The CJEU renders its first decision on the EAPO Regulation – Case C-555/18

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Introduction

On 7 November 2019, the CJEU released the very first decision on Regulation 655/2014 establishing a European Account Preservation Order ("EAPO Regulation"). From the perspective of European civil procedure, this instrument is threefold innovative. It is the first uniform provisional measure; it is also the very first *ex parte* piece of European civil procedure (and reverses the *Denilauer* doctrine); and the first one which, though indirectly, tackles civil enforcement of judicial decisions at European level. This preliminary reference made by a Bulgarian court gave the CJEU the opportunity to clarify certain aspects of the EAPO Regulation.

Facts of the case

The main facts of the case were substantiated before the District Court of Sofia.

A creditor requested a Bulgarian payment order to recover certain debts. Simultaneously the creditor decided to request an EAPO in order to attach the defendants' bank accounts in Sweden.

The payment order could not be served on the debtor because his domicile was unknown. In such cases, Bulgarian law prescribes that the debtor must initiate procedures on the substance of the case. If the creditor does not go ahead with such proceedings, the court would repeal/withdraw the payment order. The District Court of Sofia informed the creditor about this, urging the initiation of the proceedings. At the same time, the District Court of Sofia referred to the President of the District Court of Sofia for the commencement of separate

proceedings. The President of the District Court of Sofia considered that, for the purposes of the EAPO Regulation, it was not necessary to initiate secondary proceedings. On the president's view, the payment order, albeit unenforceable, constituted an authentic instrument in the sense of the EAPO Regulation. The District Court of Sofia considered that the payment order had to enforceable to be considered an authentic instrument.

As a result of these opposing views the District Court of Sofia decided to refer the following questions to the CJEU:

- *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 of the European Parliament and of the Council of 15 May 2014?*
- *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?*
- *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?*

The enforceability of the payment order

The answer to the first question constituted the core of the judgment's reasoning. The Court examined if the "enforceability" was a precondition for the payment order to be considered an authentic instrument. As the Court rightly pointed out, the EAPO Regulation does not clearly state if the acts in question (judgments, court settlements, and authentic instruments) have to be enforceable (para. 39). In order to answer this question, the CJEU followed the reasoning of AG Szpunar in his Opinion which is based on a teleological, systemic and historical interpretation of the EAPO Regulation (para. 41). In its teleological analysis, the Court stated that a broad understanding of the concept of title could undermine

the balance between the claimants' and the defendants' interests (para. 40). Creditors with a title do not have to prove, for instance, the likelihood of success on the substance of the claim (*fumus boni iuris*). Consequently, including creditors with a non-enforceable title in the more lenient regime would allow a larger number of creditors to more "easily" access an EAPO; ultimately favouring the claimant's position (para. 40). Concerning the systemic analysis, the CJEU referred to Article 14(1) of the EAPO Regulation. This provision is the only one in the EAPO Regulation which acknowledges certain rights to creditors with a non-enforceable title. In the Court's view, this was just an exception. For the rest of the cases, in which there is no such distinction between creditors with and without enforceable titles, only the former would be considered to fit the concept of title. Lastly, the historical analysis was based on the Commission Proposal of the EAPO Regulation. Unlike in the final text of the regulation, the proposal made a clear and explicit differentiation between the regimes applicable to creditors with an enforceable title, and those without one. Creditors without an enforceable title were subject to further prerequisites (e.g. satisfaction of the *fumus boni iuris*). A reading of the final text in the light of these *travaux préparatoires* might suggest, on the Court's view, that the current differentiation between creditors is also based on the enforceability of title. On this basis, the CJEU concluded that the title necessarily had to be enforceable, in order for an act to be considered an authentic instrument.

Autonomous definition of "substance of the claim"

In the second question, the Bulgarian court asked if, in the event that the payment order were not an authentic instrument, it would be necessary to initiate separate proceedings on the substance of the claim. Preservation orders can be requested before, during, or after proceedings on the substance of the claim. Those creditors who request a preservation order *ante demandam* have a deadline of "30 days of the date on which [they] lodged the application or within 14 days of the date of the issue of the Order, whichever date is the later" (Article 10(1)) in which to initiate proceedings on the substance of the matter. It is not clear what should be understood by "proceedings on the substance of the claim". Recital 13 of the EAPO Regulation, though not a binding provision, states that this term covers "any proceedings aimed at obtaining an enforceable title". In the present case, the creditor obtained a payment order. Nevertheless, such order did not become enforceable because it could not be personally notified to the debtor.

The only option left to the creditor was to initiate separate proceedings to pursue the claim. In the event that the creditor did not initiate the proceedings, the payment order would be set aside by the court. In the present case, it was not clear whether the first proceedings by which the creditor obtained a payment order, or the secondary proceedings necessary to maintain the payment order were the proceedings on the substance of the matter. The CJEU relied on the "flexible" interpretation contained in Recital 13. The Court considered the "initial" proceedings in which the creditor obtained a payment order to be proceedings on the substance of the claim. Therefore, for the purposes of the EAPO Regulation, it was not necessary to initiate secondary proceedings.

Time limit to render the decision on the EAPO application

Finally, the CJEU addressed whether a judicial vacation could be considered an "exceptional circumstance" (Article 45), justifying the delivery of the decision on the application of the EAPO outside the due time limit. The first issue concerned the way the question was formulated by the Bulgarian court. The court asks, in the event that the payment order be considered an authentic instrument, whether the time limit of Article 18(1) should be respected. If the payment order is an authentic instrument, the applicable time limit is the one under Article 18(2). This time limit is shorter (five days against the ten days of Article 18(1)), because the court that examines the EAPO applications does not have to evaluate the existence of the *fumus boni iuris* (Article 7(2)). Therefore, it is submitted that Article 18(2) should have been mentioned instead of Article 18(1) in the referring court's question. Furthermore, taking into account the way in which the question was asked, it would only have had to be answered by the Court in the event that the payment order had been considered an authentic instrument ("If a payment order under (…) is an authentic instrument"). This was not the case, and thus the CJEU was not "obliged" to reply to the question. Despite this, the Court decided to answer. The CJEU considered that judicial vacations were not "exceptional circumstances" in the sense of Article 45. In the Court's view, an interpretation to the contrary would have opposed the principle of celerity underpinning the EAPO Regulation (para. 55).

Conclusions

From a general perspective, this judgment constitutes a good example of the balances that the CJEU has to make in order to maintain the status quo between

the defendant and the claimant. One the hand, ensuring that the EAPO achieves its ultimate objectives in terms of efficiency, on the other, assuring the proper protection of the defendant. This search for an equilibrium between opposing interests also seems to be a general constant in other CJEU decisions concerning European uniform proceedings, especially those regarding the European Payment Order.

Observing the Court's reasoning in detail, we can clearly distinguish these two contrasting approaches. On the other hand, the Court adopts a pro-defendant approach regarding the first question, and a pro-claimant position on the one hand in its approach to the second and third questions.

In the first question, the Court adopted a pro-defendant approach. As the CJEU rightly remarks, the wording employed was unclear in asserting whether the title has to be enforceable or not. Anecdotally, only the Spanish version of the EAPO Regulation mentions that the authentic instrument has to be enforceable. As I already mentioned in my commentary on the AG Opinion in this case, this might be a mistranslation extracted from the Spanish version of Regulation 805/2004 establishing a European Enforcement Order Regulation. From the defendant's perspective, the EAPO Regulation is relatively aggressive. Since the preservation order is granted *ex parte*, defendants can only react once it is already effective. This puts a lot of pressure on the defendants, especially if they are a business requiring liquidity that might prefer to pay than to apply for a remedy and await to the proceedings on the substance of the case. It is for that reason that it was necessary to establish certain "barriers" to impede potential abuses: the preliminary prerequisites (Article 7). In those cases in which the creditor has already an enforceable title, the EAPO is merely the prelude to an incipient enforcement. However, if there is not such a title, or if the title is not yet enforceable, in that it is for instance a payment order, then the issuance of a preservation order must be the object of further prerequisites, since it is not clear if the right that the creditor claims exists. It is for that reason that the prima facie examination of the application includes an evaluation of the likelihood of success on the substance of the claim, and the provision of a security, which might deter abusive claimants from applying for an EAPO. Opening the most lenient regime to those creditors with a non-enforceable title would tip the balance in favour of the creditors. We might think about how the decision affects creditors who have obtained a title (e.g. judicial decisions) that is not yet

enforceable. The existence of a title would serve as evidence of the likelihood of success on the substance of the claim. Regarding the security, judges could except creditors without a title from providing the security "attending to the circumstances of the case" (Article 12(2)). Having a non-enforceable title might be also one of those circumstances. Only, judges might require a later deadline to deliver the decision on the preservation order (Article 10(1)). Therefore, materially, the impact of the decision might not harm the status of creditors with unenforceable titles as much.

For the two remaining (and more technical) questions, the Court stands on the creditors' side. In the second question, the CJEU followed the guidance offered by the Preamble. In this particular case, Recital 13 entails a broad interpretation of "substance of the claim", encompassing summary proceedings. Despite the fact that the recitals of the Preamble are not binding, the Court relied on them. Behind this decision, we might find the CJEU's acknowledgement of the popularity of such proceedings at the domestic level, especially in debt recovery claims, including in regards to the European Payment Order. A decision to the contrary might have discouraged creditors from using the EAPO Regulation. Concerning the third question, the restrictive understanding of "exceptional circumstances" is not surprising. The CJEU usually tends to adopt a restrictive approach to any "exceptions" foreseen in European legislative provisions, which avoids giving domestic judges leeway to abuse them, which would ultimately undermine the objectives of the Regulation.

There are still many *non dites* aspects for which the CJEU might have something to say. Recent domestic case law on the EAPO Regulation is good proof of that. Nonetheless, domestic courts often prefer to find out themselves the solutions for such inquiries, adopting their own interpretive solutions, largely mirroring their national procedural traditions. Hopefully, in the coming future, a court might instead opt for a preliminary reference.

Ensuring quality of ODR platforms: a new (voluntary) certification scheme in France

By Alexandre Biard, Erasmus University Rotterdam (ERC project – Building EU Civil Justice)

In a previous post published in November 2018, we presented policy discussions that were (at that time) going on in France, and aimed at introducing a new regulatory framework for ODR platforms. As also explained in an article published in September 2019 (in French), ODR tends to become a new market in France with a multiplication of players offering services of diverging qualities. Today this market is in need of regulation to ensure the quality of the services provided, and to foster trust among its users.

The Act in question was finally passed on 23 March 2019. Rules on ODR certification were recently detailed in a decree published on 27 October 2019. They establish a new voluntary certification scheme for ODR platforms (after discussions, the scheme was kept non-compulsory). ODR platforms wishing to obtain certification must bring evidence that (among other things) they comply with data protection rules and confidentiality, that they operate in an independent and impartial manner, or that the procedures they used are fair and efficient. ODR platforms will be certified by one of the COFRAC-accredited bodies (*Comité français d'accréditation*). In practice, this means that contrary to what currently exists for the certification of consumer ADR bodies in France for which a single authority is competent (Commission d'Evaluation et de Contrôle de la Médiation de la Consommation) several certification bodies will operate in parallel for ODR platforms (however a certification request can only be directed at one certification body, and not to multiple). Together, certification bodies will be in charge of certifying ODR platforms and will supervise their activities on an on-going basis. Certification is given for three years (renewable). Certified platforms are allowed to display a logo on their websites (practicalities still need to be further detailed by the Ministry of Justice).

Accredited bodies will have to submit annual reports to the Ministry of Justice in

which they will have to specify the number of certifications granted (or withdrew), their surveillance activities, and the systemic problems they faced or identified. The updated list of ODR platforms complying with the certification criteria will be available on the website www.justice.fr.

The future will tell whether ODR platforms are incentivized to seek certification (as it is expected today) or whether they will prefer to keep their regulatory freedom instead. More generally, one will see whether this step can indeed foster trust and ensure high-quality services within the emerging ODR market.

Mutual Trust v Public Policy : 1-0

In a case concerning the declaration of enforceability of a UK costs order, the Supreme Court of the Hellenic Republic decided that the 'excessive' nature of the sum (compared to the subject matter of the dispute) does not run contrary to public policy. This judgment signals a clear-cut shift from the previous course followed both by the Supreme and instance courts. The decisive factor was the principle of mutual trust within the EU. The calibre of the judgment raises the question, whether courts will follow suit in cases falling outside the ambit of EU law.

[Areios Pagos, Nr. 579/2019, unreported]

THE FACTS

The claimant is a Greek entrepreneur in the field of mutual funds and investment portfolio management. His company is registered at the London Stock Exchange. The defendant is a well known Greek journalist. On December 9, 2012, a report bearing her name was published in the digital version of an Athens newspaper, containing defamatory statements against the claimant. The claimant sued for damages before the High Court of Justice, Queens Bench Division. Although properly served, the respondent did not appear in the proceedings. The court

allowed the claim and assigned a judge with the issuance of an order, specifying the sum of the damages and costs. The judge ordered the default party to pay the amount of 40.000 ? for damages, and 76.290,86 ? for costs awarded on indemnity basis. The defendant did not appeal.

The UK order was declared enforceable in Greece [Athens CFI 1204/2015, unreported]. The judgment debtor appealed successfully: The Athens CoA ruled that the amount to be paid falls under the category of ‚excessive' costs orders, which are disproportionate to the subject matter value in accordance with domestic perceptions and legal provisions. Therefore, the enforcement of the UK order would be unbearable for public policy reasons [Athens CoA 1228/2017, unreported]. The judgment creditor lodged an appeal on points of law before the Supreme Court.

THE RULING

The Supreme Court was called to examine whether the Athens CoA interpreted properly the pertinent provisions of the Brussels I Regulation (which was the applicable regime in the case at hand), i.e. Article 45 in conjunction with Art. 34 point 1. The SC began its analysis by an extensive reference to judgments of the CJEU, combined with recital 16 of the Brussels I Regulation, which encapsulates the Mutual Trust principle. In particular, it mentioned the judgments in the following cases: C-7/98, Krombach, Recital 36; C-38/98, Renault, Recital 29; C-302/13, flyLAL-Lithuanian Airs, Recital 45-49; C-420/07, Orams, Recital 55), and C-681/13, Diageo, Recital 44. It then embarked on a scrutiny of the public policy clause, in which the following aspects were highlighted:

- The spirit of public policy should not be guided by domestic views; the values of European Civil Procedure, i.e. predominantly the European integration, have to be taken into consideration, even if this would mean downsizing domestic interests and values. Hence, the court of the second state may not deny recognition and enforcement on the grounds of perceptions which run contrary to the European perspective.
- The gravity of the impact in the domestic legal order should be of such a degree, which would lead to a retreat from the basic principle of mutual recognition.
- Serious financial repercussions invoked by the defendant may not give rise to sustain the public policy defense.

- In principle, a foreign costs order is recognized as long as it does not function as a camouflaged award of punitive damages. In this context, the second court may not examine whether the foreign costs order is 'excessive' or not. The latter is leading to a review to its substance.
- The proportionality principle should be interpreted in a twofold fashion: It is true that high costs may hinder effective access to Justice according to Article 6.1 ECHR and Article 20 of the Greek Constitution. However, on an equal footing, the non-compensation of the costs paid by the claimant in the foreign proceedings leads to exactly the same consequence.
- In conclusion, the proper interpretation of Article 34 point 1 of the Brussels I Regulation should lead to a disengagement of domestic perceptions on costs from the public policy clause. Put differently, the Greek provisions on costs do not form part of the core values of the domestic legislator.

In light of the above remarks, the SC reversed the appellate ruling. The fact that the proportionate costs under the Greek Statutes of Lawyer's fees would lead to a totally different and significantly lower amount (2.400 in stead of 76.290,86 ?) is not relevant or decisive in the case at hand. The proper issue to be examined is whether the costs ordered were necessary for the proper conduct and participation in the proceedings, and also whether the calculation of costs had taken place in accordance with the law and the evidence produced. Applying the proportionality principle in the way exercised by the Athens CoA amounts to a re-examination on the merits, which is totally unacceptable in the field of application of the Brussels I Regulation.

COMMENTS

As mentioned in the introduction, the ruling of the SC departs from the line followed so far, which led to a series of judgments denying recognition and enforcement of foreign (mostly UK) orders and arbitral awards [in detail see my commentary published earlier in our blog, and my article: Recognition and Enforcement of Foreign Judgments in Greece under the Brussels I-*bis* Regulation, in Yearbook of Private International Law, Volume 16 (2014/2015), pp. 349 et seq]. The decision will be surely hailed by UK academics and practitioners, because it grants green light to the enforcement of judgments and orders issued in this jurisdiction.

The ruling applies however exclusively within the ambit of the Brussels I Regulation. It remains to be seen whether Greek courts will follow the same course in cases not falling under the Regulation's scope, e.g. arbitral awards, third country judgments, or even UK judgments and orders, whenever Brexit becomes reality.

Gender and Private International Law (GaP) Transdisciplinary Research Project: Report on the kick-off event, October 25th at the Max Planck Institute for Comparative and International Private Law

As announced earlier on this blog, the Gender and Private International Law (GaP) kick-off event took place on October 25th at the Max Planck Institute for Comparative and International Private Law in Hamburg.

This event, organized by Ivana Isailovic and Ralf Michaels, was a stimulating occasion for scholars from both Gender studies and Private and Public international law to meet and share approaches and views.

During a first session, Ivana Isailovic presented the field of Gender studies and its various theories such as liberal feminism and radical feminism. Each of these theories challenges the structures and representations of men and women in law, and helps us view differently norms and decisions. For example, whereas liberal feminism has always pushed for the law to reform itself in order to achieve formal equality, and therefore focused on rights allocation and on the concepts of

equality and autonomy, radical feminism insists on the idea of a legal system deeply shaped by men-dominated power structures, making it impossible for women to gain autonomy by using those legal tools.

Ivana Isailovic insisted on the fact that, as a field, Gender studies has expanded in different directions. As a result, it is extremely diverse and self-critical. Recent transnational feminism studies establish links between gender, colonialism and global capitalism. They are critical toward earliest feminist theories and their hegemonic feminist solidarity perception based on Western liberal paradigms.

After presenting those theories, Ivana Isailovic asked the participants to think about the way gender appears in their field and in their legal work, and challenged them to imagine how using this new Gender studies approach could impact their field of research, and maybe lead to different solutions, or different rules. That was quite challenging, especially for private lawyers who became aware, perhaps for the first time, of the influence of gender on their field.

After this first immersion in the world of gender studies, Roxana Banu offered a brief outline of private international law's methodology, in order to raise several questions regarding the promises and limits of an interdisciplinary conversation between Private International Law (PIL) and gender studies. Can PIL's techniques serve as entry points for bringing various insights of gender studies into the analysis of transnational legal matters? Alternatively, could the insights of gender studies fundamentally reform private international law's methodology?

After a short break, a brainstorming session on what PIL and Gender studies could bring to each other took place. Taking surrogacy as an example, participants were asked to view through a gender studies lens the issues raised by transnational surrogacy. This showed that the current conversation leaves aside some aspects which, conversely, a Gender studies approach puts at the fore, notably the autonomy of the surrogate mother and the fact that, under certain conditions, surrogacy could be a rational economic choice.

This first set of questions then prompted a broader philosophical debate about the contours of an interdisciplinary conversation between PIL and Gender studies. Aren't PIL scholars looking at PIL's methodology in its best light while ignoring the gap between its representation and its practice? Would this in turn enable or obfuscate the full potential of gender studies perspectives to critique and reform

private international law?

As noted by the organizers, “although private international law has always dealt with question related to gender justice, findings from gender studies have thus far received little attention within PIL”. The participants realized that is was also true the other way around: although they were studying international issues, scholars working on gender did not really payed much attention to PIL either.

One could ask why PIL has neglected gender studies for so long. The avowedly a-political self-perception of the discipline on the one hand, and the focus on public policy and human rights on the other, could explain why gender issues were not examined through a Gender studies lens. However, Gender studies could be a useful reading grid to help PIL become aware of the cultural understanding of gender in a global context. It could also help to understand how PIL’s techniques have historically responded to gender issues and explore ways to improve them. Issues like repudiation recognition, polygamous marriage or child abductions could benefit from this lens.

It was announced that a series of events will be organized: reading groups, a full day workshop and a conference planned for the Spring of 2020.

If you want to know more about the project, please contact gender@mpipriv.de.

New Book: Recognition of Judgments in Contravention of Prorogation Agreements

Written by Felix M. Wilke, Senior Lecturer at the University of Bayreuth, Germany.

Must a foreign judgment be recognised in which a jurisdiction agreement has been applied incorrectly, i.e. in which a court wrongly assumed to be competent or wrongly declined jurisdiction? Within the European Union, the basic answer is a rather straightforward "yes". Recognition can only be refused on the grounds set forth in Article 45(1) Brussels I*bis* Regulation, and unlike Article 7(1)(d) of the recently adopted HCCH Judgments Convention, none of them covers this scenario. What is more, Article 45(3) Brussels I*bis* expressly states that the jurisdiction of the court of origin, save for certain instances of protected parties, may not be reviewed, not even under the guise of public policy.

Why, then, should one bother to read the book by Niklas Brüggemann, *Die Anerkennung prorogationswidriger Urteile im Europäischen und US-amerikanischen Zivilprozessrecht* (Mohr Siebeck) on the recognition of judgments in contravention of prorogation clauses in European and US-American law? The first and rather obvious reason can be found in the second part of the title. The book contains a concise, yet nuanced overview of the law of jurisdiction agreements in the US (in German). To the knowledge of this author, it has been 12 years since the last comparable work was published (Florian Eichel, *AGB-Gerichtsstandsklauseln im deutsch-amerikanischen Handelsverkehr* (Jenaer Wissenschaftliche Verlagsgesellschaft) – which dealt with recognition only in passing and was limited to German and US law). Thus, this new book can be recommended to anyone with sufficient command of the German language who is interested in this particular aspect of US civil procedure, whose concepts – if one even dares to use that term – partly differs from European ideas.

The second and main reason to concern oneself with Brüggemann's book, however, is his proposition for a new ground of refusal of recognition: a new Article 45(1)(e)(iii) Brussels I*bis* for which he even offers a draft. To this end, the author comprehensively analyses jurisdiction agreements within the Brussels I*bis* framework. While Article 31(2) Brussels I*bis*, one of the main innovations of the Recast, has indeed "enhance[d] the effectiveness of exclusive choice-of-court agreements" (Recital 22 Brussel I*bis*), Brüggemann argues that the Regulation still safeguards jurisdiction agreements insufficiently. He points out several situations (e.g. asymmetrical agreements, mere derogation agreements) that Article 31(2) Brussels I*bis* does not cover in the first place. He also argues in some detail that the court first seised is allowed to examine the jurisdiction agreement in question with regard to the existence of an agreement and its

formal validity; its assessment would be binding upon other courts in line with *Gothaer Allgemeine* (ECJ Case C-456/11). This in turn would lead to a race to the courts and even to a race between the courts. (The latter metaphor is only partially convincing, for it is unlikely that the judges will intentionally accelerate their respective proceedings in order to "beat" the other court.)

Brüggemann goes on to argue that when it comes to jurisdiction agreements it is contradictory to make an exception to the principle of mutual trust in the *lis pendens* context but to strictly adhere to it in the recognition context. He demonstrates that, in particular, default judgments by a derogated court pose a significant risk for the defendant – one with which US civil procedure arguably deals more effectively. Alas, this appears to be the only instance in which the author's comparative analysis, as interesting it is in and of itself, contributes to his broader point. He concludes by pointing out parallels to jurisdiction in insurance/consumer/employment matters (safeguarded at the stage of recognition by Article 45(1)(e)(i) Brussels I*bis*) and exclusive jurisdiction (safeguarded at the stage of recognition by Article 45(1)(e)(ii) Brussels I*bis*), and by suggesting that a special ground for refusal of recognition would have positive effects on the internal market.

While the abovementioned Judgments Convention is too recent to feature in the book, the author was able to consider its draft in a separate, albeit somewhat oddly positioned, chapter. Conspicuously absent is any specific discussion of the issue of damages for the violation of a choice of court agreement (see this recent post). The omission is certainly justifiable as Brüggemann is only concerned with procedural safeguards for jurisdiction agreements. But maybe such a remedy under substantive law could obviate or at least lessen the need for a separate ground of refusal of recognition? All in all, however, the author has carefully built a compelling case for an addition to Article 45(1) Brussels I*bis*.

Staying Proceedings under the Civil Code of Quebec

Written by Professor Stephen G.A. Pitel, Western University

The decision of the Supreme Court of Canada in *R.S. v P.R.*, 2019 SCC 49 (available here) could be of interest to those who work with codified provisions on staying proceedings. It involves interpreting the language of several such provisions in the Civil Code of Quebec. Art. 3135 is the general provision for a stay of proceedings, but on its wording and as interpreted by the courts it is "exceptional" and so the hurdle for a stay is high. In contrast, Art. 3137 is a specific provision for a stay of proceedings based on *lis pendens* (proceedings underway elsewhere) and if it applies it does not have the same exceptional nature. This decision concerns Art. 3137 and how it should be interpreted.

P.R. (the husband) filed for divorce in Belgium. R.S. (the wife) filed for divorce three days later in Quebec. The husband sought to stay the Quebec proceedings on the basis of *lis pendens*. [para. 2] The motions judge refused a stay but the Quebec Court of Appeal reversed and granted a stay. The Supreme Court of Canada (6-1) reversed and restored the original refusal of a stay. The upshot is that the wife is allowed to proceed with divorce proceedings in Quebec.

The dispute was protracted largely because the husband, under Belgian law, purported to revoke all gifts he had given to the wife during their marriage. [paras. 2 and 13] These were worth more than $33 million. This is legal under Belgian law though not free from controversy [para. 59].

Art. 3137 provides "On the application of a party, a Québec authority may stay its ruling on an action brought before it if another action, between the same parties, based on the same facts and having the same subject is pending before a foreign authority, provided that the latter action can result in a decision which may be recognized in Québec, or if such a decision has already been rendered by a foreign authority."

One of the central issues for the court was whether a Belgian decision could be recognized in Quebec. Because a Belgian court would give effect to the revocation of the gifts in its decision, Justice Abella did not think so. She held that "foreign

judgments which annihilate not only countless international instruments regarding the equality of spouses and the protection of a vulnerable one, but also the very philosophical underpinnings of the provisions in the [Civil Code of Quebec] contradict those conceptions and will not be recognized in Quebec." [para 142] In her view no Belgian decision accepting the revocation of the gifts on these facts could be recognized in Quebec: refusal under Art. 3155(5) – "the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations" – was inevitable. On this view, Art. 3137 did not apply and so there was no basis for a stay.

In contrast, Justice Gascon, joined by four other judges, held that a Belgian decision could be recognized in Quebec. The threshold is low, requiring only the possibility or plausibility of recognition. [para. 48] The focus is not on the specific provisions of any rule that the foreign court might apply in reaching its decision but on the outcome or decision itself. [para. 56] He held that "the husband was required to show only that there was a possibility that the eventual Belgian decision would not be manifestly inconsistent with public order as understood in international relations." [para. 57] He listed several possible outcomes by which the Belgian court might render a decision that could be recognized in Quebec, including the prospect that a Belgian court might not give effect to the revocation of the gifts on the basis that the law so allowing is unconstitutional. [paras. 58-63]

On Justice Gascon's reasoning, Art. 3137 did apply, making a stay available. However, the provision is discretionary, expressly using the word "may". [para. 67] Justice Gascon considered that the motions judge's decision to not grant a stay based on this discretion was not unreasonable and so should not have been disturbed by the Court of Appeal. [para. 80]

Unlike the other six judges, Justice Brown thought that a stay should be granted. In his dissent, he expressed concern about the motions judge's reasoning. He held that the motions judge had, in interpreting the conditions that trigger Art. 3137, made "overriding" errors that justified appellate intervention. [para. 162] He also held that the motions judge had not truly exercised the discretion under Art. 3137. [para. 169] Accordingly he was prepared to exercise it afresh and held (agreeing with the Quebec Court of Appeal) that the Quebec proceedings should be stayed. The factors favoured proceedings in Belgium, especially the concern that any Quebec judgment would not be recognized in Belgium because the Belgian proceedings had started first. [para. 186]

It appears that one of the key reasons for the split between Justice Gascon and Justice Brown is that the former focused on the substantial assets in Quebec, which would of course be subject to a Quebec divorce decision [para. 91], whereas the latter focused on the substantial assets in Belgium that would be unaffected by a Quebec divorce decision [para. 187]. This goes to the exercise of the discretion to ignore the *lis pendens* and refuse a stay. One of the relevant factors for this is whether the court's eventual judgment would be recognized by the forum first seized. It is easy to appreciate that this factor does not matter if that judgment does not need to be recognized there at all to be effective and, in contrast, that it is vital if it must be. [para. 90] The facts position this case somewhere in between the ends of this spectrum.

The split between Justice Gascon and Justice Abella in part is based on their understanding of Belgian law. Justice Abella repeatedly noted that there is no evidence – Belgian law being a matter of fact in a Canadian court – that a Belgian court would do anything other than give effect to the revocation. [paras. 117-21] In contrast, Justice Gascon held there was at least some evidence going the other way [para. 59] and in addition he was prepared to rely on the possibility that certain arguments might be successfully advanced. [paras. 61-62]

Many of the issues in this case arise specifically because of the separate treatment under Quebec law of *lis pendens*. The analysis at common law could have been quite different, all conducted under the rubric of the doctrine of *forum non conveniens*. Parallel proceedings would have been one of the factors considered in the analysis. But the common law has been prepared to reject according much if any weight to first-in-time proceedings based only on relatively short differences in timing (in this case, three days). Indeed, Justice Gascon noted the tension caused by strict application of first-in-time rules, either when staying proceedings or deciding whether to recognize a foreign judgment. [para. 89]

One small point might be worth a final comment. In developing the proper interpretation of Art. 3137 the judges stressed that if successfully invoked by the defendant it leads to a stay of proceedings, which is less final and so less prejudicial to the plaintiff than an outright dismissal of the proceeding. A proceeding so stayed could, if justice demanded, be reactivated. This is contrasted with the general provision in Art. 3135. [paras. 72-73 and 179] However, that provision, while not using the word "stay", uses the phrase "decline jurisdiction". The judges treated it is as a given that this means the

proceedings are dismissed and at an end. But is it not at least arguable that to decline jurisdiction the court must first have jurisdiction, and that the declining amounts to a stay of that jurisdiction and not a dismissal? The court could have explained the basis for its position on this issue somewhat more fulsomely.

HCCH Event on the HCCH Service Convention in the Era of Electronic and Information Technology and a few thoughts

Written by Mayela Celis

The Permanent Bureau of the Hague Conference on Private International Law (HCCH) is organising an event entitled *HCCH a / Bridged: Innovation in Cross-Border Litigation and Civil Procedure*, which will be held on 11 December 2019 in The Hague, the Netherlands. This year's edition will be on the HCCH Service Convention.

The agenda and the registration form are available here. The deadline for registrations is Monday 11 November 2019. The HCCH news item is available here.

A bit of background with regard to the HCCH Service Convention and IT: As you may be aware, the Permanent Bureau published in 2016 a *Practical Handbook on the Operation of the Service Convention* (available for purchase here), which contains a detailed Annex on the developments on electronic service of documents (and not only with regard to the Service Convention). In that Annex, developments on the service of documents by e-mail, Facebook, Twitter, etc. and its interrelationship with the Service Convention were analysed. Not surprisingly, cases where electronic service of process was used were rare under the Service Convention (usually, the physical address of the defendant is not known, thus the

Service Convention does not apply and the courts resort to substituted service).

A more important issue, though, appears to be the electronic transmission of requests under the Service Convention. According to a recent conclusion of the HCCH governance council, it was mandated that:

Electronic transmission of requests

"40. Council mandated the Permanent Bureau to conduct work with respect to the development of an electronic system to support and improve the operation of both the Service and Evidence Conventions. The Permanent Bureau was requested to provide an update at Council's 2020 meeting. The update should address the following issues: whether and how information technology would support and improve the operation of the Conventions; current practices on the electronic transmission of requests under the Conventions; legal and technological barriers to such transmission and how best to address these; and how a possible international system for electronic transmission would be financed. "

In contrast, the European Union seems to be at the forefront in encouraging electronic service of documents as such, see for example the new proposal for Regulation on the service of judicial and extrajudicial documents in civil or commercial matters, click here (EU Parliament, first reading).

Article 15a reads as follows:

"Electronic service

1. Service of judicial documents may be effected directly on persons domiciled in another Member State through electronic means to electronic addresses accessible to the addressee, provided that ***both*** of the following conditions are fulfilled: [Am. 45]

(a) the documents are sent and received using qualified electronic registered delivery services within the meaning of Regulation (EU) No 910/2014 of the European Parliament and of the Council, and [Am. 46]

(b) after the commencement of legal proceedings, the addressee gave express consent to the court or authority seized with the proceedings to use that particular electronic address for purposes of serving documents in course of the legal proceedings. [Am. 47]."

By adding the word “both” the European Parliament seems to restrict electronic service to documents ***after*** service of process has been made (see previous European Commission’s proposal). This, in my view, is correct and gives the necessary protection to the defendant. In the future and with new IT developments, this might change and IT might be more widely used by all citizens (think of a government account for each citizen for the purpose of receiving government services and service of process -although service of process comes as a result of private litigation so this might be sensitive-), and thus this might provide more safeguards. In my view, the key issue in electronic service is to obtain the consent of the defendant (except for cases of substituted service).

Reform of Singapore’s Foreign Judgment Rules

On 3rd October, the amendments to the Reciprocal Enforcement of Foreign Judgments Act (“REFJA”) came into force. REFJA is based on the UK Foreign Judgments (Reciprocal Enforcement) Act 1933, but in this recent round of amendments has deviated in some significant ways from the 1933 Act. The limitation to judgments from “superior courts” has been removed. Foreign interlocutory orders such as freezing orders and foreign non-money judgments now fall within the scope of REFJA. So too do judicial settlements, which are defined in identical terms to the definition contained in the Choice of Court Agreements Act 2016 (which enacted the Hague Convention on Choice of Court Agreements into Singapore law).

In relation to non-money judgments, such judgments may only be enforced if the Singapore court is satisfied that enforcement of the judgment would be “just and convenient”. According to the Parliamentary Debates, it may not be “just and convenient” to allow registration of a non-money judgment under the amended REFJA if to do so would give rise to practical difficulties or issues of policy and

convenience. The Act gives the court the discretion to make an order for the registration of the monetary equivalent of the relief if this is the case.

An interlocutory judgment need not be "final and conclusive" for the purposes of registration under REFJA. The intention underlying this expansion is to allow Singapore courts to enforce foreign interlocutory orders such as asset freezing orders. This plugs a hole as currently *Mareva* injunctions are not regarded as free-standing relief under Singapore law. It has recently been held by the Court of Appeal that the Singapore court would only grant Mareva injunctions in aid of foreign proceedings if: (i) the Singapore court has personal jurisdiction over the defendant and (ii) the plaintiff has a reasonable accrued cause of action against the defendant in Singapore (*Bi Xiaoqing v China Medical Technologies Inc* [2019] SGCA 50).

New grounds of refusal of registration or to set aside registration have been added: if the judgment has been discharged (eg, in the event of bankruptcy of the judgment debtor), the damages are non-compensatory in nature, and if the notice of the registration had not been served on the judgment debtor, or the notice of registration was defective.

It is made clear that the court of origin would not be deemed to have had jurisdiction in an action *in personam* if the defendant voluntarily appeared in the proceedings solely to invite the court in its discretion not to exercise its jurisdiction in the proceedings. *Henry v Geoprosco* [1976] QB 726 would thus not apply for the purposes of REFJA although its continued applicability at common law is ambiguous (see *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088).

All along, only judgments from the superior courts of Hong Kong SAR have been registrable under REFJA. The intention now is to repeal the Reciprocal Enforcement of Commonwealth Judgments Act ("RECJA"; based on the UK Administration of Justice Act 1920) and to transfer the countries which are gazetted under RECJA to the amended REFJA. The Bill to repeal RECJA has been passed by Parliament.

The amended REFJA may be found here: https://sso.agc.gov.sg/Act/REFJA1959

Party autonomy in infringement of copyright: Beijing IP Court Judgement in the Drunken Lotus

China is one of few countries that permits the parties to choose the applicable law governing cross-border infringement of intellectual property disputes. Article 50 of the Chinese Law Applicable to Foreign-Related Civil Relations 2010 (Conflicts Act) provides that the parties could choose Chinese law (*lex fori*) after dispute has arisen to derogate from the default applicable law, i.e. *lex loci protectionis*, in IP infringement disputes.

This choice of law rule was applied by the Beijing IP Court in its 2017 decision on Xiang Weiren v Peng Lichong ("Drunken Lotus"), (2015) Jing Zhi Min Zhong Zi 1814. The claimant published his painting "Drunken Lotus" in 2007. In 2014, the defendant exhibited his artwork entitled "Fairy in Lotus" in Mosco and Berlin, which allegedly had infringed the claimant's copyrights. Although the parties did not enter into an explicit choice of law agreement, both parties submitted their legal arguments based on Chinese Copyright Law, which was deemed an "implied" *ex post* choice of Chinese law. Beijing IP Court thus applied Chinese law to govern the infringement dispute.

This case reveals a number of interesting points. Party autonomy may provide a practical alternative to *lex loci protectionis* in infringements occurring in multiple jurisdictions. In the Drunken Lotus case, applying *lex loci protectionis* would result in the application of two foreign laws, Russian and German law, respectively to the infringement occurred in Russia and Germany. In the even worse scenario, where a copyright is infringed in the internet, the territoriality nature of copyrights may result in multiple, similar but independent, infringements occurring in all countries where the online information is accessed, causing more difficulties for the claimant to enforce their rights based on multiple applicable laws.

However, there may be no convincing argument to limit the choice to the *lex fori*. If party autonomy is justifiable in IP infringement, which is controversial, it would be appropriate for the parties to choose any law. The only justification of such a limitation probably sterns from judicial efficiency and pragmatism. It would be more convenient for the court to apply its own law. Also in practice, it is very common that when the litigation is brought in China and especially where both parties are Chinese, the parties naturally rely on Chinese law to support their claims or defences without being aware of the potential choice of law questions. It renders "implied" *ex post* choice exist very frequently and make it legitimate for Chinese court to apply Chinese law in most circumstances. It is also likely that allowing the parties to choose the *lex fori* could be an attractive reason for the claimants, especially those in multi-jurisdiction infringement disputes, to bring the action in China, granting Chinese court a competitive advantage versus other competent jurisdictions.

Furthermore, the Chinese law only permits party autonomy in infringement of IPRs. Any issues concerning substance of IPRs, including ownership, content, scope and validation, are exempt from party autonomy (Art 48 of Contracts Act). These issues are usually classified as the proprietary perspective of IPRs, exclusively subject to the *lex protectionis* to the exclusion of party autonomy. However, before a court could properly consider the infringement issue, it is inevitable to know at least the content and scope of the disputed IPR in order to ascertain parties' rights and obligations. In other words, the substance and infringement of IPRs are two different, but closely related, issues. Applying party autonomy means the court should apply two different laws, one for the substance and the other infringement, causing *depacage*. The necessity to decide the content of IPRs may largely reduce the single law advantage brought by party autonomy in multi-jurisdictional infringements. In the Drunken Lotus case, Chinese court simply applied Chinese law to both the content and infringement issues, without properly considering substance and infringement classification.

Law Shopping in Relation to Data Processing in the Context of Employment: The Dark Side of the EU System for Criminal Judicial Cooperation?

This post was written by Ms Martina Mantovani, Research Fellow at the Max Planck Institute Luxembourg. The author is grateful to her colleague, Ms Adriani Dori, for pointing out the tweet.

On 26th September 2019, Dutch MEP Sophie in 't Veld announced through her Twitter account the lodging of a question for written answer to the EU Commission, prompting the opening of an investigation (and, eventually, of infringement proceedings) in relation to a commercial use of the European Criminal Record Information System (ECRIS). A cornerstone of judicial cooperation in criminal matters, this network is allegedly being exploited by a commercial company operating on the European market (hereinafter name, for the purposes of this entry, The Company), in order to provide, against payment, a speedy and efficient service to actual or prospective employers, wishing to access the criminal records of current employees or prospect hires.

Commercial activities of this kind raise a number of questions concerning, first and foremost, the lawfulness of the use of the ECRIS network beyond its institutional purpose, as well as the potential liability under EU law of the national authorities which are (more or less knowingly) fostering such practices. Moreover, as specifically concerns the topic of interest of this blog, such commercial practices exemplify how law shopping, stemming from the lack of coordination of Member States' data protection laws, can be turned into a veritable profit-seeking commercial endeavor. As it is, these commercial practices are made possible not only by the specific legislation instituting the ECRIS, but also due to the legal uncertainty and fragmentation fostered by the GDPR. In fact, this Regulation leaves rooms for maneuver for Member States' legislators to specify its provisions in relation to, *inter alia*, the processing of personal data in

the context of employment (art 88), without nonetheless providing for either a guiding criterion or an explicit uniform rule to delimit or coordinate the geographical scope of application of national provisions enacted on this basis. This contributes to creating a situation whereby advantage might be taken of the uncertainty relating to the applicable data protection regime, to the detriment of the fundamental right to data protection of actual or prospective employees.

The ECRIS: institutional mission and open concerns.

The ECRIS is based on two separate but related pieces of legislation, Council Framework Decision 2009/315/JHA and Council Decision 2009/316/JHA, as well as on a separate data protection framework, previously set out by Council Framework Decision 2008/977/JHA, now repealed and replaced by Directive (EU) 2016/680. The intuitional mission of the ECRIS consists in providing competent public authorities from one Member States with access to information from the criminal records of nationals of other Member States. By facilitating the exchange of information from criminal records, this network aims at informing the authorities responsible for the criminal justice system of the background of a person subject to legal proceedings, so that his/her previous convictions can be taken into account to adapt the decision to the individual situation (Recital 15 of Council Framework Decision 2009/315/JHA). The ECRIS additionally aims at ensuring that a person convicted of a sexual offence against children will no longer be able to conceal this conviction or disqualification with a view to performing professional activity related to supervision of children in another Member State (Recital 12 of Council Framework Decision 2009/315/JHA, in conjunction with article 10(3) of Directive 2011/93/EU). In current law, ECRIS applications for accessing extracts from criminal records can be filed by judicial or competent administrative authorities, such as bodies authorized to vet persons for sensitive employment or firearms ownership. In such cases, these applications must be submitted with the central authority of the Member State to which the applicant authority belongs. This central authority may (and not *shall*) submit the request to the central authority of another Member State in accordance with its national law. In addition, access requests can also be filed by the person concerned for information on own criminal records. In this case, the central authority of the Member State in which the request is made may, in accordance with its national law, submit a request to the central authority of another Member State for information and related data to be extracted from its criminal record,

provided the person concerned is or was a resident or a national of either the requesting or the requested Member State. In relation to information extracted via the ECRIS for any purposes other than that of criminal proceedings, a Statewatch Report of 2011 already expressed serious concerns, noting that while the European Data Protection Supervisor recommended that requests of this kind should have only be allowed "under exceptional circumstances", the Council Framework Decision did not finally introduce such a stringent limitation. Moreover, since, under current article 7, the requested central authority shall reply to such requests *in accordance with its national law*, this piece of legislation provides "*an opportunity for the widespread cross-border exchange of information extracted from criminal records for a variety of purposes unrelated to criminal proceedings*". That same Report additionally stresses the huge potential for "information shopping" that may thus arise, insofar as applicants who are not able to obtain information on an individual from that person's home Member State, may access it via another Member State which also holds the information and has less stringent data protection legislation.

New commercial practices.

It is within this framework that the new commercial practices lying at the heart of Ms Sophie in 't Veld's question must be understood. The commercial services in question are provided by The Company, expressly identified in the MEP's interrogation. On its website, The Company takes great care to specify that, while it may have a name which closely echoes the EU system, it remains a private company offering commercial services and that "*the purpose of this similarity is to highlight [it uses] the EU structures to access information on criminal records*". According to the same source, the services provided aim at addressing a widespread need of employers from Europe and rest of the world, who wish to ensure that their employees have no criminal background. Having remarked that said employers often struggle to perform background checks in a compliant manner, with legislation varying across the European Union rendering such a check "*complicated, time consuming or impossible*", The Company proposes an innovative solution. According to its website, it "discovered" that by resorting to a EU program called European Criminal Records Information System, it is "*able to address all of those concerns and offer easy and compliant access to state-issued EU criminal records certificates*". The FAQs further specify how this procedure works in practice. They confirm that all certificates are obtained from central

criminal registers of EU Member States. What makes the service provided "unique" is that The Company is declaredly streamlining all access requests through the ECRIS central authority of just one Member State, who requests criminal information from its European counterparts on The Company's behalf. According to both The Company's website and MEP Sophie in 't Veld's interrogation, the National Criminal Register of this Country "*play[s] a role of a middleman in the flow of documentation and requests the information from the central register of the destined country*". While The Company claims that "*the application is made with the applicant's full awareness and explicit consent*", the MEP stresses "*it is not clear whether the person whose records are obtained has given explicit consent*". In fact, it must be acknowledged that the website's wording is rather ambiguous, being unclear whether the expression "*the applicant*" refers to the employer seeking the company's services, or to the persons whose criminal records are being accessed. The way in which The Company (which, incidentally, has UK phone number and which, according its website's FAQ's, seems to direct its services primarily to employers operating in the UK and Ireland) is effectively resorting to a foreign National Criminal Register for accessing the ECRIS remains a mystery. In fact, The Company cannot certainly be counted among either the administrative or the judicial authorities admitted to filing a request under Council Framework Decision 2009/315/JHA. Two highly speculative guesses might be made. A first possibility might be that the National Criminal Register allegedly playing the role of middleman might be misapplying the Framework Decision by submitting requests filed by non-legitimate applicants (as MEP in 't Veld seems to imply, by appealing to the principle of mutual trust and by envisioning the possibility of opening infringement proceedings). As it is, the form for access requests used by said National Criminal Register does not strictly require, according to its letter, that person filing the request shall be the same person whose criminal records need to be obtained, although it contains the explicit warning that "obtaining unauthorized information about a person from the National Criminal Register is punishable by a fine, restriction of liberty or imprisonment up to 2 years". A second possibility is that the company might be exploiting individual access requests, which – it must be stressed – could concern only "residents or nationals *of the requesting or requested Member State*" (article 6§2 of Council Framework Decision 2009/315/JHA). In such cases, one might imagine that, after being approached by the employer, The Company would transmit the aforementioned form to the employee/prospect hire, who would personally sign the form, thus

explicitly consenting to the procedure. From the standpoint of data protection law, however, such an approach would not be less problematic. As repeatedly confirmed by the Article 29 Working Party, an employer which processes personal data (even within the framework of a recruitment process) qualifies as a controller of the employee/prospect hire personal data, having moreover very limited possibilities to rely on the employee's express consent as a lawful basis for their processing. Furthermore, such approach remains even more controversial if account is taken of the fact that it may be purposefully used to circumvent the more restrictive data protection provisions in matters of employment enacted by another Member State.

The Member State's law applicable to the processing of personal data in the context of employment.

Albeit having been promoted by the EU Commission as "a single, pan-European law for data protection", the new GDPR fails to level out all legislative differences in the Member States' data protection laws. As mentioned above, it provides in fact a margin of maneuver for Member States to specify its rules, including for the processing of special categories of personal data. To that extent, it does not exclude Member State law that sets out the circumstances for specific processing situations, including determining more precisely the conditions under which the processing of personal data is lawful (recital 10). In this vein, its article 88 provides that "Member States *may*, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of recruitment […]". Commercial practices such as those signaled by Ms in 't Veld seem to thrive on this situation of persisting legal uncertainty and fragmentation. In fact, some Member States' data protection legislation expressly prohibits the use of individual access requests to criminal record in connection with the recruitment of an employee, except for very exceptional circumstances. Nonetheless, such legislative measures are often rendered toothless at the international level, either because the legislator limited – more or less willingly – their reach to the domestic domain, or because their geographical scope of application, left undefined by the relevant GDPR-complementing law, remains highly ambiguous. This is precisely what happens in relation to the British and the Irish Data Protection Acts, expressly mentioned by The Company's website.

- *The UK Data Protection Act 2018*

This law, meant to adapt the UK data protection regime to the GDPR, provides, under its *Section 184,* that:

"it is an offence for a person ("P1") to require another person to provide P1 with, or give P1 access to, a relevant record in connection with— (a)the recruitment of an employee by P1; (b)the continued employment of a person by P1; or (c)a contract for the provision of services to P1." According to *Schedule 18* of the same law, *"relevant record" means—* […] *(b)a relevant record relating to a conviction or caution …*[which] *(a)has been or is to be obtained by a data subject in the exercise of a data subject access right from a person listed in sub-paragraph (2), and (b)contains information relating to a conviction or caution.* The Company is well aware of these restrictions, which are expressly reported on its website (reference is made to Section 56 of the Data Protection Act (DPA) 2015, corresponding to Section 184 of the new DPA 2018). Nonetheless, it is further clarified that "[*The Company] do[es] not make any requests under section [184] of the DPA, therefore [being] not limited by [it]*" and that, consequently, it might even be "*safer*", as a UK-based employer, to resort to its services. And this might admittedly be true, since the prohibition set out by Section 184 solely concerns records obtained by a data subject in the exercise his/her access right from one of the UK-based authorities listed in §3(2) of Schedule 18, and not by a foreign Criminal Register. Nonetheless, despite the apparent lawfulness of the whole process, the fact remains that the use (or abuse?) of an EU system, established to address specific needs of the judicial cooperation in criminal matters, becomes, in practice, the tool for enabling a UK-established employer to access employees' personal data which he could not lawfully access domestically. This goes explicitly against the declared ratio and aim of Section 184 of the UK Data Protection Act. As clarified by the Explanatory Notes, this provision aims at thwarting conducts which may give the employer access to records which they would not otherwise have been entitled. There are, in fact, established legal routes for employers and public service providers to carry out background checks, which do not rely on them obtaining information via subject access requests. Disclosure and Barring Service (DBS) checks can in fact be performed *locally* only by one responsible organizations registered with DBS and according to the procedure and guarantees set out by British law.

- *The Irish Data Protection Act 2018*

The other relevant national GDPR-complementing provision is Section 4 of this law, entitled "obligation not to require data subject to exercise right of access under Data Protection Regulation and Directive in certain circumstances". This provision prohibits a person from requiring, in connection with the recruitment of an individual as an employee or his continued employment, that individual to exercise his rights of access to own criminal records, or to supply the employer with data obtained as a result of such a request. Again, The Company's website specifies that the services provided are not based on requests under Section 4 of the Irish law, and that this provision does not consequently constitute a limitation, thus making the use of their services "safer" for employers. It must be noted, however, that as opposed to the British provision, Section 4 does not limit the scope of the prohibition to records obtained by requesting access to Irish authorities. Therefore, the extent to which the processing of employees' personal data, including their criminal records, will be covered by Section 4 of the Irish Data Protection Act will finally depend on the identification of the scope of application of this Act *as a whole*. The problem with the Irish Data Protection Act (and with many other national GDPR-complementing laws, such as, *inter alia,* the Italian and the Spanish legislations) is that it does not explicitly define its geographical reach, thus fostering uncertainty as to the range of factual situations effectively covered and governed by its complementing provisions. This omission has been maintained in the final text of the Irish Data Protection Act despite the contrary advice given, during the drafting process, by the Irish Law Society. This pointed to such a lacuna as a potential source of ambiguity, for both individuals and controllers/processors, with regard to the remit and applicability of that piece of legislation. In particular, clarity as to what entities the Data Protection Act 2018 applies would have been especially desirous "given the number of corporations processing personal data on a large scale in Ireland and the likely queries that might otherwise arise and require judicial clarification".

The need for better coordination of national data protection laws in the context of employment.

Following Ms in 't Veld's question, the EU Commission will eventually investigate whether such a use of the ECRIS system is compliant with EU law, and whether the National Criminal Register in question is lawfully taking action on the basis of applications filed by/or with the help of The Company. In any event, the objective difficulties that may be encountered, in current law, in deciding over the

lawfulness of commercial practices this kind, which might be merely taking advantage of pre-existing legislative loopholes and gaps, are a clear cry for better coordination of the Member States' data protection laws enacted on the basis of the opening clauses enshrined in the GDPR. In a related paper, which is forthcoming in the *Rivista italiana di diritto internazionale privato e processuale,* this author tries and demonstrate that this problem is of an overarching nature, not being limited to the rather specific issues of, on the one side, the parochial approach adopted by the UK Parliament in defining the reach of its provision on forced access to criminal records for employment purposes and, on the other side, the silence kept by many national legislators concerning the geographical reach of their domestic data protection law. As it is, the entire European regime on data protection is deeply and adversely affected by a generalized lack of coordination of the spatial reach of domestic GDPR-complementing provisions. Lacking any uniform solution at EU level (set out either by the GDPR itself or by other existing instruments) the delimitation of the scope of application of national GDPR-complementing provisions is in fact left to unilateral and uncoordinated initiatives of domestic legislators. The review of existing national legislation evidences the variety of techniques and connecting factors employed for these purposes by the several Member States, which is liable to generate endemic risks of over- and under-regulations, and, above all, gaps of legal protection which are perfectly exemplified by, but not limited to, the commercial practices arisen in relation to the use of the ECRIS.