BIICL event: Rome I Regulation: The UK Set to Opt-in

As part of the BIICL's 2007-2008 Seminar Series on Private International Law the BIICL organizes on Wednesday 18 June 2008 17:30 to 19:30 (British Institute of International and Comparative Law, Council Chamber, Charles Clore House, 17 Russell Square, London, WC1B 5JP) a seminar titled "Rome I Regulation: The UK Set to Opt-in". The aim of the seminar is to provide one of the final opportunities for a discussion of the merit and implications of opting into the Rome I Regulation, and moreover to consider the questions which are raised by the Ministry of Justice in its consultation. Also, the changes to be expected for the legal practice in England & Wales upon entry into force of the Regulation will be addressed. The seminar will feature several presentations from expert academics and practitioners, while leaving ample space for discussion. For more information about the seminar, its Chair, speakers and sponsor, have a look at the website.

Rome II and Small Claims Regulations published in the Official Journal

The Rome II Regulation (see the dedicated section of our site) and the Regulation establishing a European Small Claims Procedure have been published in the Official Journal of the European Union n. L 199 of 31 July 2007. The official references are the following:

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ n. L 199, p. 40 ff.): pursuant to its Articles 31 and 32, the Rome II Regulation will apply from 11 January 2009, to events giving rise to damage occurred after its entry into force (the twentieth day following its

publication in the O.J., according to the general rules on the application in time of EC legislation).

Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ n. L 199, p. 1 ff.). The text of the Regulation is accompanied by four annexes, containing the standard forms to be used by the parties and the court in the procedure, as follows:

- Annex I: Form A – Claim form, to be filled in by the claimant (see Art. 4(1) of the Reg.)
- Annex II: Form B – Request by the Court or Tribunal to complete and/or rectify the claim form (see Art. 4(4) of the Reg.);
- Annex III: Form C – Answer form, containing information and guidelines for the defendant (see Art. 5(2) and (3) of the Reg.);
- Annex IV: Form D – Certificate concerning a judgment in the European Small Claims Procedure (to be filled by the Court/Tribunal: see Art. 20(2) of the Reg.).

According to its Art. 29, the ESCP Regulation will enter into force today (1 August 2007, the day following its publication in the O.J.), and will apply from 1 January 2009.

European Commission Proposal for a Regulation on Private International Law Rules Relating to Parenthood

This piece was written by Helga Luku, PhD researcher at the University of Antwerp

On 7 December 2022, the European Commission adopted a Proposal for a Regulation which aims to harmonize at the EU level the rules of private international law with regard to parenthood. This proposal aims to provide legal certainty and predictability for families in cross-border situations. They currently face administrative burdens when they travel, move or reside in another Member State (for family or professional reasons), and seek to have parenthood recognised in this other Member State. The proposal follows on a declaration two years ago by the Commission President von der Leyen in her State of the Union address that **"If you are a parent in one country, you are a parent in every country".**

How will this proposal change the current situation?

In line with the case law of the Court of Justice of the EU, Member States are required to recognise parenthood for the purpose of the rights that the child derives from Union law, permitting a child who is a Union citizen, to exercise without impediment, with each parent, the right to move and reside freely within the territory of Member States. Thus, parenthood established in one Member State should be recognised in other Member States for some (limited) purposes. There is currently no specific EU legislation that requires Member States to recognise parenthood established in other Member States for all purposes.

Different substantive and conflict-of-law rules of Member States on the establishment and recognition of parenthood can lead to a denial of the rights that children derive from national law, such as their succession or maintenance rights, or their right to have any one of their parents act as their legal representative in another Member State on matters such as medical treatment or schooling. Thus, the proposal aims to protect the fundamental rights of children and as it is claimed by the Commission, to be in full compliance with the UN Convention on the Rights of the Child. Through the proposed Regulation, the Commission intends to enable children, who move within the Union to benefit from the rights that derive from national law, **regardless of**:

- **the nationality of the children or the parents** (on the condition that the document that establishes or proves the parenthood is issued in a Member State);
- **how the child was conceived or born** (thus including conception with assisted reproductive technology);

- **the type of family of the child** (including e.g. the recognition of same-sex parenthood or parenthood established through adoption).

In principle, the proposal does not interfere with substantive national law in matters related to parenthood, which are and will remain under the competence of Member States. However, by putting the children's rights and best interests in the spotlight of the proposal, the Commission is requiring Member States to disregard their reluctance toward the recognition of some types of parenthood.

As the Union aspires an area of freedom and justice, in which the free movement of persons, access to justice and full respect of fundamental rights are guaranteed, the Commission proposes the adoption of Union rules on international jurisdiction and applicable law in order to facilitate the recognition of parenthood among the Member States. It covers not only the recognition of judgments but also the recognition and acceptance of authentic instruments. In this sense, the proposal covers the three main pillars of private international law and it will also introduce a European Certificate on Parenthood.

The main aspects of this proposal include:

- **Jurisdiction**: jurisdiction shall lie alternatively with the Member State of habitual residence of the child, of the nationality of the child, of the habitual residence of the respondent (e.g. the person in respect of whom the child claims parenthood), of the habitual residence of any one of the parents, of the nationality of any one of the parents, or of the birth of the child. Party autonomy is excluded. (Chapter II, articles 6-15)
- **The applicable law**: as a rule, the law applicable to the establishment of parenthood should be the law of the State of the habitual residence of the person giving birth. If the habitual residence of the person giving birth cannot be established, then the law of the State of the birth of the child should apply. Exceptions are foreseen for the situation where the parenthood of a second person cannot be established under the applicable law. (Chapter III, articles 16-23).
- **Recognition**: the proposal provides for the recognition of court decisions and authentic instruments with binding legal effects, which establish parenthood, without any special procedure being required. However, if one of the limited grounds for refusal is found to exist, competent authorities of Member States can refuse the recognition of parenthood

established by a court decision or an authentic instrument with binding effects. (Chapter IV, articles 24-43)

- **Acceptance:** the proposal also provides for the acceptance of authentic instruments with no binding legal effect. These instruments do not have a binding legal effect because they do not establish parenthood, but they refer to its prior establishment by other means or to other facts, thereby having only evidentiary effects. It may be a birth certificate, a parenthood certificate, an extract of birth from the register or any other form. The acceptance of these instruments with evidentiary effects can be refused only on public policy grounds. (Chapter V, articles 44-45)
- **Creation of a European Certificate of Parenthood**: children or their legal representatives can request it from the Member State in which the parenthood was established. This Certificate will be issued in a uniform standard form and will be available in all Union languages. It is not mandatory but children or their legal representatives have the right to request it and have it recognised in all Member States (chapter VI, articles 46-57).

What is next?

Since the current proposal concerns family law issues with cross-border implications, under Article 81(3) of the Treaty on the Functioning of the European Union, the Council shall act unanimously via a special legislative procedure after consulting the European Parliament. Besides the sensitive area the proposal regulates, it also adopts a pro-diversity and non-discrimination policy, including the recognition of same-sex parenthood and surrogacy. Thus, considering the different approaches and national identities of Member States, often associated with their more conservative or liberal convictions, unanimity will not be easy to reach. However, if unanimity cannot be reached, a number of Member States can still adopt the proposal in enhanced cooperation (see: Article 20 Treaty on European Union). This is not an uncommon procedure for Member States when they have to adopt legislation that concerns family law issues, e.g. Regulation 1259/2010 on the law applicable to divorce and legal separation (Rome III) and Regulation 2016/1103 on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. However, if it happens that the proposal is adopted in enhanced cooperation, it is doubtful whether its objective to provide the same rights for all children is truly achieved.

Additionally, the participating Member States will probably include those that did not impose very restrictive requirements with regard to the recognition of parenthood in their national laws, even before the adoption of the Regulation in enhanced cooperation.

CJEU on Lugano II Convention and choice of court through a simple reference to a website, case Tilman, C-358/21

In its judgment handed down today, the Court of Justice clarifies in essence that, under the Lugano II Convention, an agreement of choice of court meets the requirements set in Article 23(1) and (2) of the Convention in the scenario where that choice of court agreement is contained in the general terms and conditions set out on a web page, to which the contract signed by the parties contains a reference to, with no box-ticking being mechanism being implemented on the said web page.

Doing so, the Court ruled that the relevant requirements provided for in the Lugano II Convention are drafted in essentially identical terms to those of the Brussels I bis Regulation (para. 34). Thus, the relevance of the judgment may not confine itself to the framework of the aforementioned Convention, but could possibly also extend to the Regulation.

Interestingly enough, earlier this week, thanks to the post made by Geert van Calster on his blog, I learned about the EWHC judgment concerning, inter alia, the choice of court and law included in general terms and conditions, by inclusion in email and /or e-mailed click-wrapeable hyperlink. While the facts and issues discussed in those cases are not identical, both of them illustrate that there is still

something to say about choice of court agreements in online environment, despite their widespread use.

Context of the request for a preliminary ruling and the legal issue at hand

A company established in Belgium enters into a contract with a Swiss company.

The contract states that it is subject to the general terms and conditions for the purchase of goods set out on a specific web page (with the address to the website being precisely indicated in the agreement).

The aforementioned general terms and conditions provide that the English courts have jurisdiction to hear and determine any dispute in connection with the contract, and that contract is governed by, and to be interpreted in accordance with, English law.

A dispute arises and the Belgian company initiates proceedings against its Swiss contractor before the courts in Belgium.

The dispute concerns whether that agreement on choice of court was properly concluded between the parties and, therefore, whether it is enforceable in the main proceedings.

Through the proceedings, up to the Court of Cassation, the Belgian company argues that it signed a contract which contained merely a reference to it contractor's general terms and conditions, which are available on the latter's website. It claims that it was in no way prompted to accept the general terms and conditions formally by clicking on the corresponding box on the website. It therefore follows that the guidance provided by case-law cannot be transposed to the present proceedings. The situation in which a party signs a document which contains a reference to general terms and conditions that are accessible online (as in the present case) differs from that in which that party formally and directly agrees to those general terms and conditions by ticking a relevant box (see judgments in Estasis Saloti di Colzani, 24/76, and El Majdoub, C-322/14).

Faced with this argument, the Court of Cassation brought its request for a preliminary ruling before the Court of Justice, asking:

"Are the requirements under Article 23(1)(a) and (2) of the [Lugano II Convention] satisfied where a clause conferring jurisdiction is contained in general terms and conditions to which a contract concluded in writing refers by providing the hypertext link to a website, access to which allows those general terms and conditions to be viewed, downloaded and printed, without the party against whom that clause is enforced having been asked to accept those general terms and conditions by ticking a box on that website?

Findings of the Court and its answer

Before addressing the preliminary question itself, the Court notes that is being called to interpret the Lugano II Convention in order to allow the Belgian courts to decide whether the parties to the main proceedings have conferred jurisdiction to set their disputes to the English courts. The Court recognizes that Brexit may have affected the admissibility of the request for a preliminary ruling and addresses that issue (paras. 28-31).

Indeed, under Article 23 of the Lugano II Convention, the parties may choose a court or the courts of a State bound by this Convention to set their disputes.

Seen from today's perspective, the choice of court made by the parties to the main proceedings relate to the courts of a State not-bound by the Convention (and, I digress, still looking from that perspective: even where the Belgian court declines jurisdiction in favour of the English prorogated court, the latter would not be bound by the Convention).

However, the Court notes that the main proceedings were initiated before the end of the transition period provided for in the Withdrawal Agreement (i.e. before 31 December 2020), during which the Lugano II Convention applied to the UK. As the choice of court agreement produces its effect at the time where the proceedings are brought before a national court (para. 30), and – in the present case – at that time the UK applied the Convention, it cannot be concluded that the interstation thereof is not necessary for the referring court to decide on the dispute before it (para. 31).

Concerning the substance, it stems from the request for a preliminary ruling that the argumentation of the Belgian company that led to the preliminary reference boiled down to the contention that the interpretation of the Lugano II Convention under which the choice of law agreement in question is enforceable against that company ignores the requirement of genuine consent. For the said company, observance of genuine consent should be an overriding interpretative policy with regard to Article 23.

The Court addresses this line of argumentation in a detailed manner in paras. 32-59. Thus, I just confine myself to mention only some of its findings.

In particular, the Court seems to stress the commercial/professional nature of the relationship that gave rise to the dispute in the main proceedings and distinguishes those proceedings from the situations that call for consumer-oriented protection (para. 55).

Following this approach the Court addresses, by extension, Article 23(1)(b) and (c) of the Lugano II Convention, which concern, respectively, the agreements concluded "in a form which accords with practices which the parties have established between themselves" and the agreements "in [a form regular for] international trade or commerce" (para. 56).

Ultimately, without necessarily distinguishing between the three scenarios described in (a), (b) and (c), the Court indicates that the requirements stemming from Article 23(1) and (2) can be met by a choice of court agreement, contained in general terms and conditions to which a contract concluded in writing refers by providing the hypertext link to a website, access to which allows those general terms and conditions to be viewed, downloaded and printed, even without the party against whom that clause is enforced having been asked to accept those general terms and conditions by ticking a box on that website (para. 59).

The judgment is available here (for now only in French).

What is an international contract within the meaning of Article 3(3) Rome I? – Dexia Crediop SpA v Provincia di Pesaro e Urbino [2022] EWHC 2410 (Comm)

The following comment has been kindly provided by Sarah Ott, a doctoral student and research assistant at the University of Freiburg (Germany), Institute for Comparative and Private International Law, Dept. III.

On 27 September 2022, the English High Court granted summary judgment and declaratory relief in favour of the Italian bank Dexia Crediop SpA ("Dexia") in its lawsuit against the Province of Pesaro and Urbino ("Pesaro"), a municipal authority in the Marche region of Italy. This judgement marks the latest development in a long-running dispute involving derivative transactions used by Italian municipalities to hedge their interest rate risk. Reportedly, hundreds of Italian communities entered into interest rate swaps between 2001 and 2008 having billions of Euros in aggregate notional amount. It is also a continuation of the English courts' case law on contractual choice of law clauses. Although the judgments discussed in this article were, for intertemporal reasons, founded still on Art. 3(3) of the Rome Convention, their central statements remain noteworthy. The Rome Convention was replaced in almost all EU member states, which at the time included the United Kingdom, by Regulation (EC) No 593/2008 ("Rome I"), which came into effect on 17 December 2009. Article 3 Rome I Regulation contains only editorial changes compared to Article 3 of the Rome Convention. As a matter of fact, Recital 15 of the Rome 1 Regulation explicitly states that despite the difference in wording, no substantive change was intended compared to Article 3(3) of the Rome Convention.

In the case at hand, Pesaro and Dexia entered into two interest rate swap

transactions in 2003 and 2005. Each of the transactions was subject to the 1992 International Swap Dealers Association ("ISDA") Master Agreement, Multicurrency – Cross Border and a Schedule therto. During the 2008 financial crisis, the swaps led to significant financial burdens for Pesaro. In June 2021, Pesaro commenced legal proceedings in Italy seeking to unwind or set aside these transactions. Dexia then brought an action in England to establish the transactions were valid, lawful and binding on the parties.

A central question of the dispute was the law applicable to the contract. Pesaro claimed breaches of Italian civil law in its proceedings, while Dexia argued that only English law applies. As correctly stated by the court, the applicable law is determined by the Rome Convention, as the transactions between the parties took place in 2003 and 2005. According to Article 3(1) Rome Convention, a contract is governed by the law chosen by the parties. The ISDA Master Agreement in conjunction with the Schedule contained an express choice of law clause stating that the contract is to be governed by and construed in accordance with English law. Of particular importance therefore was whether mandatory provisions of Italian law could nevertheless be applied via Article 3(3) Rome Convention. This is the case if "*all the [other] elements relevant to the situation at the time of the choice are connected with one country only […]*". In order to establish weather Article 3(3) applied, the court referred to two decisions of the English Court of Appeal. Both cases also concerned similar interest rate swap transactions made pursuant to an ISDA Master Agreement with an expressed choice of English law.

In *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] EWCA Civ 1267, the Court of Appeal extensively discussed the scope of this provision in connection with the principle of free choice of law, more precisely, which factors are to be considered as "*elements relevant to the situation*". This was a legal dispute between the Portuguese Santander Bank and various public transport companies in Portugal. First, the Court of Appeal emphasised that Article 3(3) Rome Convention is an exception to the fundamental principle of party autonomy and therefore is to be construed narrowly. Therefore, "*elements relevant to the situation*" should not be confined to factors of a kind which connect the contract to a particular country in a conflict of laws sense. Instead, the Court stated that it is sufficient if a matter is not purely domestic but rather contains international elements. Subsequently the court assessed the individual factors of the specific case. In so far, the Court of Appeal confirmed all

factors the previous instance had taken into account. Relevant in the case was the use of the "Multi-Cross Border" form of the 1992 ISDA Master Agreement instead of the "Local Currency-Single Jurisdiction" form, that the contract included the right to assign to a foreign bank and the practical necessity for a foreign credit institution to be involved, as well as the foreseeability of the conclusion of hedging arrangements with foreign counterparties and the international nature of the swap market. These factors were found sufficient to establish an international situation.

In *Dexia Crediop S.P.A. v. Comune di Prato* [2017] EWCA Civ 428, the Court of Appeal addressed the issue again and concluded that already the fact that the parties had used the "Multi-Cross Border" form of the 1992 ISDA Master Agreement in English, although this was not the native language of either party, and the conclusion of back-to-back hedging contracts in connection with the international nature of the derivatives market was sufficient.

In the present case, Dexia again relied on the use of the ISDA Master Agreement, Multicurrency – Cross Border and on the fact that Dexia hedged its risk from the transactions through back-to-back swaps with market participants outside Italy. But as the relevant documents were not available, the second circumstance could not be taken into account by the court. Nevertheless, the court considered that the international element was sufficient and Article 3(3) of the Rome Convention was not engaged.

Thus, this new decision not only continues the very broad interpretation of the Court of Appeal as to which elements are relevant to the situation, but also lowers the requirements even further. This British approach appears to be unique. By contrast, according to the hitherto prevailing opinion in other Member States, using a foreign model contract form and English as the contract language alone was not sufficient to establish an international element (see, e.g., *Ostendorf* IPRax 2018, p. 630; *Thorn/Thon* in Festschrift Kronke, 2020, p. 569; *von Hein* in Festschrift Hopt, 2020, p. 1405). Relying solely on the Master Agreement in order to affirm an international element seems unconvincing, especially when taking Recital 15 of the Rome I Regulation into account. Recital 15 Rome I states that, even if a choice of law clause is accompanied by a choice of court or tribunal, Article 3(3) of the Rome I Regulation is still engaged. This shows that it is the purpose of this provision to remove the applicability of mandatory law in domestic matters from the party's disposition. The international element must rather be

determined according to objective criteria. With this interpretation, Article 3(3) of the Rome I Regulation also loses its *effet utile* to a large extent.

Unfortunately, the Court of Appeal considered its interpretation to be an *acte clair* and therefore refrained from referring the case to the CJEU. Since Brexit became effective, the Rome I Regulation continues to apply in the United Kingdom in an "anglicised" form as part of national law, but the English courts are no longer bound by CJEU rulings. As a result, a divergence between the English and the Continental European assessment of a choice of law in domestic situations is exacerbated.

This also becomes relevant in the context of jurisdiction agreements. In the United Kingdom, these are now governed by the HCCH 2005 Choice of Court Convention which is also not applicable according to article 1(2) if, "*the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State*". As there is a great interest in maintaining the attractiveness of London as a the "jurisdiction of choice", it is very likely that the Court of Appeal will also apply the standards that it has developed for Article 3(3) Rome I to the interpretation of the Choice of Court Convention as well.

One can only hope that in order to achieve legal certainty, at least within the European Union, the opportunity for a request for referral to the CJEU will present itself to a Member State court as soon as possible. This would allow the Court of Justice to establish more differentiated standards for determining under which circumstances a relevant foreign connection applies.

German Federal Court of Justice: Hungarian street tolls can be

claimed in German courts, based on, inter alia, Article 21 Rome I Regulation (public policy exception)

By judgment of 28 September 2022 – XII ZR 7/22 (so far, only the press release is available, on which the following considerations are based), the German Federal Court of Justice held that Hungarian street tolls can be claimed before German courts.

The claimant is a Hungarian company that collects Hungarian street tolls, the defendant a domestic car rental company. According to Hungarian regulation, it is the registered keeper of the car that owes the toll. If the toll is not paid by a virtual vignette (e-Matrica), an „increased substitute toll", five times higher than the vignette, must be paid within 60 days, afterwards additonally a large „processing fee". The first instance rejected the claim, on appeal the defendant was ordered to pay the claimed amount, the second appeal, on issues of law alone, confirmed the judgment on first appeal (except on the issue of which currency could be claimed, Hungarian Forinth or also Euros optionally).

The main point on the second appeal was whether the public policy exception in Article 21 Rome I Regulation applies. This analysis implies that the claim is characterised as contractual and that the Hungarian law on street tolls applies. The first issue was rather whether imposing liability solely on the part of the registered keeper would conflict with German public policy in case that this keeper is a car rental company whose business obviously is renting out its registered cars to the respective driver. As German law (section 7 German Road Traffic Act) prescribes, rather similarly, at least a subsidiary liability of the registered keeper, the Court rightly rejected a violation of German public policy. Since this result was obvious, the issue must have been dealt with upon party submission with which the Court has to deal with as a matter of fair proceedings (right to be heard, extending to a right to see the Court dealing with the Party's core points).

More interestingly, the „increased substitute toll“ was seen as a contractual penalty which was – again rightly – considered as „not entirely unknown under German law“, referring to similar substitute tolls indeed used in contracts for tramway or underground railroad traffic etc. if the traveller does not have a valid ticket. One is tempted to add that a contractual practice does not necessarily indicate the legal validity of this practice, but as this practice is virtually uncontested it is certainly convincing to take it as a „proof“ for how German law deals with contractual penalties. The German Civil Code provides for the basis in sections 339 et seq., combined with sections 305 et seq. (control of unfair terms).

On the issue of the currency of the claim, the Court observed that the debt in question in foreign currency can only be claimed in that foreign currency unless the applicable Hungarian law allows optional payment in Euros. In order to assess this point of Hungarian law the case was referred back to the court of first instance.

The case shows that Member State Courts continue being careful before striking down the results of a foreign applicable law as a violation of the national public policy. Had the highest instance of the German civil courts tended towards the opposite it would have had the obligation to refer the question to the ECJ whether activating the public policy exception was still within the confines of this exception as defined in its outer limits by European Union law. Rejecting a public policy violation in the sense of Article 21 Rome I Regulation (and comparable provisions in EU PIL) puts this decision in a (small) series of decisions of Member State courts, compared to almost none that actually assessed a violation. Nevertheless, it is remarkable that the court of appeal gave leave for a second appeal on the grounds that the questions on Article 21 Rome I Regulation would be of fundamental relevance („von grundsätzlicher Bedeutung“). Otherwise, the case could not have reached the Federal Court of Justice, as complaints against not giving leave are only admissible beyond a value of the appeal of EUR 20.000, and the total sum of the claim here was not more than approximately EUR 1.300.

Brussels IIa, habitual residence and forum necessitatis

Even after Brussels IIb's coming into force (that we reported on last week), the Court of Justice of the EU issued its judgment in case C-501/20. The case remains relevant, also under the new Regulation. The Court had the opportunity to not only add to its case law on habitual residence, but also to clarify three other matters: first, the Regulation's and the Maintenance Regulation's relation to the Vienna Convention on the Law of Treaties, specifically with regard to diplomatic immunity; second, the Brussels IIa's relation to domestic bases of jurisdiction; and third (and related to the second point), the *forum necessitatis.*

The case concerned the divorce and related disputes between a Spanish national and a Portuguese national. The couple had two children, who had dual Spanish-Portuguese nationality. The family lived first in Guinea-Bissau and later in Togo. The parents were posted at these places as EU delegates of the European Commission. They separated factually while still living in Togo. The mother then brought divorce proceedings, including the issues of parental responsibility and maintenance, in Spain. This court had to decide on its jurisdiction, which raised various issues.

Concerning the **habitual residence**, which is the first stop to determine jurisdiction (Art. 3 and 8 of Brussels IIa and Art. 3 of the Maintenance Regulation), the Court reiterated the two main factors to determine the habitual residence of adults: "first, the intention of the person concerned to establish the habitual centre of his or her interests in a particular place and, second, a presence which is sufficiently stable in the Member State concerned" (para 44, referring to its case C-289/20 interpreting the Rome III Regulation on the law applicable to divorce proceedings). The Court added that the definition of habitual residence in the Brussels IIa and Maintenance Regulations should be "guided by the same principles and characterised by the same elements" (para 53). (The Court here did not refer to Rome III, but the same is true as we know from previous case law.) Both factors of habitual residence were absent in this case. First, there was no intention to move back to Spain. Second, the parents were physically absent from Spain for this period (except for the birth of the children and periods of leave). Therefore, they could not have been habitually resident in

this Member State.

Concerning the habitual residence of the children, the Court referred to the factors in its previous case law, including the duration, regularity, conditions and reasons for the child's stay, the child's nationality, school and family and social relationships (para 73). To establish a habitual residence, it is essential that the child is physically present in this Member State (para 75). The mother's nationality and the pace where she lived prior to her marriage (and prior to the child's birth) are not relevant (para 76). The child's nationality and the place where they are born, are relevant but not decisive (para 77).

Any **diplomatic immunity** cannot change this conclusion, as the Spanish court does not have jurisdiction (paras 61 and following). Even though Recital 14 states that "[t]his Regulation should have effect without prejudice to the application of public international law concerning diplomatic immunities," this refers to a situation where a court in a EU Member State would have jurisdiction but cannot exercise it due to diplomatic immunity. In short, the existence of diplomatic immunity cannot grant jurisdiction.

The **residual jurisdiction** under Arts 6 and 7 of Brussels IIa, and specifically the situation that factual scenario that arose in this case, have long caused confusion. The legislator attempted to rectify this in Brussels IIb (Art. 6). The problem was that Art. 6 stated that if a spouse who is habitually resident in or a national of a Member State, may only be sued on the bases of jurisdiction in the Regulation, while Art. 7 referred to domestic bases of jurisdiction where no court in an EU Member State has jurisdiction. So, what is to be done where a spouse is a national of an EU Member State (Portugal in this instance) but there are no available bases of jurisdiction in the Regulation (as neither of the spouses are habitually resident in the EU and they do not have a common EU nationality)? Which provision should prevail? The Court found that Art. 7, and thus domestic bases of jurisdiction, cannot be used in this case; only the residual bases of jurisdiction of the Member State of the defendant's nationality can come into play (Portugal in this instance). See also the Opinion of Advocate-General Szpunar.

The same contradiction does not exist in the case of jurisdiction over children: Art. 14 simply states that where no court in a Member State has jurisdiction on the basis of the Regulation, domestic jurisdiction rules apply. Thus, Spanish residual bases of jurisdiction could be used concerning the parental

responsibility.

The Maintenance Regulation does not have such reference to domestic bases of jurisdiction, but contains a complete harmonisation of jurisdiction, for all situations. It is in this context that there is also a ***forum necessitatis***: if no court in a Member State has jurisdiction and it would be impossible or cannot reasonably expected of the parties to bring the proceedings in the third State to which the dispute is connected, a court in a Member State may, on an exceptional basis, hear the case (Art. 7). The Court explained that this can only come into play if no court in a Member State has jurisdiction, also not on the basis of the link of the case to the status or parental responsibility, and also not on the basis of the choice of the parties (para 101 and following). If this is the case, it is not required that the parties first attempt to institute proceedings in the third State, but the court "cannot rely solely on general circumstances relating to deficiencies in the judicial system of the third State, without analysing the consequences that those circumstances might have for the individual case" (para 112).

CJEU on action for unjust enrichment under Brussels I Regulation in the case HRVATSKE ŠUME, C-242/20

Do actions for recovery of sums unduly paid by way of unjust enrichment fall within exclusive jurisdiction under Article 22(5) of the Brussels I Regulation and, if not, do they fall within alternative jurisdiction set out in Article 5(3) in respect of "quasi-delicts"?

This is the twofold question that a Croatian court addressed to the Court of Justice in the case HRVATSKE ŠUME, C-242/20.

Last week, on 9th December, the Court handed down its judgment in this case.

Gilles Cuniberti and Geert van Calster reported and commented on the judgment. I am happy to refer to their contributions. As the judgment has already made object of their interesting analysis, the present post aims solely to complement the initial post about the Opinion presented by AG Saugmandsgaard Øe in the case at hand and the observations made there.

A brief reminder of the Opinion and its findings

Back in September, AG Saugmandsgaard Øe presented his Opinion in this case. At the request of the Court, he did only elaborate on the second part of the question presented above – and, technically speaking, the first preliminary question – pertaining to the interpretation of Article 3(5) of the Brussels I Regulation (point 20 of the Opinion).

In essence, he argued that an action for unjust enrichment is not a "matter relating to a contract" in the sense of Article 5(1), save where it is closely connected with a preexisting (or alleged to exist) contractual relationship (points 44-52). Nor it is a "matter relating to tort, delict or quasi-delict" within the meaning of Article 5(3) of the Regulation (point 79).

The judgment of the Court

On the exclusive jurisdiction

The Court starts its analysis with first part of the question presented in the introduction of the this post – and again, technically speaking, the second preliminary question – on the interpretation of Article 22(5) on the exclusive jurisdiction.

The Court reads this question in the context of a particularity of the case that is brought up by the referring court in its request for a preliminary ruling: an action for recovery of sums unduly paid by way of unjust enrichment falls within the scope of exclusive jurisdiction set out in Article 22(5) where that action concerns an amount levied in the enforcement proceedings and is brought before a court because it is not possible anymore, given the lapse of time (since the date of

enforcement), to seek recovery of the levied amount in the same enforcement proceedings? (paragraph 26).

The reasoning of the Court relies heavily on the autonomous character of the action in question with regards to the enforcement proceedings (paragraph 31) and on the predictability argument (paragraphs 30 and 34).

This reasoning leads the Court to conclude that, despite the aforementioned particularity of the case, the action for recovery of sums unduly paid does not fall within the scope of Article 22(5) of the Brussels I Regulation (paragraph 37).

On the alternative jurisdiction for contracts/torts

After that, the Court, logically, proceeds to the interpretation of Article 5(3) in order to clarify whether the action in question falls within the scope of that provision.

In short, it considers that due to the lack of the "harmful event" in the meaning of Article 5(3) , an action for recovery of sums unduly paid by way of unjust enrichment cannot fall within the scope of that provision (paragraph 55).

It also clarifies that the unjust enrichment does not, generally speaking, result from the act voluntarily undertaken by the party enriched at the expense of another. Thus, in principle it does not fall within the scope of Article 5(1), as a "matter relating to a contract" (paragraph 45). However, echoing the Opinion delivered by AG Saugmandsgaard Øe, the Cour considers that action "closely linked" to a contract would fall within the ambit of that provision (paragraphs 47 and 48).

Already second time's a charm ?

In the initial post on the Opinion, I speculated that the solution proposed by AG Saugmandsgaard Øe may have brought to mind the proposal made by AG Bobek in the context of actio pauliana in his Opinion delivered in the case Feniks, C-337/17. As a reminder, in the latter Opinion, AG Bobek proposed to consider, in essence, that an actio pauliana cannot be seen as a "matter relating to a

contract", nor it is a "matter relating to tort, delict or quasi-delict". It has to be brought before the court having jurisdiction under the general rule of jurisdiction, according to the principle actor sequitur forum rei.

Let us speculate and take that proposal one step further: while in order to identify the law governing action pauliana it might be necessary to decide whether this action is contractual or non-contractual in nature and thus falls within the scope of the Rome I Regulation or within the scope of the Rome II Regulation, it is not the case for the contract/tort distinction under the rules of jurisdiction set out in Article 5(1) and 5(3) of the Brussels I Regulation.

In the judgment in the case Feniks, C-337/17, the Court did not follow the proposal advanced by AG Bobek (see paragraph 44 of that judgment). Thus, it did not have to face or even to consider the one-step-forward speculative consequence mentioned above.

By contrast, it decided to do exactly that in the present case.

The Court acknowledges that a non-contractual characterization of the unjust enrichment is mandated by the Rome II Regulation (even though it falls within a scope of a special choice-of-law rule of Article 10), but it does not automatically translate to a similar characterization under the rules of jurisdiction of the Brussels I Regulation (paragraph 46).

The judgment can be consulted here.

AG Saugmandsgaard Øe on action for unjust enrichment and

contract/tort distinction under Brussels I Regulation in the case HRVATSKE ŠUME, C-242/20

AG Saugmandsgaard Øe observes in his Opinion presented today in the case HRVATSKE ŠUME, C-242/20, the Court of Justice has already faced requests for a preliminary ruling where arose a question on qualification of an action for unjust enrichment for the purposes of the Brussels I Regulation. He notes that no conclusive finding has been made so far as to its qualification as a "matter relating to tort, delict or quasi-delict" in the sense of Article 5(3) of the Regulation (point 4). By contrast, the present case is supposed to create an opportunity to provide a definitive conclusion to the jurisprudential saga in question.

It is noteworthy that the case itself presents a nuance: the unjust enrichment is said to have occurred in enforcement proceedings which were carried out, although they should not have been, and now reimbursement of the amount which was unjustly levied in enforcement proceeding is being sought before the Croatian courts. The nuance is addressed in the second preliminary question.

At the request of the Court, the Opinion does, however, elaborate only on the first preliminary question that reads as follows:

> *Do actions for recovery of sums unduly paid by way of unjust enrichment fall within the basic jurisdiction established in the [Brussels I Regulation] in respect of "quasi-delicts" since Article 5(3) thereof provides inter alia: "A person domiciled in a Member State may, in another Member State, be sued … in matters relating to … quasi-delict, in the courts for the place where the harmful event occurred or may occur"?*

In his Opinion, AG Saugmandsgaard Øe proposes to take a step back and view the preliminary question in a broader perspective. For him, it is necessary to determine, in the first place, whether an action for unjust enrichment falls within the scope of Article 5(1) of the Brussels I Regulation and, only in the negative, in the second place, whether it fall within the scope of Article 5(3) of the Regulation

(point 26). He established therefore an order of preference when it comes to the contract/tort distinction under the Regulation.

Having adopted that approach, he concludes that an action for unjust enrichment is not a "matter relating to a contract" in the sense of Article 5(1) of the Brussels I Regulation, save where it is closely connected with a preexisting (or alleged to exist) contractual relationship (points 44-52). Nor it is a "matter relating to tort, delict or quasi-delict" within the meaning of Article 5(3) of the Regulation (point 79).

The Opinion contains an in-depth discussion on the parallels with the Rome I/Rome II Regulations and, in this regard, the outcome of the reasoning followed by AG Saugmandsgaard Øe may bring to mind the one that AG Bobek proposed in the context of actio pauliana in his Opinion delivered in the case Feniks, C-337/17.

The Opinion of AG Saugmandsgaard Øe is available here (no English version so far).

The long tentacles of the Helms-Burton Act in Europe (II)

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Some months ago I commented here about an interlocutory ruling of September 2019, issued by the First Instance Court of Palma de Mallorca (Spain). The ruling stayed proceedings commenced by Central Santa Lucía L.C., a US corporation, against Meliá Hotels International S.A., on grounds of sovereign immunity. The court ruled that although the defendant was a Spanish legal entity, the basis of the claim entirely depended on a declaration that the nationalization of the land formerly owned by the claimants' predecessors in Cuba had been contrary to international law.

In March 2020, the Court of Appeal of Mallorca overturned the abovementioned interlocutory ruling and established the jurisdiction and competence of Spanish courts. The Court of Appeal found that the Cuban state was not a defendant in the proceedings, and neither was Gaviota S.A., a Cuban corporation owned by the Cuban state and the current owner of the expropriated land. Although the Court of Appeal admitted that any right to compensation for the allegedly illicit or unjustified enrichment of Meliá Hotels depended upon the illegality of the nationalization program introduced by Cuban Law 890 of 13 October 1960, the fact remained that the only defendant in the proceedings was a non-sovereign legal entity incorporated in Spain. Meliá Hotels argued that under the UN Convention on Jurisdictional Immunities of States and Their Property of 2004 it was not necessary that the claim be addressed to a foreign state; it was enough that the proceedings were meant to harm the interests, rights or activities of the foreign state. The Court of Appeal was not convinced and insisted that under Spanish Organic Law 16/2015 it was necessary that the proceedings had commenced against a foreign state or that measures had been requested against the property of the foreign state, in enforcement proceedings.

The Court of Appeal discussed several past rulings where Spanish courts had had an opportunity to deal with the effects of the nationalizations which followed the Cuban revolution of 1959. From this series of cases arises the doctrine that even where Spain and Cuba had entered into a lump sum agreement in 1986, whereby Cuba agreed to pay the Spanish Government a fixed amount as compensation for all Spanish nationals affected by the expropriation program, the rights of those Spanish nationals were not extinguished and might be raised again before the present or future Cuban Governments (Supreme Court Ruling of 10 December 2003). Moreover, although Spanish courts could not control the legality of the expropriations, they could indeed assess such legality in so far as it may be necessary to determine their private law effects in Spain (Supreme Court Ruling of 25 September 1992).

The Court of Appeal also disagreed with the Court of First Instance in another respect. The latter had found that, regardless of the issue of sovereign immunity, Spanish courts did not have jurisdiction to hear claims concerning property rights over immovable assets located outside Spain. The Court of Appeal found that EU Regulation (EU) No 1215/2012 (Brussels I) was applicable despite the fact that the asset was situated in Cuba, i.e. outside the territory of the European Union.

However, the Court of Appeal found that these proceedings did not have as their object a right *in rem* in immovable property. Instead, the claimants were exercising a right *in personam* to obtain monetary compensation. In this regard, the court mentioned that under Article 2 of Regulation (EC) No 864/2007 (Rome II), the concept of damage includes unjust enrichment. Therefore, Spanish courts had jurisdiction as the defendant corporation was domiciled in Spain.

Months afterwards, Meliá Hotels applied for a new stay of the proceedings, alleging that Central Santa Lucía was not the real successor of the original owners of the land in Cuba but an entity exclusively created for the purposes of obtaining compensation for the Cuban expropriations and that the claim was an attempt to circumvent Council Regulation (EC) No 2271/96, a "blocking statute" protecting against the effects of the extra-territorial application of legislation adopted by a third country. That is, Central Santa Lucía was trying to hide what was actually a claim indirectly based upon the Helms–Burton Act and from which the blocking statute was trying to shield European companies. The First Instance Court found that Central Santa Lucía seemed to have commenced proceedings in the US under the abovementioned US statute but that the current litigation in Spain did not derive from those proceedings nor could have any incidence on them. Furthermore, in the Spanish proceedings the Helms-Burton Act would not be applied and would not be taken into account.

Next, Meliá Hotels applied for a mandatory joinder (*litisconsorcio pasivo necesario*), requesting that the Cuban State be joined to the proceedings. The Court of First Instance ordered the joinder drawing on its own arguments in the earlier ruling where it had established its lack of jurisdiction on the basis of the sovereign immunity of Cuba. The court indicated that Central Santa Lucía claimed that Meliá Hotels had unjustifiably or illegitimately enriched itself by exploiting the expropriated land and that the examination of the illegality of such expropriation necessarily called for the participation of Cuba in the proceedings because any right of the claimants depended upon a declaration of the Spanish courts that the land was being illegitimately held by Cuba or, rather, by Gaviota S.A. It was wrong, the court seemed to say, to analyse the legitimacy of the acquisition of property without listening to the party who had carried out that act of acquisition. It was also impossible to recognize the original property right of Central Santa Lucía, a right which was in opposition to the present property rights of Cuba, without allowing Cuba to be heard in that respect. For these

reasons, not only the State of Cuba but Gaviota S.A. had to be brought in as co-defendants with Meliá Hotels.

Finally, the Court of First Instance issued a new interlocutory decision last 3 May, where it established that it had no jurisdiction to hear the claim because now one of the defendants is a foreign sovereign state. The Office of the Prosecutor was also of the same opinion. The Spanish Ministry of Foreign Affairs had also filed a report indicating that the act of nationalization was an act *iure imperii* and that the Cuban State enjoyed immunity for that reason. However, the ministry added that any contractual relationships between Meliá Hotels and Gaviota S.A. could be the subject matter of civil proceedings in Spain. The Court of First Instance relied much on its own ruling of September 2019 but it also drew on its own mandatory joinder of November 2020, insisting that any decision of the Spanish courts concerning the right of Central Santa Lucía to be compensated by Meliá Hotels would involve analysing the act of acquisition as well as the property rights of the Cuban State and Gaviota S.A. This was the reason why the latter had been joined and were now co-defendants, one of whom – Cuba – was a foreign sovereign which enjoyed immunity from jurisdiction. Since it was impossible to separate the analysis of the jurisdiction of the Spanish court from that of the claim against Meliá Hotels, the proceedings had to be stayed against all parties. Finally, the Court of First Instance mentioned that although Cuba had not made an appearance in the proceedings after being named as a defendant, that could not be interpreted as tacit submission under Spanish law.

The Court of First Instance does not seem to be aware of the "Catch 22" type of decision it has made. On the one hand the claim could not be heard because Central Santa Lucía had not brought Cuba in as a co-defendant. On the other hand, now the Spanish court does not have jurisdiction precisely because Central Santa Lucía has brought a sovereign defendant into the proceedings, further to the mandate of the same court, at the request of the primary defendants.

The Court of First Instance also seems to have given a lot of weight to the fact that if it decided that the nationalization had been illegal, that would have affected the property rights of Cuba over the nationalized land. This is obviously not the case, precisely because Spain does not have any kind of enforcement jurisdiction over property located in Cuba. As the abovementioned Supreme Court ruling of 25 September 1992 indicated, even if Spanish courts cannot control the legality of the Cuban expropriations, they can indeed draw certain consequences

from their illegality, provided that those consequences are of a private law nature and are limited to the Spanish territory.

As it was mentioned in my first post, the Spanish Court also seems to have confused immunity from jurisdiction with the act of state doctrine – which has no place in the Spanish legal system –, mentioning once and again that the acts of nationalization of the Cuban State are protected when, in fact, the only one protected is Cuba itself, but this protection is restricted to certain types of acts.

Although this ruling of 3 May may be appealed, the exiled Cubans are running out of options, especially now that two years have elapsed since the Helms-Burton act was activated without much to show for. Title III lawsuits continue to face legal obstacles and conflicting rulings by US courts. The growing body of case law is, nevertheless, clarifying the conditions concerning the right of action of the claimants, which must be based on their standing and on the knowledge that defendants had about the confiscated nature of the property.

Maybe the best option for the Cuban community in the US is not to hope for a full implementation of the Helms-Burton act but to lobby for a lump-sum agreement between Cuba and the US, similar to the agreement between Cuba and Spain of 1986. The diplomatic opening that commenced with President Obama would have been a good start for that but there are doubts that President Biden wants to push forward in the same direction, given the communist island's poor human rights record. Still, Venezuela, the oil rich and long standing ally of the Castro brothers is now in a state of such turmoil that Cuba may feel the need to make concessions.