What Does it Mean to Submit to a Foreign Forum?

The meaning of submission was the central question, though by no means the only one, in the Supreme Court of Canada's decision in *Barer v Knight Brothers LLC*, 2019 SCC 13 (available here). Knight sought enforcement of a Utah default judgment against Barer in Quebec. The issue was governed by Quebec's law on the recognition and enforcement of foreign judgments, which is set out in various provisions of the Civil Code of Quebec (so much statutory interpretation analysis ensued). Aspects of the decision may be of interest to those in other countries that have similar provisions in their own codes.

The court held that the Utah decision was enforceable in Quebec. Seven judges (Gascon J writing the majority decision) held that Barer had submitted to the Utah court's jurisdiction. Two judges held that he had not. One of them (Brown J) held that the Utah court had jurisdiction on another basis, and so concurred in the result, while the other (Cote J) held it did not, and so dissented.

The majority held that in his efforts to challenge the Utah's court's jurisdiction, Barer had presented substantive arguments going to the merits of the dispute (para 6). It analysed various possible steps in a foreign proceeding that either would or would not constitute submission (paras 59-63). It was invited by Barer to consider the "save your skin" approach to submission, which would recognize that a defendant who both challenged jurisdiction and raised substantive arguments would not be taken to have submitted. It rejected that approach (para 68). Its core concern was to protect "the plaintiff's legitimate interest in knowing at some point in the proceedings, whether or not the defendant has submitted to the jurisdiction" (para 62). It added that "plaintiffs who invest time and resources in judicial proceedings in a jurisdiction are entitled to some certainty regarding whether or not the defendants have submitted to the court's jurisdiction" (para 67).

The majority acknowledged that in a case in which the process of the foreign forum required the raising of a substantive argument alongside a jurisdictional challenge, this could affect the determination of whether the defendant had submitted (para 75). But this was not such a case: the defendant had not

established, as a factual matter, that this was such a feature of the Utah procedure (paras 75 and 78). Accordingly, the fact that Barer had raised a defence on the merits – that a pure economic loss rule barred the claim against him – amounted to submission (para 71).

In dissent, Justice Cote finds the majority's test for submission to be "too strict" (para 212). She urged a "more flexible approach" which would allow a defendant to raise substantive arguments alongside a jurisdictional challenge (para 213). In her view, if "a broad range of arguments may convince a Utah court that it lacks jurisdiction over a matter … A defendant must be allowed to present those arguments" (para 219). While Gascon J put the onus of showing that the Utah process required raising substantive arguments at a particular time on the defendant, Cote J put that onus on the plaintiff, the party seeking to enforce the foreign judgment (para 223).

Brown J's concurring decision did not comment at any length on the test for submission. He held that "I agree with my colleague Cote J. that Mr. Barer has not submitted to the jurisdiction of the Utah court merely by presenting *one* argument pertaining to the merits of the action in his Motion to Dismiss" (para 146; emphasis in original). This is consistent with Cote J's approach to the meaning of submission.

There is a further interesting dimension to the reasons. Cote J held, in the alternative, that even if Barer had submitted, the plaintiff also had to show a real and substantial connection between the dispute and Utah before the judgment could be enforced (para 234). This engaged her in a complex argument about the scheme and wording of the Civil Code. Having identified this additional legal requirement, she held this was a case in which the submission itself (if established) was not a sufficiently strong connection to Utah and so the decision should nonetheless not be enforced (para 268). In contrast, Brown J held that there was no separate requirement to show such a connection to Utah (paras 135 and 141-42). Showing the submission was all that was required. The majority refused to resolve this interpretive dispute (para 88), holding only that on the facts of this case Barer's submission "clearly establishes a substantial connection between the dispute and the Utah court" (para 88).

The judges disagreed about several other aspects of the case. Put briefly and at the risk of oversimplification, Brown J relied primarily on the notion that all

parties and aspects of the dispute should have been before the Utah court. Barer was sufficiently connected with various aspects of the dispute, over which Utah clearly did have jurisdiction, that its jurisdiction over him was proper (see paras 99, 154 and 161-62). Neither Cote J nor Gascon J agreed with that approach. There are also disputes about what types of evidence are proper for establishing the requirements for recognition and enforcement and what law applies to various aspects of the analysis.

In a small tangent, the majority decision criticized the "presumption of similarity" doctrine for cases in which the content of foreign law is not properly proven and it offered a more modern explanation of why forum law is applied in such cases (para 76).

Recognition of Surnames in Greece – Where do we go from here? –

The recognition of surnames determined abroad by virtue of a judgment or an administrative act has never attracted the attention of academics in Greece. The frequency of appearance concerning reported judgments is also scarce. In practice however, applications are filed regularly, mostly related with non EU-Member States. Until recently, recognition was granted by courts of law, save some minor exceptions, where the public order clause was invoked to deny recognition. A ruling of the Thessaloniki Court of Appeal from 2017 brings however an unexpected problem to surface.

I. The legal status in Greece

Name and surname issues are regulated by a decree published in 1957, as amended. For a person to change her/his name, there are certain requirements and an administrative procedure to be followed. The applicant has to prove the existence of a reason, such as psychological problems due to cacophonous sound

of the surname, its pronunciation difficulty or hilarious meaning, its bad reputation or connotation, the lack of any contact with the applicant's father, whose last name she/he uses, etc. In case of acceptance, the competent Mayor issues an act, granting the right of the petitioner to carry the new surname. If the application is dismissed, the applicant may file a recourse before the General Secretary of the territorially competent Decentralized Administration unit. The Council of State, i.e. the highest administrative court in Greece, serves as the last resort for the applicant.

II. The treatment of foreign judgments / administrative acts

The above decree does not regulate the situation where a person of double nationality (one of which is of course Greek) requests the registration of a foreign judgment or administrative act, whereupon a change of surname has been determined. Being confronted with relevant petitions, the Greek administration sought the assistance of the Legal Council of State, i.e. an advisory body at the service of state authorities. By virtue of a legal opinion issued in 1991, the Legal Council stated that registration may not take place prior to court recognition of the foreign judgment, pursuant to standard procedures provided for by the Greek Code of Civil Procedure [= GCCP]. In this fashion, the ball was sent to the courts.

III. The practice of the courts

Until recently, Greek courts reacted in a rather formal and simplistic way: Reference to the applicable provisions of the GCCP, presentation of facts, brief scrutiny on the merits and the documents produced, and recognition was granted. There are two exceptions to the rule. The first one is a reported case from 1996 [Athens 1st Instance Court Nr. 4817/1996, published in: Hellenic Justice 1997, p. 452], where a court order by the Supreme Court of Queensland was denied recognition, because it was based on the applicant's wish to give up his surname and acquire a new one, without any examination by the Australian court. The Greek court invoked the public policy clause, stating that the issue goes beyond private autonomy, and is differently regulated in Greece. The same outcome appeared 32 years later in the course of an application for the recognition of an act issued by the Civil Registry of Suchoj Log, Sverdlovsk Oblast: In a ruling from last year, the Thessaloniki 1st Instance Court refused recognition on public policy grounds, because the procedure followed in Russia contravened mandatory rules

of Greek law on the change of surnames [Thessaloniki 1st Instance Court Nr. 8636/2018, unreported].

A different stance was however opted by the Piraeus Court of Appeal with respect to an act issued by the Mayor of Vienna: After quashing the first instance decision, which dismissed the application as legally unfounded, the appellate court stayed proceedings, requesting a legal opinion on the procedure followed for the change of surnames pursuant to Austrian law. Upon submission of the legal opinion, the court proceeded to a brief analysis, whose outcome was the recognition of the Austrian act. In particular, the court confirmed that the procedure followed was in accordance with Austrian law [*Bundesgesetz vom 22. März 1988 über die Änderung von Familiennamen und Vornamen (Namensänderungsgesetz – NÄG)*]. Hence, no public policy reservations were in place [Piraeus Court of Appeal Nr. 141/2017, unreported].

IV. The Game Changer

The complacency era though seems to be over: In a judgment of the Thessaloniki CoA issued end 2017, things are turning upside-down. The application for the recognition of a registration made by the Civil Registry of Predgorny, District of Stavropol, was denied recognition, this time not on public order grounds, but on lack of civil courts' jurisdiction. The court stated that the recognition of a foreign administrative act may not be examined by a civil court, if the subject matter at stake (change of surname) is considered to be an administrative matter according to domestic law. Bearing in mind that the change of surname is a genuinely administrative procedure in Greece (see under I), civil courts have no jurisdiction to try such an application.

V. Repercussions and the way ahead

What would be the consequences of this ruling in regards to the overall landscape?

First of all, there could be a sheer confusion in practice: If the administration demands court recognition, and courts decline their jurisdiction, stagnation is at the gates. A ping pong game will start between them, and the ball will be the poor applicant, trapped in the middle. Needless to say, there is no other judicial path for recognition. The Code of Administrative Procedure does not contain any

provisions on the matter.

Secondly, is it to be expected that the same stance will prevail with respect to judgments or administrative acts coming from EU Member States? A spillover effect is not to be excluded. Courts seem to be encapsulated in their national niche. It is remarkable that no reference is made to the case law of the CJEU, even in the case regarding the Austrian Mayor's act.

Therefore, an intervention by the legislator is urgently needed, otherwise we're heading for stormy weather.

Much-awaited draft guidelines on the grave risk exception of the Child Abduction Convention (Art. 13(1)(b)) have been submitted for approval

After years in the making, the revised HCCH draft Guide to Good Practice on Article 13(1)(b) of the Child Abduction Convention has been completed and is accessible here. It has been submitted to the governance body of the Hague Conference on Private International Law (*i.e.* the Council on General Affairs and Policy) for approval.

There are five exceptions under the Child Abduction Convention and this is one of them; see also Arts 12(2), 13(1)(a), 13(2) and 20 of the Convention. Under this exception, the judicial or administrative authority of the requested State *may* refuse to return the child to his or her State of habitual residence following a wrongful removal or retention.

According to the latest survey of the Hague Conference of applications made in

2015, the refusals on the basis of Article 13(1)(b) of the Child Abduction Convention amount to 18% of the total judicial refusals. Thus, this is the most frequently raised exception. Other grounds for judicial refusal relate to the scope of the Convention (such as the lack of habitual residence or rights of custody). See the survey available here (p. 15).

Article 13(1)(b) contains the following three different types of risk:

- a grave risk that the return would expose the child to physical harm;
- a grave risk that the return would expose the child to psychological harm; or
- a grave risk that the return would otherwise place the child in an intolerable situation.

Particularly useful for practitioners are the examples of assertions that can be raised under this exception, which include but are not limited to (see paras 53-77):

- Domestic violence against the child and / or the taking parent
- Economic or developmental disadvantages to the child upon return
- Risks associated with circumstances in the State of habitual residence
- Risks associated with the child's health
- The child's separation from the taking parent, where the taking parent would be unable or unwilling to return to the State of habitual residence
- Separation from the child's sibling(s)

In my opinion, the Child Abduction Convention, and in particular this exception, can no longer be interpreted in a vacuum and one should also look to the human rights case law which is quickly developing in this area (in addition to the applicable regional regulations).

The U.S. Arbitration-Litigation

Paradox

The U.S. Supreme Court is well-known for its liberal pro-arbitration policy. In *The Arbitration-Litigation Paradox*, forthcoming in the Vanderbilt Law Review, I argue that the U.S. Supreme Court's supposedly pro-arbitration stance isn't as pro-arbitration as it seems. This is because the Court's hostility to litigation gets in the way of courts' ability to support arbitration—especially international commercial arbitration.

This is the arbitration-litigation paradox in the United States: On one hand, the U.S. Supreme Court's hostility to litigation *seems* to complement its pro-arbitration policy. Rising barriers to U.S. court access in general, and in particular in transnational cases (as I have explored elsewhere), seems consistent with a U.S. Supreme Court that embraces arbitration as an efficient method for enforcing disputes. Often, enforcement of arbitration clauses in these cases leads to closing off access to courts, as Myriam Gilles and others have documented.

But there's a problem. As is perhaps obvious to experts, arbitration relies on courts—for enforcing arbitration agreements and awards, and for helping pending arbitration do what it needs to do. So closing off access to courts can close access to the litigation *that supports* arbitration. And indeed, recent Supreme Court cases narrowing U.S. courts' personal jurisdiction over foreign defendants have been applied to bar arbitral award enforcement actions. Courts have also relied on forum non conveniens to dismiss award-enforcement actions.

That's one way in which trends that limit litigation can have negative effects on the system of arbitration. But there's another way that the Court's hostility to litigation interacts with its pro-arbitration stance, and that's in the arbitration cases themselves.

The Supreme Court has a busy arbitration docket, but rarely hears international commercial arbitration cases. Instead, it hears domestic arbitration cases in which it often states that the "essence" of arbitration is that it is speedy, inexpensive, individualized, and efficient—everything that litigation is not.

(As an aside, this description of the stark distinction between arbitration and litigation is widely stated, but it's a caricature. The increasingly judicialized example of international commercial arbitration shows this is demonstrably false.

As practiced today, international commercial arbitration can be neither fast, nor cheap, nor informal.)

But in the United States, arbitration law is mostly trans-substantive. That means that decisions involving consumer or employment contracts often apply equally to the next case involving insurance contracts or international commercial contracts.

In the paper, I argue that the Court's tendency to focus on arbitration's "essential" characteristics, and to enforce these artificial distinctions between arbitration and litigation, can be harmful for the next case involving international commercial arbitration. It could undermine the likelihood of enforcement of arbitration awards where the arbitral procedure resembled litigation or deviated from the Court's vision of the "essential virtues" of arbitration.

To prevent this result, I argue that any revisions of the U.S. Federal Arbitration Act should pay special attention not only to fixing the rules about consumer and employment arbitration, but also to making sure that international commercial arbitration is properly supported. In the meantime, lower federal courts should pay no heed to the Supreme Court's seeming devotion to enforcing false distinctions between arbitration and litigation, particularly in the international commercial context.

In 2018, the Dutch Supreme Court found a Spanish judgment applicable in the Netherlands, based on the Hague Convention on the International Protection of

Adults. Minor detail: neither the Netherlands nor Spain is a party to this Convention.

Written by Dr. Anneloes Kuiper, Assistant Professor at Utrecht University, the Netherlands

In 2018, the Dutch Supreme Court found a Spanish judgment applicable in the Netherlands, based on the Hague Convention on the International Protection of Adults. Minor detail: neither the Netherlands nor Spain is a party to this Convention.

Applicant in this case filed legal claims before a Dutch court of first instance in 2012. In 2013, a Spanish Court put Applicant under 'tutela' and appointed her son (and applicant in appeal) as her 'tutor'. Defendants claimed that, from that moment on, Applicant was incompetent to (further) appeal the case and that the tutor was not (timely) authorized by the Dutch courts to act on Applicant's behalf. One of the questions before the Supreme Court was whether the decision by the Spanish Court must be acknowledged in the Netherlands.

In its judgment, the Dutch Supreme Court points out that the Convention was signed, but not ratified by the Netherlands. Nevertheless, article 10:115 in the Dutch Civil Code is (already) reserved for the application of the Convention. Furthermore, the Secretary of the Department of Justice has explained that the reasons for not ratifying the Convention are of a financial nature: execution of the Convention requires time and resources, while encouraging the 'anticipatory application' of the HCIPA seems to be working just as well. Because legislator and government seem to support the (anticipatory) application of the Convention, the Supreme Court does as well and, for the same reasons, has no objection to applying the Convention when the State whose ruling is under discussion is not a party to the treaty either (i.e. Spain).

This 'anticipatory application' was – although as such unknown in the Vienna Convention on the Law of Treaties – used before in the Netherlands. While in 1986 the Rome Convention was not yet into force, the Dutch Supreme Court applied article 4 Rome Convention in an anticipatory way to determine the

applicable law in a French-Dutch purchase-agreement. In this case, the Supreme Court established two criteria for anticipatory application, presuming it concerns a multilateral treaty with the purpose of establishing uniform rules of international private law:

1. No essential difference exists between the international treaty rule and the customary law that has been developed under Dutch law;
2. the treaty is to be expected to come into force in the near future.

In 2018, the Supreme Court seems to follow these criteria. These criteria have pro's and con's, I'll name one of each. The application of a signed international treaty is off course to be encouraged, and the Vienna Convention states that after signature, no actions should be taken that go against the subject and purpose of the treaty. Problem is, if every State applies a treaty 'anticipatory' in a way that is not too much different from its own national law – criterion 1 – the treaty will be applied in as many different ways as there are States party to it. Should it take some time before the treaty comes into force, there won't be much 'uniform rules' left.

The decision ECLI:NL:HR:2018:147 (in Dutch) is available here.

The Netherlands Commercial Court holds its first hearing!

Written by Georgia Antonopoulou and Xandra Kramer, Erasmus University Rotterdam (PhD candidate and PI ERC consolidator project Building EU Civil Justice)

Only six weeks after its establishment, the Netherlands Commercial Court (NCC) held its first hearing today, 18 February 2019 (see our previous post on the creation of the NCC). The NCC's maiden case *Elavon Financial Services DAC* v. *IPS Holding B.V. and others* was heard in summary proceedings and concerned an application for court permission to sell pledged shares (see here). The

application was filed on 11 February and the NCC set the hearing date one week later, thereby demonstrating its commitment to offer a fast and efficient forum for international commercial disputes.

The parties' contract entailed a choice of forum clause in favour of the court in Amsterdam. However, according to the new Article 30r (1) of the Dutch Code of Civil Procedure and Article 1.3.1. of the NCC Rules an action may be initiated in the NCC if the Amsterdam District Court has jurisdiction to hear the action and the parties have expressly agreed in writing to litigate in English before the NCC. Lacking an agreement in the initial contract, the parties in *Elavon Financial Services DAC* v. *IPS Holding B.V.* subsequently agreed by separate agreement to bring their case before the newly established chamber and thus to litigate in English, bearing the NCC's much higher, when compared to the regular Dutch courts, fees. Unlike other international commercial courts which during their first years of functioning were 'fed' with cases transferred from other domestic courts or chambers, the fact that the parties in the present case directly chose the NCC is a positive sign for the court's future case flow.

As we have reported on this blog before, the NCC is a specialized chamber of the Amsterdam District Court, established on 1 January 2019. It has jurisdiction in international civil and commercial disputes, on the basis of a choice of court agreement. The entire proceedings are in English, including the pronouncement of the judgment. Judges have been selected from the Netherlands on the basis of their extensive experience with international commercial cases and English language skills. The Netherlands Commercial Court of Appeal (NCCA) complements the NCC on appeal. Information on the NCC, a presentation of the court and the Rules of Procedure are available on the website of the Dutch judiciary. It advertises the court well, referring to "the reputation of the Dutch judiciary, which is ranked among the most efficient, reliable and transparent worldwide. And the Netherlands – and Amsterdam in particular – are a prime location for business, and a gateway to Europe." Since a number of years, the Dutch civil justice system has been ranked no. 1 in the WJP Rule of Law Index.

In part triggered by the uncertainties of Brexit and the impact this may have on the enforcement of English judgments in Europe in particular, more and more EU Member States have established or are about to establish international commercial courts with a view to accommodating and attracting high-value commercial disputes (see also our previous posts here and here). Notable similar

initiatives in Europe are the 'Frankfurt Justice Initiative' (for previous posts see here and here) and the Brussels International Business Court (see here). While international commercial courts are mushrooming in Europe, a proposal for a European Commercial Court has also come to the fore so as to effectively compete with similar courts outside Europe (see here and here).

The complexity of the post Brexit era for English LLPs and foreign legal professionals in EU Member States: a French perspective

Written by Sophie Hunter, University of London (SOAS)

In light of the turmoil in the UK Parliament since the start of 2019, the only certain thing about Brexit is that everything is uncertain. The Law Society of England and Wales has warned that "if the UK's relationship with the rest of the EU were to change as the result of significant renegotiations, or the UK choosing to give up its membership, the effects would be felt throughout the legal profession." As a result of Brexit, British firms and professionals will no longer be subject to European directives anymore. This foreshadows a great deal of complexity. Since British legal entities occupy a central place within the European legal market, stakes are high for both British and European lawyers. A quick overview of the challenges faced by English LLPs in France and the Paris Bar demonstrates a high level of complexity that, is not and, should be considered more carefully by politicians.

Currently, 1872 foreign lawyers from 92 different citizenships are registered at the Paris Bar, according to a report by Dominic Jensen, 181 are British citizens, out of which 72 are registered under their original professional titles pursuant to the European Directive 98/5/CE (70 solicitors and 2 barristers). From 61 foreign legal entities established in France, the majority are English limited liability

partnerships (LLP) which employ 1,600 lawyers. Some American law firms rely on the LLP structure as a strategy to establish themselves within the European legal market. According to the European Directive 98/5/CE, foreign legal entities of one Member State can be registered at the Bar of another Member State. The consequences of Brexit will be radical. Because the UK will no longer be part of the EU, foreign legal entities subject to English Law and established in EU Member States will no longer be recognized by the Bar of the host state, and thus will no longer be entitled to do business within its jurisdictions. For the Paris Bar, stakes are high since no other European capital has experienced such an important implementation of British and American law firms.

With the deadline of Brexit looming closer, no one has raised the topic of foreign lawyers and the exercise of their right to practice in European jurisdictions, in spite of numerous calls from The Law Society of England and Wales. While the UK is advocating for mutual recognition of professional qualifications, the French Bar led by Florent Loyseu de Grandmaison has drafted a report outlining various ways to solve this problem. According to a new ordinance published in April 2018, a foreign legal consultant can register with the Paris Bar to practice international law and any other type of law he or she is registered for, with the exception of European law and the law of Member States. The main concern of LLPs will focus primarily on how to continue to practice in France with little disruptions. LLPs owned by English solicitors will need to establish French legal entities owned and managed according to French and European Law. Most likely, English LLPs established in France will benefit from a new legal structure called AARPI, which stands for French limited partnership and mirrors the structure of LLPs. However it is not fully implemented within French legislation yet.

In a tensed climate between the UK and the EU, the fate of foreign legal consultants and entities seem more than ever uncertain. The example of France demonstrates, first, a high degree of complexity in the legislation that prevents LLPs to easily transpose their structure into the jurisdiction post Brexit, and a lack of preparation from both LLPs and the host state to face the practical consequences of Brexit. The UK and EU Member States will need to show a great deal of flexibility to quickly adapt legislation to incorporate English LLPs within their jurisdictions. Therefore, the fear of The Law Society of England and Wales which has repeatedly warned the UK government of the consequences of a “no deal” seem justified. Regardless of whether Brexit is implemented or postponed

on March 29, finding an appropriate answer to the dilemma faced by foreign legal professionals and LLPs across the continent should be a priority on the agenda.

The Aftermath of the CJEU's Kuhn Judgment – Hellas triumphans in Vienna. Really.

Written by Stephan Walter, Research Fellow at the Institute for German and International Civil Procedure Law, University of Bonn, Germany

Claims brought by creditors of Greek state bonds against Greece in connection with the 2012 haircut do not fall under the substantive scope of the Brussels Ibis Regulation because they stem from the exercise of public authority. Hence, they cannot be regarded as civil and commercial matters in the sense of Article 1(1) Brussels Ibis Regulation. This is the essence of the CJEU's *Kuhn* judgment (of 15 November 2018, Case C-308/17, ECLI:EU:C:2018:911), which was already discussed on this blog.

In said blog post, it was rightly pointed out that the judgment could be nothing but a Pyrrhic victory for Greece. Not least the – now possible – application of national (sometimes exorbitant) jurisdictional rules was considered to have the potential to backfire. This was, however, only the case, if Greece was not granted immunity in the first place. In short: the fallout of the CJEU's judgment was hardly predictable.

A recent decision rendered by the Austrian Supreme Court of Justice (*Oberster Gerichtshof*, OGH) introduces some clarity – at least with regard to litigation in Austria. The decision (of 22 January 2019, docket no. 10 Ob 103/18x) concerned the case that gave rise to the preliminary reference.

In a first step, the OGH held that Greece does indeed enjoy immunity from the Austrian jurisdiction. This is a major change of case law. Unlike the German

Federal Court of Justice (*Bundesgerichtshof*, BGH), the OGH repeatedly held the opposite (most recently six days after (!) the CJEU's *Kuhn* judgment in a decision of 21 November 2018, docket no. 6 Ob 164/18p). While, in principle, there is nothing wrong with changing the case law, it is somewhat astonishing that the OGH did this in a very superficial fashion (one sentence). In fact, the court merely backed up its claim with a reference to the CJEU's *Kuhn* judgment, although this judgment was not concerned with the question of immunity but solely the substantive scope of the Brussels Ibis Regulation. Because of the severe consequences of the OGH's new approach, it is incomprehensible that the OGH did not discuss why the CJEU's holding applies to the issue of state immunity as well.

Ironically, the OGH declared itself – by virtue of section 42(3) of the Austrian Law on Jurisdiction (*Jurisdiktionsnorm*, JN) in conjunction with section 528(2) no. 2 of the Austrian Code of Civil Procedure (*Zivilprozessordnung*, ZPO) – bound by the finding of the court of previous instance that Greece did not enjoy immunity because the court of second instance upheld said finding.

Consequently, the OGH examined if Austrian courts had international jurisdiction based on the Austrian autonomous rules on jurisdiction. According to section 99 JN, jurisdiction can be established by the presence of assets in Austria (comparable to section 23 German Code of Civil Procedure). However, the OGH declined jurisdiction based on section 99 JN because the claimant had not relied upon this head of jurisdiction during the court proceedings. Therefore, the OGH found that Austrian courts had no international jurisdiction and dismissed the claim. This reasoning is hardly convincing. It is true that Austrian courts are – in principle – bound by the statement of the claimant when they examine their jurisdiction (see section 41(2) JN) and that the claimant did not rely upon section 99 JN. However, up until now, the OGH always applied the Brussels Ibis Regulation to claims in connection with the haircut. The court never – not even in the preliminary reference – questioned the applicability of the Regulation. Hence, one is inclined to ask: why should a claimant rely on the autonomous rules on jurisdiction if it is standing case law that they do not apply? Why did the OGH not remit the matter to the lower instance court, giving the claimant at least the chance to rely on section 99 JN (or Austrian autonomous rules on jurisdiction in general)? Is this not a prime example of a denial of justice? Be that as it may, the court's one-sentence (!) reasoning leaves at least a bitter taste.

What's the bottom line? Thanks to the *Kuhn* judgment, Greece now enjoys immunity from Austrian jurisdiction regarding claims in connection with the 2012 haircut. Consequently, Austria's (exorbitant) section 99 JN is out of the equation. Therefore, the OGH has turned Greece's Pyrrhic victory in the CJEU's Kuhn judgment into a clear victory. While the OGH's reasoning is far from bulletproof, the door to the Austrian courts has closed.

The decision (in German) can be accessed here.

Is there a need for international conventions on legal parentage (incl. international surrogacy arrangements)?

The Experts' Group on Parentage / Surrogacy of the Hague Conference on Private International Law (HCCH) has answered in the affirmative.

At its fifth meeting earlier this year, the Experts' Group agreed that it would be feasible to develop both:

- a general private international law instrument on the recognition of foreign judicial decisions on legal parentage; and
- a separate protocol on the recognition of foreign judicial decisions on legal parentage arising from international surrogacy arrangements (abbreviated as "ISA").

As announced on the HCCH website, the Experts' Group will recommend to the governance body of the HCCH (*i.e.* Council on General Affairs and Policy) during its meeting in March 2019 that "work continue with a view to preparing proposals for inclusion in future instruments relating to the recognition of judicial decisions." The Council will have the last word.

In my opinion, there are many reasons for drafting two separate instruments, which may range from legal to political as these are very sensitive topics. One that particularly struck me relates to the indirect grounds of jurisdiction when considering the recognition of such decisions:

“Most Experts concluded that the indirect grounds previously identified in the context of general legal parentage would not work in ISA cases, and instead supported the **State of birth of the child as the primary connecting factor in an ISA case** as this would provide certainty and predictability. A qualifier to that connecting factor (such as the habitual residence of the person giving birth to the child) might be necessary to guarantee sufficient proximity, as well as to prevent and combat trafficking of persons and law evasion.” See also para 25 of the Report.

Please note that these instruments would deal with the *recognition* and not with the enforcement of foreign judicial decisions given the nature of decisions on legal parentage. See in contrast my previous post on the HCCH draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

The HCCH news item is available here.

The full report is available here.

Sweden: New rules on non-recognition of underage marriages

Written by Prof. Maarit Jänterä-Jareborg, Uppsala University, Sweden

On 1 January 2019, new restrictions came into force in Sweden’s private international law legislation in respect of marriages validly concluded abroad. The revised rules are found in the Act (1904:26 p. 1) on Certain International Relationships on Marriage and Guardianship, Chapter 1 § 8a, as amended by SFS

2018:1973. The content of the new legislation is, briefly, the following: no marriage shall be recognised in Sweden if the spouses or either one of them was under the age of 18 years at the time of the marriage. By way of exception, this rule may be set aside once both parties are above 18 years of age, if there are exceptional reasons to recognise the marriage.

The law reform is in line with a recent European trend, carried out in e.g., Germany, Denmark and Norway, to protect children from marrying and, one could claim, to 'spare' people who married as a child (or with a child) from their marriage.[1] The requirement of 18 years of age has been introduced not only as the minimum marriage age for concluding a marriage in the State's own territory, i.e., as a kind of an internationally mandatory rule, but also as a condition for the recognition of a foreign marriage.

The new Swedish legislation constitutes perhaps the most extreme example on how to combat the phenomenon of child marriages. The marriage's invalidity in Sweden does not require a connecting factor to Sweden at the time of the marriage, or that the spouses are underage upon arrival to Sweden. Theoretically, the spouses may arrive to Sweden decades after marrying, and find out that their marriage is not recognised in Sweden. The later majority of the persons involved does not repair this original defect. The only solution, if both (still) wish to be married to each other, will be to (re)marry!

It remains to be seen whether the position taken in the Government Bill, claiming that the new law conforms with EU primary law and the ECHR, is proportionate and within Sweden's margin of appreciation, will be shared by the CJEU and the ECtHR. Swedish Parliament, in any case, shared this view and did not consider that EU citizens' free movement within the EU required exempting underage spouses from the rule of non-recognition. The new law applies to marriages concluded as of 1 January 2019. It does not affect the legal validity of marriages concluded before that date.

To understand the effects of the Swedish law reform, the following needs to be emphasised. One of the special characteristics of Swedish family procedure law is that is does not provide for decrees on marriage annulment or the invalidity of a marriage. Divorce and death are in Sweden the only ways of dissolving a marriage! This position has applied since 1 January 1974, when the right to immediate divorce became the tool to dissolve any marriage concluded in Sweden

against a legal obstacle to the marriage, e.g., a spouse's still existing marriage or duress to marry. A *foreign* marriage not recognised in Sweden is, however, invalid directly by force of Swedish private international law legislation. It follows that it cannot be dissolved by divorce – as it does not exist as a marriage in the eyes of Swedish law. It does not either produce any of the legal effects of marriage, such as the right to maintenance or property rights. It does not qualify as a marriage obstacle, with the result that both 'spouses' are free to marry each other or anyone else.

What, then, is the impact of the legislation's exception enabling, in exceptional circumstances, to set aside the rule of non-recognition? This is an assessment which is aimed to take place *ad hoc,*usually in cases where the 'marriage's' validity is of relevance as a preliminary issue, whereby each competent authority makes an independent evaluation. It is required that non-recognition must produce exceptional hardships for the parties (or their children). The solution is legally uncertain and unpredictable and has been subject to heavy criticism by Sweden's leading jurists.

The 2019 law reform follows a series of reforms carried out in Sweden since 2004. According to the established main rule, a marriage validly concluded in the State of celebration or regarded as valid in States where the parties were habitually resident or nationals at the time of the marriage, is recognised in Sweden, Chapter 1 § 7 of the 1904 Act. Since a law reform carried out in 2004, an underage marriage is, nevertheless, invalid directly by force of law in Sweden, if either spouse had a connection to Sweden through habitual residence or nationality at the time of the marriage. (The 2019 law reform takes a step further, in this respect.) Recognition can, in addition, be refused with reference to the *ordre public*exception of the 1904 Act, Chapter 7 § 4. The position taken in Swedish case law is that *ordre public*captures*any*marriage concluded before both parties were 15 years of age. Forced marriages do not qualify for recognition in Sweden, since the 2004 reform. The same applies to marriages by proxy, since 2014, but only on condition that either party to the marriage had a connection to Sweden through habitual residence of nationality at the time of the marriage.

The 2019 legislation differs in several respects from the proposals preceding it, for example the proposed innovation of focusing on the underage of a spouse at the time of either spouse's arrival to Sweden. A government-initiated inquiry is currently pending in Sweden, the intention being to introduce rules on non-

recognition of polygamous marriages validly concluded abroad.

[1] See M. JÄNTERÄ-JAREBORG, 'Non-recognition of Child Marriages: Sacrificing the Global for the Local in the Aftermath of the 2015 "Refugee Crisis"', in: G. DOUGLAS, M. MURCH, V. STEPHENS (eds), *International and National Perspectives on Child and Family Law, Essays in Honour of Nigel Lowe*, Intersentia 2018, pp. 267-281.