Van Den Eeckhout on Choice and Regulatory Competition and on Business and Human Rights

The working paper “Choice and regulatory competition. Rules on choice of law and forum”, written by Veerle Van Den Eeckhout (https://www.uantwerpen.be/nl/personeel/veerle-vandeneeckhout/) is now available on ssrn, here. The paper is the short written version of her contribution to the Conference “Norm-Setting, Enforcement and Choice”, held in Maastricht (the Netherlands) on 18 October 2013. The Conference report is available here.
The paper analyzes PIL from the perspective of “Choice and regulatory competition”. The final version of the paper will be published in the Congress book.

The Power Point of another Presentation of Veerle Van Den Eeckhout has also been made publicly available: The Power Point of her contribution to the Conference at Lausanne on 10 October 2014 is available on slideshare, see http://www.slideshare.net/vvde/lausanne10oktober201419septdefinitief . This Power Point was presented during the Conference “The Implementation of the UN Principles on Business and Human Rights in Private International Law” at Lausanne, see for the programme of the Conference http://www.isdc.ch/d2wfiles/document/4713/4018/0/Human%20Rights%20in%20PIL-%2010-10-2014.pdf The presentation of Veerle Van Den Eeckhout was entitled “The Private International Law Dimension of the Principles. Introduction.”

Conference on International Child

Abduction and Human Rights, 16 October

The University of Antwerp (Research Group Personal Rights and Real Rights) and the British Institute of International and Comparative Law are organising a conference on **International Child Abduction and Human Rights: A Critical Assessment of the Status Quo**.

The confernce will take place in **Antwerp** – Stadscampus – R.212 – Rodestraat- on **16 October 2014.**

Register through http://www.biicl.org/event/1061

Programme:

10.00-10.30 Registration and coffee

10.30-10.45 Welcome (Thalia Kruger and Eva Lein)

Chair: Maarit Jänterä-Jareborg, Uppsala University

10.45-11.45 Panel on recent case law (Karin Verbist and Carolina Marín Pedreño)

11.45-12.15 United States Supreme Court Hague Abduction Decisions: Developing a Global Jurisprudence (Linda Silberman)

12.15-12.45 The Role of Central Authorities (Andrea Schulz)

12.45-14.00 Lunch??

Chair: Frederik Swennen, University of Antwerp

14.00-14.30 Keynote Address, Permanent Bureau of the Hague Conference: ?"Quo vadis 1980 Convention" (Marta Pertegas)

14.30-15.00 Keynote Address, European Commission: "Quo vadis Brussels IIbis" ?(Michael Wilderspin)

15.00-15.30 Children's Rights and Children's Interests: (Helen

Stalford)

15.30-16.00	Is Harmonised Case Law Possible? (Paul Beaumont)
16.00-16.30	The Concerns of Children's Organisations: (Hilde Demarré and Alison Shalaby)
16.30-17.00	Debate

Is an International Arbitral Tribunal the Answer to International Human Rights Litigation?

I just was alerted to a proposal that was put forward to create an International Arbitral Tribunal on business and human rights. The authors of the proposal are Claes Cronstedt, Robert C Thompson, Rachel Chambers, Adrienne Margolis, David Rönnegard and Katherine Tyler, all (save for Ms Margolis, a journalist, and Dr Rönnegard, a philosopher and economist) one-time or current private practice lawyers with a background and/or practice in human rights and CSR.

The initiative seeks to respond, in part, to the US Supreme Court's decisions in *Kiobel v Royal Dutch Petroleum* and *Daimler AG v Bauman.* In short, it is now difficult to plead international human rights violations against corporations in U.S. courts. As I discuss in a forthcoming article, foreign courts may move in to fill the gap. This proposal raises another question: Are international tribunals the right forum for such cases?

New Papers on Business and Human Rights

"Business, Human Rights And Children: The Developing International Agenda", by O. Martin-Ortega and R. Wallace, has been published in *The Denning Law Journal* 2013, vol 25, pp 105 – 127. The following excerpt illustrates the contents:

> "The instruments analysed in this article are part of an important trend: the development of a comprehensive response to the risks children's rights face from business activities. Until recently international focus has been somewhat ad hoc and sector-specific. This has been evidenced by the concentration on the regulation of child labour and economic exploitation of children and the consequences of the privatisation of public services on their rights. The international legal instruments regulating these spheres placed the responsibility in the fulfilment of the rights of the child exclusively on states. However, both the CRB Principles and General Comment 16 acknowledge a responsibility of business vis-à-vis children's rights beyond that of the state (…). Whilst only states have direct obligations with regards to children's rights, increased recognition of business responsibilities in instruments such as the ones analysed here, contribute to (…) the creation of fertile ground for increased demands on business. This may lead to indirect obligations in international law and the development of direct obligations in national systems.
>
> The CRB Principles and General Comment 16 are also important because they are based on the conception of children as rights bearers. This goes beyond the traditional perception, in the context of business activities, that children are mainly objects of protection from economic exploitation and abuse as members of the labour force or recipients of welfare services."

Still in the domain of business and human rights, another recent (and critical) publication of Prof. Zamora Cabot is worth mentioning – this time on the USSC Daimler decision: "Decisión del Tribunal Supremo de los Estados Unidos en el

caso Daimler Ag v. Bauman et al.: Closing the Golden Door" (Papeles *El tiempo de los derechos*, 2014, 2).

To download click here (in Spanish).

A Comparative and Legislative Approach to Human Rights Litigation After Kiobel

As the impact of the Supreme Court's *Kiobel* decision continues to take shape before U.S. federal courts, one recent essay, entitled "Reviving Human Rights Litigation After *Kiobel*" (appearing in the near future in the October 2013 *American Journal of International Law),* encourages a comparative and legislative approach to the Alien Tort Statute. As Professors Vivian Grosswald Curran (Pitt Law) and David Sloss (Santa Clara Law) explain:

"This essay proposes a legislative response to *Kiobel* that would preserve some of the benefits of ATS human rights litigation, while minimizing the costs. Although the proposed legislation does not address the corporate liability questions that were at issue when the Supreme Court initially granted certiorari in *Kiobel*, the legislation would allow human rights victims to bring civil claims against perpetrators in some foreign-cubed cases. However, plaintiffs could not file such claims until after a federal prosecutor filed criminal charges against the perpetrator. This approach would allow federal executive officials to block claims that raised serious foreign policy concerns by choosing not to prosecute.

It would also promote a more robust dialogue between federal executive officials and groups representing prospective human rights plaintiffs. The proposed legislation is modeled partly on pending French legislation, as well as existing Belgian and German legislation. Statutes in all three countries share two critical features (assuming the French bill becomes law). First, victims of genocide, war crimes, and crimes against humanity have the right to initiate judicial

proceedings against perpetrators who committed crimes extraterritorially, including in foreign-cubed cases. Second, public prosecutors in all three countries can block such judicial proceedings if they determine that a victim-initiated case would impair the state's foreign policy interests or would otherwise be contrary to public policy. The next section gives a brief overview of the foreign legislation. The concludingnsection explains and defends our proposal."

The full essay will be available soon at the *American Journal of International Law* website (here). *[Editor's note: the PDF of the article has been removed, on copyright grounds, at the demand of the Journal.]*

The ECJ and ECHR Judgments on Povse and Human Rights – a Legislative Perspective

by Dorothea van Iterson

Dorothea van Iterson is a former Counsellor of legislation, ministry of Justice of the Netherlands[1]

In the contributions published last month on this topic, the blame for what is felt to be the unsatisfactory operation of article 11 Brussels II bis is put on the parties who negotiated the relevant provisions of the Regulation. For those who are unfamiliar with the history of the Regulation and wish to participate in the debate about a possible recast of Brussels II bis, it may be helpful to recall how these provisions came into being[2].

The articles of Brussels II bis relating to the return of a child who has been wrongfully abducted reflect a political compromise which was reached with great difficulty after discussions of 2 ½ years in the Council working party dealing with the topic. This explains some of the ambiguities in the text. The main elements of the compromise were the following:

1) The 1980 Hague Child Abduction Convention, to which all Member States of the EU are parties, was preserved in relationships between Member States. Consequently, the courts of the Member State of the child's refuge continues to have jurisdiction in respect of requests for the return of an abducted child. The procedures under the 1980 Hague Convention seek to ensure a speedy voluntary return of the child. If a voluntary return cannot be secured, the courts of that State are required to hand down an order restoring the *status quo ante****[3]***. There are very limited grounds for refusing the child's return. Return orders under the Convention are no judgments on the merits of custody. No decision on the merits may be taken by the courts of the child's State of refuge until it has been determined that the child is not to be returned under the Convention (article 16). As long as such determination has not been made, the courts of the child's habitual residence at the time of the removal are competent to deal with the merits of the custody issue. The conditions for the passage of jurisdiction as to the merits to the courts of the Member State of refuge are specified in article 10 of the Regulation.

2) Article 11, paras 2 to 5, Brussels II bis were agreed upon as a complement to the Hague system. They reflect policy guidelines developed over the years. These paragraphs were intended for the courts of the Member State of refuge of the child, not for the courts of the Member State of the child's habitual residence prior to the removal.

3) Article 11, paras 6 to 8, as included in the compromise, specifically address the situation in which the courts of the Member State of refuge have handed down a non-return order based on article 13 of the Convention. The three paragraphs were accepted as a package. Paragraph 7 cannot be isolated from paragraphs 6 and 8. The competent court in the Member State of the child's habitual residence prior to the removal has to be informed of any non-return order given in the Member State of refuge. This court can then examine the merits of custody. The Council compromise did not purport to provide for immediate "automatic" enforceability abroad of a *provisional* return order handed down by those courts. "Any subsequent judgment which requires the return of the child", as referred to in paragraph 8, was to be understood as "any decision on the merits of custody which requires the return of the child"[4]."Custody" comprises the elements stated in article 2, point 11, sub b, which corresponds to article 5 of the Hague Convention. It includes, among other rights and duties, the

right to determine the child's residence.

4) Abolition of exequatur was accepted by way of an experiment for a very narrow category of judgments. According to the Council compromise, exequatur was to be abolished only for judgments *on the merits of custody* entailing the return of the child handed down following the procedural steps described in article 11, paras 6 and 7. It was considered that the issue of the child's residence should be finally resolved as part (or as a sequel) of the other custody arrangements and that the judgment on custody should put an end to the proceedings between the parents on the child's place of residence following the abduction. Successive provisional changes of residence were considered to be contrary to the child's interests.

5) Abolishing exequatur in this context means that once a certificate has been issued in accordance with article 42 Brussels II bis, the judgment is enforceable by operation of law in another Member State. No recourse can be had in the Member State of refuge to the grounds of non-recognition (and enforceability) stated in article 23. The tests mentioned in article 23 are carried out by a judge of the court which has handed down the judgment and who is asked to issue the certificate (article 42, second paragraph). The issuance of a certificate is therefore unlikely to be refused. The Aguirre/Pelz ruling of the ECJ has shown that questions may then arise about the statements made in the certificate.

6) "Enforceability by operation of law" means that the judgment is eligible for enforcement as if it had been given in the Member State where enforcement is sought (article 47 Brussels II bis). The judgment is not enforced "automatically", as the procedures for enforcement are governed by the law of the requested Member State. The enforcement laws of the EU Member States were left untouched by the Brussels II bis Regulation. Many of those laws make enforcement conditional on a court decision in the requested State. Enforcement may be stayed or stopped in exceptional cases where human rights are in issue. The radical interpretation given by the ECJ in the Povse and Aguirre/Pelz rulings leaves us with questions regarding the meaning of article 47 and the actual approach to be taken by enforcement bodies if they find that there is an immediate danger for the child. Is it realistic to require them to enforce "automatically" a provisional order which contradicts an order of the same type which has just been handed down by the courts of their own country?

7) The implication of the Council compromise was that a *provisional* return order handed down by the courts of the Member State of the child's habitual residence prior to the removal should be enforceable in the Member State of refuge *only* after the issuance of an exequatur in the latter State. The intention was that the checks provided for in article 23 should to be made in the exequatur proceedings.

8) The proceedings before the ECHR on Povse were about the judgment *on the merits of custody* which was finally handed down in Italy. See the ECHR judgment, point 69. The ECHR did not dwell on the provisional return order on which the ECJ answered a number of preliminary questions. Would the outcome of the ECHR proceedings have been the same if it had been asked to assess the provisional return order?

9) On the face of it, the ECJ's ruling that article 11, para 8, Brussels II bis applies to a provisional return order of the courts of the Member State of habitual residence prior to the removal, seeks to reinforce the return mechanism of the 1980 Hague Convention. In reality it brings the EU closer to an abandonment of the Hague system. This is a matter for regret. If, in the forthcoming revision of Brussels II bis, exequatur were abolished in all matters relating to parental responsibility, the left-behind parent would resort to the courts of his own country immediately rather than seeking to obtain a return order in the State of refuge. It may be questioned whether such an approach would be conducive to balanced solutions which would, in the end, be accepted by the parties involved in an abduction case[5].

[1] The views expressed in this post are personal views of the author.

[2] For a detailed account see Peter McEleavy, The New Child Abduction Regime in the European Union, Journal of Private International Law, 2005, Vol.1, No.1.

[3] See the Explanatory Report by E. Perez-Vera, para 106, which states: "..the compulsory return of the child depends in terms of the Convention on a decision having been taken by the competent authorities of the requested State".

[4] Cf. the ECJ's correct statement in the Povse judgment that a "judgment on custody that does not entail the return of the child" in article 10 is to be

understood as a final decision.

[5] See, on another regrettable development, Mr J.H.A. van Loon and S. De Dijcker, LL.M., The role of the International Court of Justice in the Development of Private International Law, Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht, No. 140, 2013, p. 109-110.

On MNCs and Human Rights: an Overall Picture (Article)

"Las Empresas Multinacionales y Su Responsabilidad en Materia de Derechos Humanos: Una Visión de Conjunto" (click here) is the title of a new article by Professor Zamora Cabot, of the University of Castellón, on multinational coroporations and human rights.

An Introductory Part (Part I), places this work in the field of governance of global public interests. In Part II the author critically reviews the recent decision of the USSC in *Kiobel* case, contesting the projection to the human rights ATCA litigation of the canon against the extraterritoriality of laws as applied in *Morrison;* the history-based interpretation made by Chief Justice Roberts is also contested in that it fossilizes the ATCA in its origins, thus difficulting a judicial reading of the Act adapted to our time. In Part (III), after having considered several cases in some European countries, the author evaluates critically the European legal framework, especially in relation to the jurisdiction of the Courts and the applicable law. In Part (IV) Professor Zamora Cabot studies a new interesting field: the Extraterritorial Obligations of States (ETOs) and how they operate as regard the responsibility of transnational corporations, either through international regulations or by national initiatives; among the latter the author highlights some Acts passed in the United States on trafficking of human beings or on transparency in the supply chain. In Part (V), the author focuses on the extractive industry and its problems related to indigenous minorities, as well as on the implementation in Spain of the United Nations Guiding Principles by

means of a National Plan on Business and Human Rights being currently developed. Professor Zamora Cabot finishes with a Part VI, where he recalls his view on the US *Kiobel* case as a step backward in the field of human rights protection; however, as a partial compensation to this judicial decision, he highlights the increasing awareness of the problem in many other countries, where public authorities and other stakeholders are advancing some proper solutions to the challenges posed by transnational corporations regarding the protection and development of human rights.

Ps: this article adds to one of the main lines of research of Prof. Zamora Cabot, focused on the liability of multinational enterprises as regards human rights. The work reflects a Report presented to the 25th Congress of the AEPDIRI, celebrated in September 2013 in the University Pompeu Fabra of Barcelona.

Conference: The Implementation of the UN Guiding Principles on Business and Human Rights in Spain (Sevilla, 4-6 November 2013)

The University of Sevilla will host on 4-6 November an international conference on the responsibility of transnational corporations with regard to human rights, focusing on the UN Guiding Principles on Business and Human Rights: **"The Implementation of the UN Guiding Principles on Business and Human Rights in Spain"**. Here's an excerpt from the conference's website:

> *Recent years have witnessed the cristallysation of the social expectation that business enterprises, and transnational corporations in particular, have a*

responsibility to respect the human rights of the people and communities that may be adversely affected by their activities.

The unanimous endorsement of the Guiding Principles on Business and Human Rights by the UN Human Rights Council has helped clarifying the scope of corporate responsibility to respect human rights, in interaction with the state's duty to protect those rights. The conceptual framework "Protect, Respect and Remedy" has contributed to a rapid development of policy and regulatory standards worldwide, as evidenced by the OECD revised guidelines on multinational enterprises, the review of IFC's social and sustainability framework, or ISO 26000 (Social Responsibility), among others.

The UN Guiding Principles are not a point of arrival, but a starting point for future developments. Implementation of the new UN business and human rights framework simultaneously requires the review of existing State regulatory frameworks; the establishment or improvement of the corporate human rights policies and due diligence mechanisms; and the opening of new avenues of dialogue and responsibility between duty-bearers, rights-holders and other stakeholders. In the development of this complex program, there is an urgent need for academic reflection and political innovation.

The expansion of Spanish foreign direct investment in recent decades and the growing presence of Spanish transnational corporations in various countries have given raise to growing concern and pressure from civil society concerning the human rights impacts of their operations. Allegations of human rights violations have been particularly significant in relation to extractive industries and renewable energy projects in Latin America, including in relation to the rights of indigenous peoples. However, despite an important number of CSR initiatives in the past, the business and human rights agenda in Spain remains yet to be explored. The ongoing elaboration of the Spanish National Plan on business and human rights adds timeliness for this exploration.

The following is a synopsis of the main sections of the very rich programme of the conference (the detailed content of each panel, including the full list of speakers and paper presentations, is available on the conference's website and as a .pdf file):

Monday 4 November – **The UN Guiding Principles of Business and Human**

Rights: Prospects and Challenges

Keynote Address: "Assessing the UN Framework for Business and Human Rughts. An International Human Rights Perspective" (*Prof. James Anaya*, Univ. of Arizona and United Nations Special Rapporteur on the rights of indigenous peoples)

- Panel 1: "Implementing Pillar I under UN and EU Law: The State Duty to Protect Human Rights";
- Panel 2: "Implementing Pillar II Business Responsibility to Respect Human Rights";
- Panel 3: "Implementing Pillar III. The Obligation to Remedy: Judicial and Non-Judicial Mechanisms".

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Tuesday 5 November – **Spain and the Implementation of the UN Guiding Principles**

"Spain and the implementation of the Guiding Principles: The drafting and content of the National Action Plan on Business and Human Rights" (*Ms. Cristina Fraile*, Director of the Human Rights Office, Ministry of Foreign Affairs and Cooperation of Spain)

- Panel 4: "The implementation of Spain's obligations in the area of business and human rights";
- Panel 5: "The Implementation of the Responsibility to Respect by Spanish Companies";
- Panel 6: "Remedies for Alleged Human Rights Violations by Spanish Companies".

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Wednesday 6 November – **Business, Human Rights, and Vulnerable Groups**

- Panel 7: "Business Enterprises and the Rights of Vulnerable Persons and Groups";
- Panel 8: "Business Enterprises and Human Rights in Conflict Situations".

(Many thanks to Prof. Fabrizio Marrella, Univ. of Venice, for the tip-off)

Muir Watt on Abolition of Exequatur and Human Rights

Horatia Muir Watt is Professor of Law at Sciences Po Law School

I. Framing the child-return issue. Several recent cases handed down by the two European Courts appear to be opening new vistas for conflicts of laws, in which human rights play a large part. The cases are well-known (ECJ/CJUE *Aguirre v Pelz* 2010*;* ECtHR *Sneersone & Sneersone & Kampanella v. Italy* 2011*, Povse v. Austria* 2013). They concern cross-border child abduction, and, more specifically, "fast-track" orders for the return of the abducted child, made by the (national) court of the child's pre-abduction residence under article 11 (8) of Regulation Brussels II bis. This provision was designed to avoid the effect of delaying tactics by the abducting parent, which were progressively becoming systematic by virtue of article 13(b) of the 1980 Hague Convention (allowing the authorities of the country to which the child has been abducted, to refuse exceptionally to order the return if to do so would be to expose that child to a serious risk of harm). To this end, the fast-track return order is immediately enforceable, notwithstanding the resistance of that local court (hereafter, the court of the "country of refuge"). The difficulty, addressed partially by each of the cases above, concerns potential collision between the "notwithstanding" provision of article 11 (8) and with both procedural (6-1 ECHR, including the right of the child to be heard; article 24 EU Charter) and substantive (article 8 ECHR) human rights requirements.

This situation is particularly complex because it involves the articulation, in an identical dispute arising out of the same set of facts, of the two European legal orders. While both guarantee fundamental rights on the basis of constitutional provisions (EU Charter and ECHR), among which the rights of the child are accorded the utmost supremacy, they may not share a methodology in the assessment of the existence of a violation, nor give exactly the same weight to the various factors which weigh into the process. This is the context in which the "*Bosphorus* presumption" (ECtHR *Bosphorus v. Ireland* 2005), which allows an

overlapping consensus between the two universes, is now brought into the equation (*Povse*). Meanwhile, back down among the national courts, local judges – sometimes "siding" with the parent who is the national or domiciliary of their jurisdiction and who prefers to litigate to the bitter end rather than let the other win on the (theoretically) preliminary issue of where the merits of the custody dispute is to be decided – have to decide this mega-conflict between two supra-national regimes which both purport to promote the interests of the child! The child is often the prime victim of all this. To my mind, the real problem may well lie with the whole design of the cross-border child-return system, which focuses on the restitution of the abducted child before the custody dispute can be decided on the merits. While a highly creative idea at the outset, its undoubted potential to absorb tension when the parents are cooperative is as great as the risk of amplification of conflict it carries with it when they are not. See the sheer length and number of procedural incidents in the *Povse* case (which led to a first preliminary ruling under Brussels II bis by the ECJ before the case was lodged with the ECtHR).

However, although Gilles Cuniberti mentions the *Povse* case in his opening lines to this symposium, the question for debate is framed in more general terms as concerning the abolition of exequatur (within the EU) and human rights. Therefore, beyond child return issues, it can be understood to be about the primacy either of the new, highly efficient, nuclear missile which has emerged progressively in recent EU secondary legislation (direct cross-border enforceability of a court order without intermediary enforcement proceedings), or of the ultimate joker of fundamental rights (which will be invoked in the very forum that has been by-passed by direct cross-border enforcement). So I'll start with the larger picture, which, in addition to Brussels II bis, extends to Brussels I recast, and various other instruments that have abolished the formality of *exequatur* or enforcement proceedings (alimentary obligations, TEE, small claims…). Thoughts on the circulation of debt may be helpful for reflecting upon the more sensitive issues relating to children.

II. The wider picture. Much of the literature on the abolition of exequatur within the European Union under, or in anticipation of, Brussels I recast, turns on whether or not it implies a significant reduction in the protection due to the fundamental rights (particularly procedural rights, which will therefore be the focus of the remarks below), of defendants. In other words, in re-establishing the

balance in favor of the creditors of the internal market, who have traditionally suffered from the partitioning of national spheres of enforcement (including the costs of bringing even informal enforcement proceedings), have the tables turned too far in the opposite direction, in diminishing the guarantees due to henceforth vulnerable defendants? According to many accounts, abolishing the intermediate procedural filter of *exequatur* creates a significant risk of free-wheeling misfit-judgments, of which, when the floodgates are opened in 2015, the defects will be amplified by their cross-border effects.

A first observation is that in assessing this risk, the strength of assertions on either side contrast with the scarcity of empirical findings, as to its extent. We have, for instance, the Commission's own statistics for the (small) number of effective appeals against enforcement orders (under the existing provisions of Brussels I), according to which it made sense to abolish the remaining procedural formalities (article 38 s. Brussels I). On the other hand, we also have an idea of the very large number of cases in which Member States have been called for account for procedural faults, either in Strasbourg, in Luxembourg, or in the shadow of either in domestic cases in national courts. In the specifically transnational sphere, many of the usual suspects are various forms of transnational injunctive relief, which have met with the disapproval of the ECJ itself (*Krombach* 2000*, Gambazzi* 2007…). But such cases can be used to demonstrate either the escalation of vitiated judgments with transnational effects, or the inevitable cultural determination of core standards of fairness. That is not to say that there will not always be (more or less) occasional duds among the number of judicial decisions produced by any legal system; that is precisely indeed why fair process requires allowing an appeal. However, the question here is specifically whether the risk of being subject to misjudgments from another country is greater with or without exequatur.

The political terms of the debate are also complex. For instance, while France has produced its highly predictable strain of critique against any European Union initiative, which though probably accurate in some instances would be more credible if it were not so frequently histrionic or indeed couched in the language of fantasized or quaint accounts of parliamentary democracy, the detractors of Brussels I are now calling for *more human rights protection*, which of course leads them from Scylla to Charybdis, to the extent that the latter are usually denounced, in private international law and beyond, as a worse methodological

sin than the former. Interestingly, the focus of the new ire is no longer a defense of the idiosyncratic play of national public policy, but the safeguard of the due process requirements of the ECHR. *Allez savoir!*

Moreover, many of the historical and contextual arguments voiced in this context can be unhelpful. The main theoretical support for exequatur appears to be that free movement of judgments assumes their interchangeability, as does a market for non-judicial products; in a world composed of legal systems of very variable quality or content, producing equally heterogeneous judgments, exequatur thus fulfills the leveling function of a lock. However, such a function was constructed at a time when there was no supervisory device ensuring procedural (and indeed substantive) guarantees "from above" (that is, based on the ECHR or, where applicable, the EU Charter), nor indeed any common standard as to their content; a horizontal filter of incoming decisions supplied by exequatur or enforcement proceedings was therefore, naturally, put into place in each national forum, on the basis of highly variable conceptions of procedural and substantive fairness. The origins of the whole Brussels jurisdiction and judgment system are to be found in the supposed costs that this variation created for those supplying credit in the internal market (at a time when Member States also used purely jurisdictional criteria as part of the filter). In retaining *exequatur*, if only as a formality, the existing Brussels I Regulation still adheres to a similar logic.

The shift wrought by the new regime in Brussels I recast is therefore a form of trade-off, made possible by the fact that each domestic court is deemed accountable *within its own legal system* in respect of the content of fair trial resulting from article 6-1° ECHR. Every court of origin, in handing down a judgment, is committed to respect *ex ante* the very same guarantees that can at present (under the existing Brussels I) be invoked additionally *ex post* in *exequatur* proceedings (or more accurately in appeal therefrom). Thus, the question is: does the reshuffling of the places of control, which under the new regime means that any challenge to the procedural fairness of a judgment or public act is to take place *ex ante* in the country of origin, and not *ex post* in the courts of the place of enforcement, potentially reduce fundamental procedural rights protection?

At this stage it is also worth pointing out that the emergence of a common core of procedural standards under article 6-1° ECHR put an end to the traditionally "attenuated" form of public policy control which had hitherto been associated (as

such, or as an expression of *Inlandbeziehung*) with the recognition and enforcement of foreign judgments, at least as far as procedural guarantees are concerned. In other words, the enforcing state is bound by exactly the same standards (of which, however, the open-endedness subtly precludes absolute identity of procedural rules) as the state of origin. These are indeed applicable in full to judgments from third states (see ECJ *Pellegrini* 2001). Within the European Union, the question is once again how far maintaining only one set of controls, *ex ante* in the state of judgment (rather than two sets, of which one in the enforcing state under identical standards), implies a reduction of the level of protection for potential debtor-defendants. In other words, how far is the second control *ex post* actually useful as a human rights safeguard, and to what extent is it parasitical in terms of costs to (both) parties?

The statistics upon which the Commission acted seem to indicate that it is not indeed indispensable, since exequatur orders give rise to appeals infrequently. But the debate continues. Thus, even if the statistics hold true across the board (are they really significant beyond small or uncontested claims?), there may be additional advantages attached to the existence of an intermediary procedure. One of these might be an important element of inter-systemic judicial dialogue which works to boost human rights protection ("outsiders' insights", to use the phrase of Basil Markesinis): look, after all, what it took in *Krombach* to challenge the civil effects of *contumace* in French (criminal) procedure. It may be, on the other hand, that given the large corpus of common standards which have developed since 2000 in the case-law of the ECtHR on the basis of article 6-1° ECHR, such an argument is becoming increasingly irrelevant; after all, lawyers are far more accustomed now to invoking such case-law within domestic settings, so that the time may have come to dispense with an external source of challenge and concentrate on efficiency.

But what if (exceptionally?), nevertheless, a vitiated judgment slips though the net? Part of the answer lies with the power of the court at the place of enforcement to refuse to give it effect. In the case of Brussels I recast, articles 46 et seq allow both preventive and remedial opposition to mis-judged foreign judgments, thereby transferring to the enforcing judge the control exercised until now in the course of (on appeal from) *exequatur* proceedings. The grounds for opposition (article 45) are indeed the same and allow for refusal of enforcement for both (exceptional) substantive (a) and procedural (b) reasons. What was the

point of so much ado over the "recast", then, one might ask? Certainly, in the end, the burden of initiating the unforceability proceedings shifts to the defendant. Nevertheless, under the existing system, it is also the defendant who shoulders the (lesser?) weight and cost of the appeal against the *exequatur*. The result is probably similar, therefore, no better no worse, than within the previous framework.

However, *whether or not in the latter context*, there is always a possibility (arguably – though not necessarily convincingly – amplified by this shift), that the requirements of article 6-1° may not be satisfied nevertheless, following an unsuccessful attempt to oppose such enforcement before the local court. At first glance this might give rise to a risk of the type encountered in the child abduction case *Sneersone & Kampanella* cited above, where insufficient regard to the fundamental rights of the abducting parent or child by the original pre-abduction home court, ordering an immediately enforceable return, created not only a cause of refusal but also a jurisdictional-procedural incident unprovided-for by Brussels II bis' fast-track procedure. However, the analogy may not be as clear-cut as it might seem at first glance since, in the latter context, the *whole point* of the fast-track is that it is intended to eliminate all obstacles to the enforcement of the initial cross-border return order along the way, in the name of the superior interests of the child. Whereas, in the context of Brussels I recast (as far I can see), the local enforcement procedure would appear to make all the difference, by providing an opportunity to resist a foreign judgment on fundamental rights grounds (at least those covered by article 45), as a last resort. Much, therefore, turns on this local enforcement procedure; the cases in which no such procedure exists (alimentary obligations, TEE..) may be more dicey. Be that as it may, in the context of Brussels I recast, I'm not convinced that in terms of loss of protection of defendants' fundamental rights, the change is as big a deal as is sometimes made out (although of course – no sooner said than done – practice will probably come up with a morally inacceptable cross-border small claims case…).

III. Now for the real difficulty. By contrast, article 11 (8) Brussels II bis provides for a return order by the pre-abduction home court, *notwithstanding* a judgment of non-return by the court at the place of enforcement; in other words, the fast-track is designed to by-pass resistance in the country of refuge, where the abducting parent seeks to keep the child (by virtue of article 13b 1980 Hague Convention). This provision takes the speediness of return to be of the essence, in

the name of the best interests of the child, whatever the risk invoked under article 13b. The stakes are (merely) jurisdictional here: ultimately, it is for the court of the child's pre-abduction home to decide, where appropriate, on the substantive custody issue. However, the need for speed, and the (merely) restitutionary nature of the return, are no apology for sloppy process. Because the nuclear weapon inscribed in article 11(8) suffers no further procedural delay before the child is effectively returned home, it is counterbalanced by the particular duty of the home court under article 42 Brussels IIbis to ensure, before ordering the child's return notwithstanding the refusal of the court of the country of refuge, that the reasons for such refusal have been properly considered (at stake in *Sneersone & Kampanella*) and the child heard, unless inappropriate (at stake in *Aguirre*). If the home court does not do so, or does so unsatisfactorily, it is open to the applicant to challenge the order – including through an individual application to the ECtHR (as indicated in *Povse*).

But can the human rights joker still be played, as a last resort, *at the place of enforcement* (in the country of refuge)? Or is such a possibility, which has obvious implications for the allocation of jurisdiction, excluded by the very architecture of the fast-track, in the name of the child's own best interests? The answer, taking account of the positions of both European courts, is a bit of both, in a subtle dosage of which national courts will now have to take account. What is particularly complex is that the human rights complaint (typically for violation of article 8 ECHR) may involve an issue of access to relief *in the country of refuge*, that is, a question of international jurisdiction, which is one and the same as that of the procedural (or indeed substantive) guarantees due to the child and/or the abducting parent.

In *Aguirre (*as indeed in its own preliminary ruling in *Povse)*, the ECJ/CJUE allows no exception to the concentration of jurisdiction at the child's pre-abduction home – including for the purposes of human rights protection, deemed explicitly to be effective here (§69) by reason of locally available remedies despite the fact that the child and abducting parent are precisely elsewhere. On the other hand, in *Sneersone & Kampanella*, the ECtHR allows the human rights joker (article 8 ECHR) to be raised at the place of enforcement (country of refuge). Then, however, in *Povse*, the *Bosphorus* presumption of "equivalent protection" weighs into the equation. This presumption is conceded by the ECtHR in the name of inter-judicial comity "so as to reduce the intensity of its supervisory role" and

avoid putting national courts in the distressful situation of having to choose between competing international obligations. In *Povse*, it was held that nothing justified a rebuttal of the presumption in the case of the applicants' claim (article 8 ECHR) within the framework of Brussels II bis. How does all this fit together? It is probably clearer if one distinguishes two different, successive, issues.

(1) The first is whether the lack of recourse *per se* (abolition of exequatur), as a structural feature of the fast-track procedure, deprives the child of adequate protection (as claimed for instance by the applicant in *Povse*).

– In *Aguirre (*as in the *Povse* preliminary ruling), the ECJ judges that the fact that challenges to the return order are all to be raised exclusively in the country of origin does not run counter to article 24 of the Charter, in the light of which article 42 Brussels II bis has to be read.

– While the ECtHR endorses this result (in *Povse*), it is by virtue of a line of reasoning in two steps.

(i) Firstly, the "*Bosphorus* presumption" is applicable because under article 11(8) Brussels IIbis, the court of the country of refuge, having no choice but to order the return of the child, exercises no discretion (see ECtHR *MSS* 2011). Moreover, the ECJ/CJEU had already considered (as would have to be the case under ECtHR *Michaud v France* 2012, §114 et s.) the *specific* issue of the compatibility between article 11 (8) Brussels II bis and the article 8 Convention right to a family relationship (it having judged in its own preliminary ruling in the *Povse* case that the availability of an appeal on the basis of article 8 before the courts of the pre-abduction home country was sufficient protection: see on the CJUE's position, ECtHR *Povse,* §85). Given these two factors (no discretion and prior decision of the CJUE), the protection accorded to the right claimed under the ECHR is deemed by the ECtHR to be equivalent, under the *Bosphorus* presumption, to the protection afforded by Brussels II bis; the jurisdiction of the home court remains exclusive.

(ii) Secondly, there is no showing here, in the specific context of the *Povse* case, that the presumption should be rebutted. The decisive reason seems to be that the applicants did not even attempt to avail themselves here of the opportunity of challenging the order in the court of origin (ultimately, if necessary, by lodging an application with the ECtHR if such an attempt were to fail). This circumstance is

clearly salient precisely because the availability of an appeal on the basis of article 8 ECHR in the home country is taken to be the reason for which the *Michaud* requirement (relating to the CJEU's own confirmation of adequate protection in respect of the right invoked) is fulfilled here (see above). Implicitly, according to the *Bosphorus* line of reasoning, there is an exhaustion-of-local-remedies condition, that does not – of course – preclude a challenge to the return order at the place of enforcement, *if all else fails*.

(2) Considering, then, that the presumption is rebuttable (even if not rebutted in *Povse*), would it still be possible to raise a human rights joker before the courts of the country of refuge (as in *Sneersone & Kampanella,* decided before *Bosphorus* was brought into the equation) if, in a particular case, the (pre-abduction home) court ordering the return did not deal, or dealt inadequately, with the human rights challenge? Under *Bosphorus*, the rebuttal of the presumption of equivalent protection would have to meet a particularly rigorous standard of proof of the violation (§156 *:* a "manifest deficiency" of protection) in a particular case in order to justify that the constitutional values of the ECHR prevail over the interests of international cooperation. In principle, however, if it could be shown that despite exhaustion of all available remedies in the pre-abduction home country, the protection of child's (or a parent's) right has nevertheless been severely hampered, this would then still seem to imply, as in *Sneersone & Kampanella*, that there would be a right of access to the court of the place of refuge, and grounds for a refusal of enforcement of the notwithstanding order by such court. However, since the exhaustion of remedies in the home country would include (again, as indicated in *Povse*) an application to the ECtHR itself, it would only be if for some reason the access to such remedy proved to be impossible that the access argument could be made effectively in the courts of the country of refuge. Of course, it also appears from *Sneersone & Kampanella* and *Povse* combined, that in most (all?) cases, had the return order been effectively challenged locally and had the courts of the pre-abduction home country (on appeal) carried out their obligations under article 42 Brussels II bis (and the Charter), there would be no need – and indeed, by the same token, no right – to call for help from the courts of the country of refuge under the ECHR.

In the meantime, the policy problem is whether the current child-return system, designed to ensure against (assumedly) opportunistic forum shopping by the abducting parent, really works to further the best interests of the child. It may be

that the current litigation inflation is transitional and that, once stabilized, the system will work more satisfactorily, with less collateral damage. Arguably, however, the multi-level jurisdictional scheme may have become too unwieldy, and whether or not it now weighs too heavily in favor of the non-abducting or stay-at-home parent (see *Kampanella*), such violent and probably costly legal battles can only be detrimental to the child. While on the one hand Brussels II bis supports speedy return in the name of the child's interest *in abstracto*, on the other, the circumstances of particular children in individual cases, to which the ECtHR directs its attention, often point in a different direction. These two opposite viewpoints, which also correspond to two competing epistemological schemes in the two European courts' patterns of reasoning, may indeed be at the very heart of the new mega-conflict-of-laws.

Online Symposium: Abolition of Exequatur and Human Rights

In June, the European Court of Human Rights ruled in *Povse v. Austria* that the abolition of exequatur was compatible with the European Convention of Human Rights, and that the mechanism introduced by the Brussels IIa Regulation was not dysfunctional from the perspective of the Convention.

In December 2010, the Court of Justice of the European Union had also ruled in *Joseba Andoni Aguirre Zarraga v. Simone Pelz* that the allegation of violation of fundamental rights should not prevent the free circulation of judgments under the Brussels IIa Regulation.

For several years, European scholars debated whether the project of the European Commission to abolish exequatur and to suppress the public policy exception would comport with Member States ECHR obligations. Many thought that it would not. Member States eventually successfully resisted the project which was not adopted in the Brussels I Recast.

From this week-end onwards, *ConflictofLaws.net* will organize an online

symposium on Abolition of Exequatur and Human Rights. Scholars from different jurisdictions will share their first reaction on the *Povse* judgment and on its consequence on the evolution of European civil procedure. Readers interested in participating may either contact directly the editors or use the comment section.

- Requejo on *Povse*
- Muir Watt on Abolition of Exequatur and Human Rights
- Arenas Garcia on *Povse*: Taking Direct Effect Seriously?
- Gascon on *Povse*: a Presumption of ECHR Compliance when Applying the European Civil Procedure Rules?
- van Iterson on *Povse*: a Legislative Perspective