely within jurisdiction in matters relating to a contract, the driving factor seemingly being the hope to offer the claimant an additional forum that presumably has a close connection to the dispute (Case C-722 *Reitbauer*, [60]: Case C-337/17 *Feniks*, [44]–[45]).

Looking beyond the *actio pauliana*, the case law begs the question what other types of remedies – however remotely linked to a contract – could be subject to Art 7(1) Brussels Ia. An action for wrongful interference with contract, for

example, regarded to be tortious in nature (e.g. *Tesam Distribution Ltd v Schuh Mode Team GmbH and Commerzbank AG* [1990] I.L.Pr. 149), would be a matter relating to a contract by the standard applied in *Feniks* and *Reitbauer*. It is doubtful whether such a broad construction of jurisdiction in matters relating to a contract complies with the limited role of Art 7(1) Brussels Ia within the Regulation (Recital (15) Brussels Ia).

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

Written by Anna Bizer

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

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

Eva Glawischnig-Piesczek, an Austrian politician, claimed that a Facebook user had violated her personality right by posting a defamatory comment on the social network. She sued Facebook Ireland for the removal of the publication in question as well as other identical and/or equivalent publications. The commercial court in Vienna granted a corresponding injunction and Facebook Ireland did indeed disable access to the publication – but only in Austria by means of geo-blocking. Hereafter, the Austrian Supreme Court referred various questions to the CJEU

regarding the interpretation of Article 15(1) of the e-Commerce Directive (Directive 2000/31) which prohibits the imposition of a general monitoring obligation on host providers. While the details of the responsibility of host providers regarding their users' activities are certainly interesting, this comment focuses on the territorial dimension of the provider's obligation to delete certain online content. So, the crucial question is whether an Austrian court may oblige Facebook Ireland to make a user's comment globally inaccessible or whether the injunction is limited to the respective state of the court.

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

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

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

Generally, AG Szpunar is not comfortable with a worldwide obligation to remove an online publication, "*because of the illegality of that information established*

under an applicable law, [such an obligation] *would have the consequence that the finding of its illegality would have effects in other States. In other words, the finding of the illegal nature of the information in question would extend to the territories of those other States*" (para. 80). To avoid this effect, a worldwide obligation of removal could only be justified when all potentially applicable laws agree. Of course, this leads to disadvantages: "*should a claimant be required, in spite of the practical difficulties, to prove that the information characterised as illegal according to the law designated as applicable under the conflict rules of the Member State in which he brought the action is illegal according to all the potentially applicable laws?*" (para. 97). AG Szpunar leaves this question unanswered and continues to focus on the freedom of information: „*the legitimate public interest in having access to information will necessarily vary, depending on its geographic location, from one third State to another. Thus, as regards removal worldwide, there is a danger that its implementation will prevent persons established in States other than that of the court seised from having access to the information*." (para. 99)

To avoid this conflict between the freedom of information and personality rights, AG Szpunar recommends the following: "*However, owing to the differences between, on the one hand, national laws and, on the other, the protection of the private life and personality rights provided for in those laws, and in order to respect the widely recognised fundamental rights, such* ***a court must****, rather,* ***adopt an approach of self-limitation****. Therefore, in the interest of international comity […] that court should, as far as possible, limit the extraterritorial effects of its junctions concerning harm to private life and personality rights. The implementation of a removal obligation should not go beyond what is necessary to achieve the protection of the injured person. Thus, instead of removing the content, that court might, in an appropriate case, order that access to that information be disabled with the help of geo-blocking*." (para. 100) "*Those considerations cannot be called into question by the applicant's argument that the geo-blocking of the illegal information could be easily circumvented by a proxy server or by other means.*" (Rz. 101)

First, it is noteworthy that the AG strongly emphasizes the freedom of information. So far, this aspect has been rather neglected in the discussion on violations of personality rights compared to freedom of speech and freedom of the press. However, including freedom of information in the balancing of interest

reflects that a publication necessarily requires to be noted by at least one other person to have defamatory effects.

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

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

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

Fifth, one has to consider the effects of this proposal in the context of conflict of laws in a technical sense: if a claimant wanted Facebook to delete a publication globally and a court had "universal" jurisdiction according to *eDate* and *Bolagsupplysningen*, the court – in accordance with the suggestion of the AG – would have to apply the laws of each state from which the publication is still accessible. To make a long story short: Adopting the AG's proposal means resurrecting the mosaic approach in conflict of laws! This appears to be a step backwards. Not only are the disadvantages of the mosaic principle in times of the internet commonly known, but also this approach contradicts the CJEU's rejection of the mosaic principle regarding the question of jurisdiction in actions for the removal of publications (*Bolagsupplysningen*).

Finally, the question of the direct consequences of this opinion remains. It is likely

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