The CJEU Shrems cases – Personal Data Protection and International Trade Regulation

Carmen Otero García-Castrillón, Complutense University of Madrid, has kindly provided us with her thoughts on personal data protection and international trade regulation. An extended version of this post will appear as a contribution to the results of the Spanish Research Project lead by E. Rodríguez Pineau and E. Torralba Mendiola "Protección transfronteriza de la transmisión de datos personales a la luz del nuevo Reglamento europeo: problemas prácticos de aplicación" (PGC2018-096456-B-I00).

The regulatory scenario

1. In digital commerce times, it seems self-evident that personal data protection and international trade in goods and services are intrinsically connected. Within this internet related environment personal data can be accessed, retrieved, processed and stored in a number of different countries. In this context, the legal certainty for economic actors, and even the materialisation or continuation of commercial transactions requires taking into consideration both, the international jurisdiction and the applicable law issues on the one hand, and the international trade regulations covering these commercial transactions on the other hand.

Too much personal data protection can excessively restrict international trade, especially in countries with less developed economies for which the internet is considered an essential sustainable development tool. Little protection can prejudice individual fundamental rights and consumers' trust, negatively affecting international trade also. Hence, some kind of balance is needed between the international personal data flux and the protection of these particular data. It must be acknowledged that, summarising, whilst in a number of States personal data and their protection are fundamental rights (expressly in art. 8 CFREU, and as a part of the right to private and family life in art. 8 ECHR), in others, though placed in the individual's privacy sphere (in the light of art. 12 UDHR), it is

basically associated to consumer's rights.

2. The only general international treaty specifically dealing with personal data protection is the Convention 108 + of the Council of Europe, for the protection of individuals with regard to the processing of personal data. The Convention defines personal data as any information relating to an identified or identifiable individual (art. 2.a) without an express and formal recognition of its fundamental right character. The Convention, whose *raison d'etre* was justified for need to avoid that the personal data protection controls interfere with the free international flow of information (Explanatory Report, para. 9), "should not be interpreted as a means to erect non-tariff barriers to international trade" (Explanatory Report, para. 25). Its rules recognise the individual's rights to receive information on the obtaining and the treatment of their data, to be consulted and oppose that treatment, to get the data rectified or eliminated and to count, for all this, with the support of a supervisory authority and judicial and non-judicial mechanisms (arts. 8, 9 and 12). On the basis of these common standards, member States agree not to prohibit or subject to special authorisations the personal data flows as long as the transfer does not imply a serious risk of circumventing them (art. 14). Moreover, the agreed rules can be exempted when it is a "necessary and proportionate" measure "in a democratic society" to protect individual rights and "the rights and fundamental freedoms of others", particularly "freedom of expression" (art. 11). Presently, 55 States are parties to this Convention, including the EU but not the US, that have an observer status.

Along these lines, together with other Recommendations, the OECD produced a set of *Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data* (11.7.2013; revising the 1980 version). After establishing general principles of action as minimum standards, it was concluded that the international jurisdiction and the applicable law issues could not be addressed "at that stage" provided the "discussion of different strategies and proposed principles", the "advent of such rapid changes in technology, and given the non-binding nature of

the Guidelines" (Explanatory Memorandum, pp. 63-64).

On another side, the World Trade Organisation (WTO) administers different Agreements multilaterally liberalising international trade in goods and services that count with its own dispute settlement mechanism. In addition, States and, of course, the EU and the US, follow the trade bilateralism trend in which data protection and privacy has begun to be incorporated. Recently, this issue has also been incorporated into the WTO multilateral trade negotiations on e-commerce.

CJEU Schrems' cases

3. Last 16 July, in *Schrems II* (C-311/18), the CJEU declared the invalidity of the Commission Decision 2016/1250 on the adequacy of the protection provided by the Privacy Shield EU–US, aimed at allowing the personal data transfer to this country according to the EU requirements, then established by Directive 95/46 and, from 25 May 2018, by the Regulation 2016/679 (GDPR). On the contrary, Commission Decision 2010/87 (2016/2297 version) on the authorisation of those transfers through contractual clauses compromising data controllers established in third countries is considered to be in conformity with EU law.

In a nutshell, in order to avoid personal data flows to "data heavens" countries, transfers from the EU to third States are only allowed when there are guarantees of compliance with what the EU considers to be an adequate protective standard. The foreign standard is considered to be adequate if it shows to be substantially equivalent to the EU's one, as interpreted in the light of the EUCFR (*Schrems II* paras. 94 and 105). To this end, there are two major options. One is obtaining an express Commission adequacy statement (after analysing foreign law or reaching an agreement with the foreign country; art. 45 GDPR). The other is resorting to approved model clauses to be incorporated in contracts with personal data importers, as long as effective legal remedies for data subjects are available (art. 46.1 and 2.c GDPR). According to the Commission, this second option is the most commonly used (COM/2020/264 final, p. 15).

4. In *Schrems II* the CJEU confirms that, contrary to the Privacy Shield Decision, the US data protection regime is not equivalent to EU's one because it allows public authorities to access and use those data without being subject to the proportionality principle (para. 183; at least in some surveillance programs) and, moreover, without recognising data owners their possibility to act judicially against them (para. 187). It never rains but what it pours since, in 2015, a similar reasoning led to the same conclusion in *Schrems I* (C-362/14, 5.6.15) on the Safe Harbour Decision (2000/520), preceding the Privacy Shield one. Along these lines, another preliminary question on the Privacy Shield Decision is pending in the case *La cuadrature du net,* where, differing from *Schrems II*, its compatibility with the CFREU is expressly questioned (T-738/16). In this realm, it seems relevant noting that the CJEU has recently resolved the *Privacy International* case, where, the non-discriminated capture of personal data and its access by national intelligence and security agencies for security reasons, has been considered contrary to the CFREU unless it is done exceptionally, in extraordinary cases and in a limited way (C-623/17, para. 72). Given the nature of the issue at hand, a similar Decision could be expected in the *La cuadrature du net* case; providing additional reasons on the nullity of the Privacy Shield Decision, since it would also contravene the CFREU. Moreover, all this could eventually have a cascading effect on the Commission's adequacy Decisions regarding other third States (Switzerland, Canada, Argentina, Guernsey, Isle of Man, Jersey, Faeroe Islands, Andorra, Israel, Uruguay, New Zealand and Japan).

5. As to the contractual clauses, beyond confirming the Commission analysis on their adequacy in this case, the CJEU states that it is necessary to evaluate the data access possibilities for the transferred country public authorities according to that country national law (para. 134). At the end of the day, EU Data Protection authorities have to control the risks of those authorities' actions not conforming with EU standards, as much as the capability of the contractual parties to comply with the contractual clause as such. If the risk exists, the transfers have to be prohibited or

suspended (para.135).

6. The EU personal data protection norms are imperative and apply territorially (art. 3 GDPR; Guidelines 3/18 EDPB version 2.1, 7.1.2020 and CJEU C-240/14, *Weltimmo*). Therefore, data "imports" are not regulated and the "exports" are subject to the condition of being done to a country where they receive EU equivalent protection. In the light of CJEU case law, the measures to watch over the preservation of the EU standard are profoundly protective, as could be expected provided the fundamental rights character of personal data protection in the EU (nonetheless, many transfers have already taken place under a Decision now declared to be void).

Hence, once a third country legislation allows its public authorities to access to personal data -even for public or national security interests- without reaching the EU safeguards level, EU Decisions on the adequacy of data transfers to those countries would be contrary to EU law. In similar terms, and despite the recent EDPB Recommendations (01 and 02/20, 10.11.2020), one may wonder how the contracts including those authorised clauses could scape the prohibition since, whatever the efforts the importing parties may do to adapt to the EU requirements (as Microsoft has recently announced regarding transfers to the US; 19.11.2020), they cannot (it is not in their hands) modify nor fully avoid the application of the corresponding national legislation in its own territory.

As a result, the companies aiming to do business in or with the EU, do not only have to adapt to the GRDP, but not to export data and treat and store them in the EU (local facilities). This entails that, beyond the declared personal data international transferability (de-localisation), *de facto*, it seems almost inevitable to "localise" them in the EU to ensure their protection. To illustrate the confusion created for operators (that have started to see cases been filed against them), it seems enough to point to the EDPB initial reaction that, whilst implementing the *Strategy for EU institutions to comply with "Schrems II" Ruling*, "strongly encourages … to avoid transfers of personal data towards the United States for

new processing operations or new contracts with service providers" (Press Release 29.10.2020).

Personal data localisation and international trade regulation

7. There is a number of national systems that, one way or another, require personal data (in general or in especially sensitive areas) localisation. These kinds of measures clearly constitute trade barriers hampering, particularly, international services' trade. Their international conformity relies on the international commitments that, in this case, are to be found in the WTO Agreements as much as in the bilateral trade agreements if existing. The study of this conformity merits attention.

8. From the EU perspective, as an initial general approach it must be acknowledged that, within the WTO, the EU has acquired a number of commitments including specific compromises in trans-border trade services in the data process, telecommunication and (with many singularities) financial sectors. Beyond the possibility of resorting to the allowed exceptions, the "localisation" requirement could eventually be infringing these compromises (particularly, arts. XVI and/or XVII GATS).

Regarding EU bilateral trade agreements, some of the already existing ones and others under negotiation include personal data protection rules, basically in the e-commerce chapters (sometimes also including trade in services and investment). Together with the general free trade endeavour, the agreements recognise the importance of adopting and maintaining measures conforming to the parties' respective laws on personal data protection without agreeing any substantive standard (i.e. Japan, Singapore). At most, parties agree to maintain a dialog and exchange information and experiences (i.e. Canada; in the financial services area expressly states that personal data transfers have to be in conformity with the law of the State of origin). For the time being, only the Australian and New Zealand negotiating texts expressly recognise the fundamental character of privacy and data protection along with the freedom of the parties to adopt protective

measures (international transfers included) with the only obligation to inform each other.

Concluding remarks

9. As the GDPR acknowledges "(F)lows of personal data to and from countries outside the Union and international organisations are necessary for the expansion of international trade and international cooperation. The increase in such flows has raised new challenges and concerns with regard to the protection of personal data." (Recital 101). In facing this challenge, *Schrems II* confirms the unilaterally asserted extraterritoriality of EU personal data protection standards that, beyond its hard and fully realistic enforcement for operators abroad, constitute a trade barrier that could be eventually infringing its WTO Agreements' compromises. Hence, in a digitalised and globally intercommunicated world, the EU personal data protection standards contribute to feeding the debate on trade protectionism. While both the EU and the US try to expand their respective protective models through bilateral trade agreements, multilaterally -among other initiatives involving States and stakeholders, without forgetting the role of technology (*privacy by design*)- it will be very interesting to see how the on-going WTO negotiations on e-commerce cover privacy and personal data protection in international trade data flows.

Frontiers in Civil Justice – An Online Debriefing

Conference 'Frontiers in Civil Justice' held on 16 and 17 November 2020 (online)

By Jos Hoevenaars & Betül Kas, Erasmus University Rotterdam (postdocs ERC

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As announced earlier on this blog, the Conference Frontiers in Civil Justice organized by the ERC team together with Ilja Tillema of Erasmus School of Law in Rotterdam, took place on 16 and 17 November 2020.

The conference addressed four key issues in civil justice, which require a deeper and renewed reflection in light of their contribution to facilitating access to justice. Those concern the shaping of the interaction between formal and informal justice (panel I), the digitalization of consumer dispute resolution (panel II), the collectivizing and monetizing of civil litigation (panel III) and justice innovation and frontier developments in civil justice (panel IV). Renowned speakers and selected speakers following a call for papers gave their views during the two-day conference that, although set up previously as a blended event with online as well as live attendance at Erasmus University in Rotterdam, was forced to move fully online due to the tightening of Covid-19 measures in the Netherlands.

The Needs and Challenges of Digitizing Justice in Europe (Keynote 1)

The first day of the conference was kicked-off by the keynote speech of **Hrvoje Grubisic** (DG Justice and Consumers, European Commission). Grubisic underlined the necessity of digitalisation in the justice field in order to guarantee Europe's citizens access to justice. The EU's efforts of furthering the employment of digital technologies in the justice area is particularly warranted by the persistent increase in cross-border activities in civil and commercial matters. Grubisic pointed to the importance of the principles contained in the Tallinn ministerial declaration in framing and guiding the Commission's strategy of the digitalisation of justice in the EU. The current COVID-19 crisis has accelerated the Commission's activities. On the basis of its roadmap setting out the need to steer and coordinate the digitalisation of justice at EU level, the Commission plans to publish a communication of its policy priorities by the end of 2020. In practical terms, the Commission intends to employ a toolbox approach, starting with the identification of cross-border judicial procedures that can be digitised, ascertaining the appropriate IT tools (e.g. e-CODEX based systems) and ensuring funding sources for the Member States.

Shaping the Interaction between Formal and Informal Justice (Panel I)

Subsequently, **Elisabetta Silvestri** (University of Pavia) introduced the first panel dealing with the interaction between formal and informal justice. Silvestri stressed the importance of understanding how formal and informal justice can coexist in a balanced relationship that is able to grant individuals access to justice. According to her, the need for a fruitful cooperation between courts and ADR providers in the best interest of stakeholders became even more pronounced in the current pandemic. The presentation of **Diana Wallis** (Hull University; former ELI president) reflected on the differing nature of formal and informal justice. Wallis traces how the EU has promoted the shift of the delivery of justice away from the nation states' courts to ADR bodies. While the ELI Statement addressed the practicalities of the relationship between private and public justice, the deeper question about how to address the dangers and drawbacks of privatized justice remains unresolved. **Anna Nylund** (The Arctic University of Norway) submitted in her presentation that many ADR processes fail to deliver on their promises of improved access to justice. Nylund sees ADR to be based predominantly on individualistic values, expecting citizens to exercise self-determination, and as such therefore geared towards the highly educated middle class. The gap between theory and practice contributes to the reluctance towards ADR processes in Europe. She therefore proposed a step-by-step approach of re-designing ADR according to context-dependent goals. The following two presentations provided insights into the relationship between formal and informal justice by drawing on the concrete experiences of two national legal systems: **Masood Ahmed** (University of Leicester) presented the experience of the English civil justice system with compulsory ADR. While compulsory ADR has been traditionally dismissed by the English judiciary, a divergent judicial approach has emerged which impliedly obliges the parties to engage with ADR. Ahmed criticises the persistence of the traditional approach and calls upon the courts to fully embrace their case management powers in making ADR orders. **Stefaan Voet (KU Leuven)** reports how informal justice has been introduced by a number of procedural reforms in Belgium. Voet's presentation addresses five critical issues regarding informal justice processes, namely (1) their possible mandatory nature; (2) their quality; (3) the procedural guarantees offered by them; (4) the enforcement of their outcomes; and (5) the interaction with the formal justice process.

Digitalization of Consumer Dispute Resolution (Panel II)

The second day of the conference started with a panel, chaired by **Burkhard Hess** (Max Planck Institute Luxembourg), focusing on online dispute resolution (ODR) for consumer claims, using case-studies as a starting point to discuss how different types of cODR procedures can contribute to consumers' access to justice. **Martin Ebers** (University of Tartu) presented on the promise and challenge of AI based techniques in cODR and its impact on due process. Giving an overview of current uses of AI in different phases of disputes, from case management and automated anonymisation to data inference and automated decision-making, Ebers laid out the framework for future regulation of the use of AI in European ODR. Subsequently, **Marco Giacalone** (Vrije Universiteit Brussels) used examples from the US, Canada, Australia and Slovakia to zoom in on the concept and application of e-negotiation. Reflecting on the potential of this mode of assisted and automated negotiation in resolving disputes, Giacalone considers EU practices of e-negotiation for consumer dispute resolution as significant yet insufficient, with considerable room for improvement in enhancing consumer access to justice in the EU. **Eline Verhage** (Leiden University) presented on the recent experience of the Dutch Foundation for Consumer Complaints Boards (Geschillencommissies) in responding to the Covid-19 crisis. Presenting very recent data on the move to online hearings she reflected on the impact on the 'voluntariness gap' in these out-of-court alternative dispute schemes, concluding that virtual hearings seem a promising cODR tool for enhancing business participation, due to the increased option and lower costs. Finally, **Emma van Gelder** (Erasmus University Rotterdam) discussed observations from empirical research on Klachtencompas (a free online complaint platform of the Dutch consumer protection organization Consumentenbond) and the in-house dispute resolution platform used by Paypal, to discuss the benefits and drawbacks of these 'first-line' complaint resolution mechanisms. The main point of discussion following the various examples presented during the panel was on the applicability of Article 6 ECHR and Article 47 of the EU Charter, and on the question of how to apply the notions of fair trial and due process to both certified and uncertified ADR schemes in the EU.

Current Issues in Access to Justice: An English Perspective (Keynote 2)

In the second keynote of the conference, professor **Dame Hazel Genn** (University College London) provided a very timely insight into current developments in the English civil justice system in the context of the Covid-19

pandemic. Bringing together the most recent insights from (some unpublished) rapid reviews of the rush to mostly online justice administration and reflecting on the impact of online courts and tribunals on access to justice especially for those that are in most dire need of legal assistance and resolution. Quite in contrast to previous discussions about the great potential of technological innovations in the areas of small claims and consumer dispute resolution, Professor Genn stressed the need to also look at what we potentially lose in procedural and substantive terms when hearings are undertaken remotely or on paper. Contrasting the great benefits of technology in terms of convenience, economy and efficiency with its downsides apparent in both the experiences of litigants as well as the judiciary, Genn ended on the pertinent question: Are we processing cases or are we doing justice?

Collectivizing & Monetizing Civil Litigation (Panel III)

The third panel chaired by **John Sorabji** (Barrister, 9 St John Street; University College London) turned attention to collective redress via adjudication and, specifically, the funding of civil litigation. **Ianika Tzankova** (Tilburg University) drew lessons for the funding of collective redress in global disputes from the Dutch experience. In particular, Tzankova explored and compared the financing of collective civil litigation on the basis of the Dexia case which was the first major consumer mass claim in the Netherlands and the investor litigation in the Fortis collective action, which resulted in the first global collective settlement that can be considered 'EU-originated'. **Astrid Stadler** (University of Konstanz) explained in her presentation the German situation regarding litigation funding of collective actions. In particular, Stadler presented on how the judiciary dealt with third-party funding arrangements and funding by legal tech companies and SPVs in recent case law. The judiciary's strong aversion against entrepreneurial litigation endangers the effective enforcement of the law. Stadler concluded that third-party funding must be available for representative claimants and should be regulated by the legislator. Complementing Tzankova's presentation, **Ilja Tillema** (Erasmus University Rotterdam) reflected on the rise of entrepreneurial mass litigation in the Netherlands. Particularly in the last decade, spurred by the potential of large earnings, entrepreneurial parties have started to diversify the Dutch mass litigation landscape. Tillema reflected on the pros and cons of their involvement, presented empirical material of the amount and types of cases in which entrepreneurial parties are involved, and evaluated the way that the

legislator and courts have dealt with this development. **Catherine Piché** (Université de Montréal) elucidated Quebec's experience with public forms of financing class litigation. According to Piché, the Canadian province of Quebec's Fonds d'aide aux recours collectifs (the assistance fund for class action lawsuits) serves not only as an effective class litigation funding mechanism, but also as a mandatory independent oversight body. Piché evaluates that financing class actions publicly through assistance by such entities is the most appropriate and effective way to finance class action litigation and could therefore serve as a model for other legal systems.

Innovations in Civil Justice (Panel IV)

Chaired by professor **Alan Uzelac** (University of Zagreb) the final panel brought together speakers following a call for papers. The call invited submissions on topics relating to justice innovation, specifically about the development of initiatives aimed at bringing justice closer to citizens, their relevance for access to justice and the judicial system, and the challenges they may pose for judicial administration, litigants and other stakeholders. The presentation of **Iris van Domselaar** (UvA) kicked off with legal philosophical reflections on civil justice innovations that aim to 'bring justice closer to the citizen', and posed the question to what extent the 'pragmatic turn' in civil justice systems is reconcilable with courts being objective justice-affording institutions, as such setting the scene for the specific examples of innovation and developments that were to follow. **Pietro Ortolani** (Radboud University Nijmegen) & **Catalina Goanta** (Maastricht University) and next **Naomi Appelman** & **Anna van Duin** (UvA) presented to the audience two specific examples that raised divergent questions about the frontier civil justice development playing out in the realm of online social media. The former, by comparatively analyzing reporting systems and underlying procedural rights of users related to content moderation by four social media platforms (Facebook, Twitch, TikTok and Twitter), presented an example where innovation may actually pose a threat to access to justice. While the latter, reporting on the findings of empirical research on the need for procedural innovation in the Netherlands to quickly take down online content that causes personal harm, presented how innovations in civil justice could contribute to the effective protection of rights in the digital realm. The final topic of this panel was presented by **Nicolas Kyriakides** & **Anna Plevri** (University of Nicosia) who, taking Zuckerman's predictions on AI's role in guaranteeing access to justice as a

starting point, presented their own evaluation on this matter, encouraging further debate on AI's role in adjudication. By elucidating the potential of AI to render the familiar open-court, multi-party process of justice completely unrecognisable, they warned about the potential loss of perceived legitimacy of the justice system as a whole, should AI systematically penetrate the entire justice system.

Although the conference was forced to move fully online, the digital setting did not stifle the interaction with the audience. Through the use of the chat function and live chat moderators the speakers were able to answer questions from the audience in the chat and the chairs were able to open up the floor to members of the audience. This led to lively discussions very much resembling a live setting.

This conference was organised by Erasmus School of Law of Rotterdam University and funded by an ERC consolidator grant from the European Research Council for the project ***'Building EU Civil Justice'****.*

Mutual Trust: Judiciaries under Scrutiny – Recent reactions and preliminary references to the CJEU from the Netherlands and Germany

I. Introduction: Foundations of Mutual Trust

A crucial element element for running a system of judicial cooperation on the basis of mutual trust is sufficient trust in the participating judiciaries. EU primary law refers to this element in a more general way in that it considers itself to be

based on „the rule of law“ and also „justice“. Article 2 TEU tells us: „The Union is founded on the values of (…) the rule of law (…). These values are common to the Member States in a society in which „(…) justice (…) prevail.“ Subparagraph 2 of the Preamble of the EU Charter of Fundamental Rights, recognized by the EU as integral part of the Union's foundational principles in Article 6 (1) TEU, confirms: „Conscious of its spiritual and moral heritage, the Union (…) is based on (…) the rule of law. It places the individual at the heart of its activities, by (…) by creating an area of freedom, security and justice“. Article 47 of the EU Charter of Fundamental Rights guarantees the right to an effective remedy and to a fair trial when EU law is „implemented“ in the sense of Article 51 of the Charter, as does Article 6(1) European Convention on Human Rights generally.

The Area of Freedom, Security and Justice has indeed become a primary objective of the EU. According to Article 3 (1) TEU, „[t]he Union's aim is to promote peace, its values and the well-being of its peoples.“ Article 3 (2) TEU further spells out these objectives: „The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime“. Only in the following subparagraph, in Article 3 (2) Sentence 1 TEU, the original objective of the EU is listed: „The Union shall establish an internal market“.

II. No „blind trust“ anymore

Based on these fundaments, the CJEU, in its Opinion Opinion 2/13 of 18 December 2014, paras 191 and 192, against the EU's accession to the European Convention on Human Rights, explained: "[t]he principle of mutual trust between the Member States is of fundamental importance in EU law (…). That principle requires (…) to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law (…). Thus, when implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU". Hence, the Court concluded, at para. 194, that "[i]n so far as the ECHR would, in requiring the EU and the Member States to be considered

Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law". This is why (inter alia) the CJEU held that the accession of the EU to the ECHR would be inadmissible – based on the promise in Article 19(1) Sentences 2 and 3 TEU: „[The CJEU] shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." When it comes to judicial cooperation, these Member States are primarily the Member States of origin, rather than the Member States of destination, unless „systemtic deficiencies" in the Member States of origin occur.

It did not come as a surprise that the European Court of Human Rights rejected the claim made by the European Court of Justice that mutual trust trumps human rights: In *Avoti?š v. Latvia* (ECtHR, judgment of 23 May 2016, Application no. 17502/07), the applicant was defendant in civil default proceedings in Cyprus. The successful claimant sought to get this judgment recognized and enforced in Latvia against the applicant under the Brussels I Regulation. The applicant argued that he had not been properly served with process in the proceedings in Cyprus and hence argued that recognition must be denied according to Article 34 no. 2 Brussels I Regulation. The Latvian courts nevertheless granted recognition and enforcement. Thereupon, the applicant lodged a complaint against Latvia for violating Article 6 (1) ECHR. The ECHR observed, at paras. 113 and 114:

„[T]he Brussels I Regulation is based in part on mutual-recognition mechanisms which themselves are founded on the principle of mutual trust between the member States of the European Union. (…). The Court is mindful of the importance of the mutual-recognition mechanisms for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require. (…). Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms (…)".

The Court further held, in direct response to Opinion 2/13 of the ECJ that „[l]imiting to exceptional cases the power of the State in which recognition is

sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient".

Thus, a court must, under all circumstances, even within the scope of the „Bosphorus presumption" (European Court of Human Rights, judgment of 30 June 2005 – *Bosphorus Hava Yollar? Turizm ve Ticaret Anonim ?irketi v. Ireland* [GC], no. 45036/98, paras. 160-65, ECHR 2005?VI), „[v]erify that the principle of mutual recognition is not applied automatically and mechanically to the detriment of fundamental rights – which, the CJEU has also stressed, must be observed in this context. In this spirit, where the courts of a State which is both a Contracting Party to the Convention and a member State of the European Union are called upon to apply a mutual-recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law". To cut it short: mutual trust does not (fully) trump human rights – "no blind trust" (Koen Lenaerts, La vie après l'avis: Exploring the principle of mutual (yet not blind) trust, Common Market Law Review 54 (2017), pp. 805 et seq.).

III. What does this mean, if a Member State (Poland) undermines the independence of its judiciary?

This question has been on the table ever since Poland started "reforming" its judiciary, first by changing the maximum age of the judges at the Polish Supreme Court and other courts during running appointments, thereby violating against the principle of irremovability of judges. The Polish law („Artyku?i 37 i 111 ust?p 1 of the Ustawa o S?dzie Najwy?szym [Law on the Supreme Court] of 8 December 2017 [Dz. U. of 2018, heading 5]) entered into force on 3 April 2018, underwent a number of amendments (e.g. Dz. U. of 2018, heading 848 and heading 1045), before it was ultimately set aside (Dz. U. of 2018, heading 2507). The CJEU declared it to infringe Article 19 (1) TEU in its judgment of 24 June

2019, C- 619/18 – *Commission v. Poland*. The Court rightly observed, in paras. 42 et seq.: "[t]he European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them, EU law being based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, those same values. That premiss both entails and justifies the existence of mutual trust between the Member States and, in particular, their courts that those values upon which the European Union is founded, including the rule of law, will be recognised, and therefore that the EU law that implements those values will be respected". Indeed, the principle of irremovability is one central aspect of judicial independence; see e.g. Matthias Weller, Europäische Mindeststandards für Spruchkörper: Zur richterlichen Unabhängigkeit, in Christoph Althammer/Matthias Weller, Europäische Mindeststandards für Spruchkörper, Tübingen 2017, pp. 3 et seq.). Later, and perhaps even more worrying, further steps of the justice "reform" subjected judgments to a disciplinary control by political government authorities, see CJEU, Ordonnance de la Cour (grande chambre), 8 avril 2020, C?791/19 R (not yet available in English; for an English summary see the Press Release of the Court). The European Court of Human Rights is currently stepping in – late, but may be not yet too late. The first communications about filings of cases concerning the independence of Poland's judiciary came up only in 2019. For an overview of these cases and comments see e.g. Adam Bodnar, Commissioner for Human Rights of the Republic of Poland and Professor at the University of the Social Sciences and Humanities in Warsaw, Strasbourg Steps in, Verfassungsblog, 7 July 2020.

IV. What are the other Member States doing?

1. The Netherlands: Suspending cooperation

One of the latest reactions comes from the Netherlands in the context of judicial cooperation in criminal matters, namely in respect to the execution of a European Arrest Warrant under **Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.** In two rulings of 24 March and one of 26 March 2020 (ECLI:NL:RBAMS:2020:1896, 24 March 2020; ECLI:NL:RBAMS:2020:1931, 24 March 2020; ECLI:NL:RBAMS:2020:2008, 26 March 2020) the *Rechtbank* Amsterdam stopped judicial cooperation under this instrument and ordered the

prosecutor and the defence to take the entering into force of the latest judicial reforms in Poland into account before deciding to transfer a person to Poland. For a comment on this case line see Petra Bárd, John Morijn, Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings (Part II). Marta Requejo Isidro, on the EAPIL's blog yesterday, rightly asked the question what a decision to reject judicial cooperation in criminal matters would mean in relation to civil matters. For myself, the answer is clear: if the fundaments for mutual trust are substantially put into question (see above on the ongoing actions by the Commission and the proceedings before the CJEU since 2016 – for a summary see here), the Member States may and must react themselves, e.g. by broadening the scope and lowering the standards of proof for public policy violations, see Matthias Weller, Mutual Trust: In search of the future of European Private International Law, Journal of Private International Law 2015, pp. 65, at pp. 99 et seq.).

2. Germany: Pushing standards beyond reasonable degrees

Against these dramatic developments, the decision of the Regional Court of Erfurt, Germany, of 15 June 2020, Case C-276/20, for a preliminary reference about the independence of German judges appears somewhat suprising. After referring a question of interpretation of EU law in relation to the VW Diesel scandal, the referring court added the further, and unrelated question: „Is the referring court an independent and impartial court or tribunal for the purpose of Article 267 TFEU, read in conjunction with the third sentence of Article 19(1) TEU and Article 47(2) of the Charter of Fundamental Rights of the European Union?" The referring court criticizes blurring lines between the executive and the judiciary – which is the very issue in Poland. It explained:

„The referring court, a civil court in the Thuringia region of Germany, shares the concerns and doubts of the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden, Germany) as to the institutional independence of the German courts and their right of reference pursuant to Article 267 TFEU … . The court refers to the question referred by the Administrative Court, Wiesbaden, on 28 March 2019 and the proceedings pending before the Court of Justice of the European Union (… C-272/19 …). (…). According to the [CJEU's] settled case-law, a court must be able to exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking

orders or instructions from any source whatsoever (see judgment of 16 February 2017, C-503/15, paragraph 36 et seq.). Only then are judges protected from external intervention or pressure liable to jeopardise their independence and influence their decisions. Only that can dispel any reasonable doubt in the mind of an individual seeking justice as to the imperviousness of the courts to external factors and their neutrality with respect to the conflicting interests before them.

The national constitutional situation in Germany and in Thuringia does not meet those standards (see, with regard to the lack of independence of the German prosecution service, judgment of 27 May 2019, C-508/18). It only recognises a functional judicial independence in the key area of judicial activity, which is a personal independence. However, that is not sufficient to protect judges from all forms of external influence. The additional institutional independence of the courts required for that is by no means guaranteed. However, the independence of individual judges is guaranteed by the independence of the judiciary as a whole.

In Thuringia, as in every other federal state in Germany, the executive is responsible for the organisation and administration of the courts and manages their staff and resources. The Ministries of Justice decide on the permanent posts and the number of judges in a court and on the resources of the courts. In addition, judges are appointed and promoted by the Ministers for Justice. The underlying assessment of judges is the responsibility of the ministries and presiding judges who, aside from any judicial activity of their own, must be regarded as part of the executive. The Ministers for Justice and the presiding judges who rank below them administratively and are bound by their instructions act in practice as gatekeepers. In addition, the presiding judges exercise administrative supervision over all judges.

The formal and informal blurring of numerous functions and staff exchanges between the judiciary and the executive are also typical of Germany and Thuringia. For example, judges may be entrusted with acts of administration of the judiciary. The traditional practice of seconding judges to regional or federal ministries is one particular cause for concern. Seconded judges are often integrated into the ministerial hierarchy for years. It is also not unusual for them to switch back and forth between ministries and courts and even between the status of judge and the status of civil servant.

The judge sitting alone who referred the question has personally been seconded three times (twice to the Thuringia Ministry of Justice and once to the Thuringia State Chancellery).

This exchange of staff between the executive and the judiciary infringes both EU law and the Bangalore Principles of Judicial Conduct applied worldwide (see Commentary on the Bangalore Principles of Judicial Conduct, www.unodc.org, p. 36: '*The movement back and forth between high-level executive and legislative positions and the judiciary promotes the very kind of blurring of functions that the concept of separation of powers intends to avoid.*').

Most importantly, these informal practices sometimes appear to be arbitrary. While the courts guarantee the absence of arbitrariness outwardly, informal practices may expose judges to the threat of arbitrariness and administrative decisionism. Inasmuch as 'expression-of-interest' procedures have been initiated recently, including in Thuringia, as awareness of the problem increases, for example on secondments and trial periods in higher courts or on the management of working groups for trainee lawyers, there is still no justiciability (enforceability).

All this gives the executive the facility to exert undue influence on the judiciary, including indirect, subtle and psychological influence. There is a real risk of 'reward' or 'penalty' for certain decision-making behaviours (see Bundesverfassungsgericht (Federal Constitutional Court, Germany) order of 22 March 2018, 2 BvR 780/16, … , paragraphs 57 and 59)."

The close interlock in Germany between the judiciary and the executive and the hierarchical structure and institutional dependence of the judiciary are rooted in the authoritarian state of 19th century Germany and in the Nazi principle of the 'führer'. In terms of administrative supervision, the entire German judiciary is based on the president model (which under National Socialism was perverted and abused by applying the principle of the 'führer' to the courts …)."

These submissions appear to go way over the top: mechanisms to incentivise (which inenvitably contain an aspect of indirect sanction) are well-justified in a judiciary supposed to function within reasonable time limits; comparing the voluntary (!) temporary placement of judges in justice ministries or other positions of the government (or, as is regularly the case, in EU institutions), while

keeping a life-time tenure under all circumstances (!) can hardly be compared or put into context with methods of the Nazi regime at the time, whereas cutting down currently running periods of judges and disciplinary sanctions in relation to the contents and results of judgments evidently and clearly violate firmly established principles of judicial independence, as well as a direct influence of the government on who is called to which bench. Yet, the German reference illustrates how sensitive the matter of judicial independence is being taken in some Member States – and how far apart the positions within the Member States are. It will be a delicate task of the EU to come to terms with these fundamentally different approaches within the operation of its systems of mutual recognition based on mutual trust. Clear guidance is needed by the CJEU in the judicial dialogue between Luxemburg and the national courts. One recommendation put on the table is to re-include the Member States in its trust management, i.e. the control of compliance with the fundaments of judicial cooperation accordingly; concretely: to re-allow second and additional reviews by the courts of the receiving Member States in respect to judicial acts of a Member State against which the EU has started proceedings for violation of the rule of law in respect to the independence of its judiciary.

Lord Jonathan Mance on the future relationship between the United Kingdom and Europe after Brexit

Nicole Grohmann, a doctoral candidate at the Institute for Comparative and Private International Law, Dept. III, at the University of Freiburg, has kindly provided us with the following report on a recent speech by Lord Jonathan Mance.

On Wednesday, 15 July 2020, the former Deputy President of the Supreme Court of the United Kingdom (UKSC), Lord Jonathan Mance, presented his views on the

future relationship between the United Kingdom and Europe after Brexit in an online event hosted by the *Juristische Studiengesellschaft Karlsruhe*. This venerable legal society was founded in 1951; its members are drawn from Germany's Federal Constitutional Court, the Federal Supreme Court, the office of the German Federal Prosecutor, from lawyers admitted to the Federal Supreme Court as well as judges of the Court of Appeals in Karlsruhe and the Administrative Court of Appeals in Mannheim. In addition, the law faculties of the state of Baden-Württemberg (Heidelberg, Freiburg, Tübingen, Mannheim, Konstanz) are corporate members. Due to Corona-induced restrictions, the event took place in the form of a videoconference attended by more than eighty participants.

After a warm welcome by the President of the *Juristische Studiengesellschaft*, Dr. Bettina Brückner (Federal Supreme Court), Lord Mance shared his assessment of Brexit, drawing on his experience as a highly renowned British and internationally active judge and arbitrator. In the virtual presence of judges from the highest German courts as well as numerous German law professors and scholars, Lord Mance elaborated – in impeccable German – on the past and continuing difficulties of English courts dealing with judgments of the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) and the future legal struggles caused by the end of the transition period on the withdrawal of the United Kingdom from the European Union on 31 December 2020. Lord Mance's speech was followed by an open discussion regarding the most uncertain political and legal aspects of Brexit.

In his speech, Lord Mance highlighted the legal difficulties involved in the withdrawal of his country from the European Union. Since Lord Mance himself tends to picture the British as being traditional and generally pragmatic, he named Brexit as a rare example of a rather unpragmatic choice. Especially with regard to the role of the United Kingdom as a global and former naval power, Lord Mance considered Brexit a step backwards. Besides the strong English individualism, which has evolved over the past centuries, the United Kingdom did not only act as an essential balancing factor between the global players in the world, but also within the European Union. Insofar, the upcoming Brexit is a resignation of the United Kingdom from the latter position.

Subsequently, Lord Mance focussed on the role of the European courts, the European Court of Justice and the European Court of Human Rights and their

judgments in the discussions leading to Brexit. Both European courts gained strong importance and influence in the UK within the first fifteen years of the 21st century. Especially, the ECtHR is of particular importance for the British legal system since the Human Rights Act 1998 incorporated the European Convention on Human Rights into British law. Lord Mance described the Human Rights Act 1998 as a novelty to the British legal system, which lacks a formal constitution and a designated constitutional court. Apart from the Magna Charta of 1215 and the Bill of Rights of 1689, the British constitutional law is mainly shaped by informal constitutional conventions instead of a written constitution such as the German Basic Law. Following the Human Rights Act 1998 and its fixed catalogue of human rights, the British courts suddenly exercised a stricter control over the British executive, which initially gave rise to criticism. Even though the British courts are not bound by the decisions of the ECtHR following the Human Rights Act 1998, the British participation in the Council of Europe soon started a dialogue between the British courts and the ECtHR on matters of subsidiary and the ECtHR's margin of appreciation. The UK did not regard the growing caseload of the ECtHR favourably. Simultaneously, the amount of law created by the institutions of the European Union increased. Lord Mance stressed the fact that in 1973, when the United Kingdom joined the European Economic Community, the impact of the ECJ's decision of 5 February 1963 in *Van Gend & Loos*, C-26/62, was not taken into account. Only in the 1990s, British lawyers discovered the full extent and the ramifications of the direct application of European Union law. The binding nature of the ECJ's decisions substantiating said EU law made critics shift their attention from Strasbourg to Luxembourg.

In line with this development, Lord Mance assessed the lack of a constitutional court and a written constitution as the main factor for the British hesitance to accept the activist judicial approach of the ECJ, while pointing out that Brexit would not have been necessary in order to solve these contradictions. The EU's alleged extensive competences, the ECJ's legal activism and the inconsistency of the judgments soon became the primary legal arguments of the Brexiteers for the withdrawal from the EU. Especially the ECJ's teleological approach of reasoning and the political impact of the judgments were mentioned as conflicting with the British cornerstone principles of parliamentary sovereignty and due process. Lord Mance stressed that the so-called *Miller* decisions of the Supreme Court in *R (Miller) v Secretary of State* [2017] UKSC 5 and *R (Miller) v The Prime Minister, Cherry v Advocate General for Scotland* (Miller II) [2019] UKSC 41,

dealing with the parliamentary procedure of the withdrawal from the EU, are extraordinary regarding the degree of judicial activism from a British point of view. In general, Lord Mance views British courts to be much more reluctant compared to the German Federal Constitutional Court in making a controversial decision and challenging the competences of the European Union. As a rare exception, Lord Mance named the decision in *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3, in which the UKSC defended the British constitutional instruments from being abrogated by European law. Indeed, Lord Mance also expressed scepticism towards the jurisprudential approach of the ECJ, because inconsistences and the need of political compromise could endanger the foreseeability and practicability of its decisions. Especially with regard to the recent decision of the German Constitutional Court of 5 May 2020 on the European Central Bank and the Court's approach to *ultra vires*, Lord Mance would have welcomed developing a closer cooperation between the national courts and the ECJ regarding a stricter control of the European institutions. Yet this important decision came too late to change Brexiteers' minds and to have a practical impact on the UK.

Finally, Lord Mance turned to the legal challenges resulting from the upcoming end of the transition period regarding Brexit. The European Union (Withdrawal) Acts 2018 and 2020 lay down the most important rules regarding the application of EU instruments after the exit day on 31 December 2020. In general, most instruments, such as the Rome Regulations, will be transposed into English domestic law. Yet, Lord Mance detected several discrepancies and uncertainties regarding the scope of application of the interim rules, which he described as excellent bait for lawyers. Especially two aspects mentioned by Lord Mance will be of great importance, even for the remaining Member States: Firstly, the British courts will have the competence to interpret European law, which continues to exist as English domestic law, without the obligation to ask the ECJ for a preliminary ruling according to Art. 267 TFEU. In this regard, Lord Mance pointed out the prospective opportunity to compare the parallel development and interpretation of EU law by the ECJ and the UKSC. Secondly, Lord Mance named the loss of reciprocity guaranteed between the Member States as a significant obstacle to overcome. Today, the United Kingdom has to face the allegation of 'cherry picking' when it comes to the implementation of existing EU instruments and the ratification of new instruments in order to replace EU law, which will no longer be applied due to Brexit. Especially with regard to the judicial cooperation

in civil and commercial matters and the recast of the Brussels I Regulation, the United Kingdom is at the verge of forfeiting the benefit of the harmonized recognition and enforcement of the decisions by its courts in other Member States. In this regard, Lord Mance pointed out the drawbacks of the current suggestion for the United Kingdom to join the Lugano Convention, mainly because it offers no protection against so-called torpedo claims, which had been effectively disarmed by the recast of the Brussels I Regulation – a benefit particularly cherished by the UK. Instead, Lord Mance highlighted the option to sign the Hague Convention of 30 June 2005 on Choice of Court Agreements which would allow the simplified enforcement of British decisions in the European Union in the case of a choice of court agreement. Alternatively, Lord Mance proposed the ratification of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments. So far, only Uruguay and Ukraine have signed this new convention. Nevertheless, Lord Mance considers it as a valuable option for the United Kingdom as well, not only due to the alphabetical proximity to the other signatories.

Following his speech, the event concluded with a lively discussion about the problematic legal areas and consequences of Brexit, which shall be summarised briefly. Firstly, the President of the German Supreme Court Bettina Limperg joined Lord Mance in his assessment regarding the problem of jurisprudential inconsistency of the ECJ's decisions. However, like Lord Mance she concluded that the Brexit could not be justified with this argument. Lord Mance pointed out that in his view the ECJ was used as a pawn in the discussions surrounding the referendum, since the Brexiteers were unable to find any real proof of an overarching competence of the European Union. Secondly, elaborating on the issue of enforceability, Lord Mance added that he considers the need for an alternative to the recast of the Brussels I Regulation for an internationally prominent British court, such as the London Commercial Court, not utterly urgent. From his practical experience, London is chosen as a forum mainly for its legal expertise, as in most cases enforceable assets are either located in London directly or in a third state not governed by EU law. Hence, Brexit does not affect the issue of enforceability either way. Finally, questions from a constitutional perspective were raised regarding the future role of the UKSC and its approach concerning cases touching on former EU law. Lord Mance was certain that the UKSC's role would stay the same regarding its own methodological approach of legal reasoning. Due to the long-standing legal relationship, Lord Mance

anticipated that the legal exchange between the European courts, UK courts and other national courts would still be essential and take place in the future.

In sum, the event showed that even though Brexit will legally separate the United Kingdom from the European Union, both will still be closely linked for economic and historical reasons. As Lord Mance emphasized, the UK will continue to work with the remaining EU countries in the Council of Europe, the Hague Conference on PIL and other institutions. Further, the discrepancies in the Withdrawal Acts will occupy lawyers, judges and scholars from all European countries, irrespective of their membership in the European Union. Lastly, the event proved what Lord Mance was hoping to expect: The long-lasting cooperation and friendship between practitioners and academics in the UK and in other Member States, such as Germany, is strong and will not cease after Brexit.

The end of fostering outdated injustice to children born outside marriage through reparation of Nazi-expatriation acts: Ruling of the German Constitutional Court of 20 May 2020 (2 BvR 2628/18)

Marie-Luisa Loheide is a doctoral candidate at the University of Freiburg who writes her dissertation about the relationship between the status of natural persons in public and private international law. She has kindly provided us with her thoughts on a recent ruling by the German Constitutional Court.

According to Article 116 para. 2 of the German Basic Law *(Grundgesetz – GG)*, every descendant of former German citizens of Jewish faith who have been forcibly displaced and expatriated in a discriminatory manner by the Nazi-regime

is entitled to attain German citizenship upon request. This rule has been incorporated in the Basic Law since 1949 as part of its confrontation with the systematic violations of human rights by the Nazi-regime and is therefore meant to provide reparation by restoring the *status quo ante*.

Descendants *("Abkömmlinge")* as referred to in Article 116 para. 2 are children, grandchildren and all future generations without any temporal constraint. Regardless of their parents' choice of citizenship, they have a personal right to naturalisation which is exercised upon request by reactivation of the acquisition of citizenship *iure sanguinis*. This very wide scope is legitimated by the striking injustice done by the Nazi-regime. Yet, according to the settled case law of the Federal Administrative Court, it had been limited by a strict "but-for" test: in order to solely encompass those people affected by this specific injustice. This meant that the descendant must hypothetically have possessed German citizenship according to the applicable citizenship law at the time of its acquisition which is usually the person's birth. To put it more clearly, one had to ask the following hypothetical question: Would the descendant be a German citizen if his or her ancestor had not been expatriated by the Nazis?

Exactly this limiting prerequisite was the crucial point of the matter decided upon by the German Constitutional Court on 20 May 2020. In the underlying case, the hypothetical question described above would have had to be answered in the negative: Until its revocation in 1993, German citizenship law stated that children of an unmarried German father and a mother of other citizenship did not acquire the German citizenship of their father but only that of their mother, contrary to today's principle of *ius sanguinis*-acquisition. As *in casu* the daughter of a forcibly displaced and expatriated former German emigrant of Jewish faith and a US-American mother was born outside marriage in 1967, she was denied the acquisition of the German citizenship. Whereas this was not criticised by the administrative courts seised, the German Constitutional Court in its ruling classified the denial as an obvious violation of the principle of equal treatment of children born within and outside marriage underlying Article 6 para. 5 GG as well as the principle of equal treatment of women and men according to Article 3 para. 2 GG, as alleged by the plaintiff. In its reasoning, the Court emphasised that an exception from the principle of equal treatment of children born outside marriage could only be made if absolutely necessary. This corresponds to the case-law of the European Court of Human Rights on Article 14 of the ECHR that a difference

in treatment requires “very weighty reasons”. The former non-recognition of the family relationship between an unmarried father and his child, however, did obviously contradict the stated constitutional notion without being justified by opposing constitutional law. Out of two possible interpretations of “descendant” as referred to in Article 116 para. 2 GG the court must have chosen the one that consorts best with the constitution. According to the Constitutional Court, the more generous interpretation of descendant also prevents a perpetuation of the outdated notion of inferiority of children born outside marriage through Article 116 para 2 GG and corresponds to its purpose of reparation.

As the notion of inferiority of children born outside marriage has fortunately vanished, a clarifying judgment was highly overdue and is therefore most welcome. It is not acceptable that outdated notions are carried to the present through a provision of the Basic Law that is meant to provide reparation of Nazi crimes. Especially in post-Brexit times, the question dealt with has become more and more urgent with respect to people reclaiming their German citizenship in order to maintain their Union citizenship and the rights pertaining to it (see here).

In regard to conflicts law, this clarification of a key question of citizenship law is relevant to the determination as a preliminary issue (incidental question or *Vorfrage)* when nationality is used as a connecting factor. The judgment is likely to lead to more cases of dual citizenship that are subject to the ambiguous conflicts rule of Art. 5 para. 1 sentence 2 EGBGB.

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 4/2020: Abstracts

The latest issue of the „Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)“ features the following articles:

E. Schollmeyer: **The effect of the entry in the domestic register is governed**

by foreign law: Will the new rules on cross-border divisions work?

One of the most inventive conflict-of-law rules that secondary law of the European Union has come up with, can be discovered at a hidden place in the new Mobility Directive. Article 160q of the Directive assigns the determination of the effective date of a cross-border division to the law of the departure Member State. The provision appears as an attempted clearance of the complicated brushwood of the registration steps of a cross-border division of a company. This article explores whether the clearance has been successful.

F. Fuchs: **Revolution of the International Exchange of Public Documents: the Electronic Apostille**

The Apostille is of utmost importance for the exchange of public documents among different nations. The 118 states currently having acceded to the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents issue, altogether, several millions of Apostilles per year in order to certify the authenticity of public documents emanating from their territory. Some years ago, the electronic Apostille was implemented, which allows states to issue their Apostilles as an electronic document. Interested parties may verify the authenticity of such an electronic document via electronic registers which are accessible on the internet. Whereas Germany has not yet acceded to that new system, 38 other jurisdictions already have done so.

G. Mäsch: **Third Time Lucky? The ECJ decides (again) on the place of jurisdiction for cartel damages claims**

In three decisions now the ECJ has dealt with the question of where the "place of the causal event" and the "place where the damage occurred" are to be located in order to determine, based on the ubiquity principle enshrined in Article 7(2) of the Brussels Ibis Regulation, the place of jurisdiction for antitrust damages (tort) claims. In this paper the overall picture resulting from the ECJ decisions in CDC Hydrogen Peroxides, flyLAL-Lithuanian Airlines and now Tibor-Trans is analysed. The place of the "conclusion" of a cartel favoured by the ECJ to determine the place of the causal event is not only unsuitable in the case of infringements of Art. 102 TFEU (abuse of a dominant market position), but also in cases of infringement of Art. 101 TFEU (prohibition of cartels). The same criticism applies to the ECJ's localisation of the place where the damage occurred at the place

where the competition is impaired and the victim of the cartel or the abuse of the dominant market position (claimant) sustained the financial loss. In this paper it is suggested to dock the place of the causal event to the actual seat(s) of the cartel offender(s) and the place where the damage occurred exclusively to the affected market.

J. Kleinschmidt: **Jurisdiction of a German court to issue a national certificate of succession ('Erbschein') is subject to the European Succession Regulation**

The European Succession Regulation provides little guidance as to the relationship between the novel European Certificate of Succession and existing national certificates. In a case concerning a German "Erbschein", the CJEU has now clarified an important aspect of this relationship by holding that jurisdiction of a Member State court to issue a national certificate is subject to the harmonised rules contained in Art. 4 et seq. ESR. This decision deserves approval because it serves to avoid, as far as possible, the difficult problems ensuing from the existence of conflicting certificates from different Member States. It remains, however, an open question whether the decision can be extended to national certificates issued by notaries.

K. Thorn/K. Varón Romero: **The Qualification of the Lump-Sum Compensation for Gains in the Event of Death Pursuant to Section 1371 (1) of the German Civil Code (BGB) in Accordance with the Regulation (EU) No. 650/2012**

In "Mahnkopf" the CJEU had to decide whether the material scope of application of the Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4/7/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession also covers national provisions which, like Section 1371 (1) of the German Civil Code (BGB), grant the surviving spouse a lump-sum compensation for gains after the death of the other spouse by increasing his or her inheritance. Hence, this was a question of the qualification of Section 1371 (1) BGB, which had been discussed controversially in Germany for a long time and had only been clarified on a national level in 2015. The CJEU decided in favour of a qualification under inheritance law at the level of Union law, and thus took a view which contradicts

that of the Federal Court of Justice (BGH) for national conflict of laws. The authors agree with the result of the CJEU but criticise the methodical approach to the implementation of the functional qualification. The article identifies the new questions and problems that will now have to be clarified by the German courts as a result of the CJEU decision and in this context analyses two recent decisions of Higher Regional Courts. The authors note that in the context of Section 1371 (1) BGB, the question of the (temporal) scope of application of the Regulation is likely to become more important in the future, asotherwise, in their opinion, the BGH case law will still have to be considered. Accordingly, in the opinion of the authors, for future German jurisdiction much will depend on whether the BGH adapts its previous case law to that of the CJEU.

P. Mankowski: **Recognition and free circulation of names 'unlawfully' acquired in other Member States of the EU**

The PIL of names is one of the strongholds of the recognition principle. The touchstone is whether names "unlawfully" acquired in other Member States of the EU must also be recognised. A true recognition principle implies that any kind of révision au fond is interdicted. Yet any check on the "lawfulness" or "unlawfulness" of acquiring a certain name abroad amounts to nothing else than a révision au fond.

M. Gernert: **Termination of contracts of Iranian business relations due to US sanctions and a possible violation of the EU Blocking Regulation and § 7 AWV**

US secondary sanctions are intended to subject European economic operators to the further tightened US sanctions regime against Iran. In contrast, the socalled Blocking Regulation of the European Union is intended to protect European companies from such extraterritorial regulations and prohibits to comply with certain sanctions. In view of the great importance of the US market and the intended uncertainty in the enforcement of US sanctions, many European companies react by terminating contracts with Iranian business partners in order to rule out any risk of high penalties by US authorities. This article examines if and to what extent the Blocking Regulation and § 7 AWV influence the effectiveness of such terminations.

B. Rentsch: **Cross-border enforcement of provisional measures – lex fori as**

a default rule

Titles from provisional measures are automatically recognised and enforced under the Brussels I-Regulations. In consequence, different laws will apply to a title's enforceability (country of the rendering of the provisional measure) and ist actual enforcement (country where the title is supposed to take effect). This sharp divide falls short of acknowledging that questions of enforceability and the actual conditions of enforcement are closely entangled in preliminary measure proceedings, especially the enforcement deadline under Sec. 929 para. 2 of the German Code of Civil Procedure (ZPO). The European Court of Justice, in its decision C-379/17 (Societ Immobiliare Al Bosco Srl) refrained from creating a specific Conflicts Rule for preliminary measures and ruled that the deadline falls within the scope of actual enforcement. This entails new practical problems, especially with regard to calculating the deadline when foreign titles are involved.

A. Spickhoff: **"Communication torts" and jurisdiction at the place of action**

Communication torts in more recent times are mostly discussed as "internet torts". Typically, such torts will be multi-state torts. In contrast, the current case of the Austrian Supreme Court concerns the localisation of individual communication torts. The locus delicti commissi in such cases has been concretised by the Austrian Supreme Court according to general principles of jurisdiction. The locus delicti commissi, which is characterised by a falling apart of the place of action and place of effect, is located at the place of action as well as at the place of effect. In the event of individual communication torts, the place of effect is located at the victim's place of stay during the phone call or the message arrival. The place of action has to be located at the sending location. On the other hand, in case of claims against individual third parties, the place of effect is located at the residence of the receiver. The Austrian Supreme Court remitted the case to the lower court for establishing the relevant facts for jurisdiction in respect of the denial of the plaintiff's claim. However, the court did not problematise the question of so-called "double-relevant facts". The European Court of Justice, in line with the judicial practice in Austria and Germany, has accepted a judicial review of the facts on jurisdiction only with respect to their conclusiveness.

R. Rodriguez/P. Gubler: **Recognition of a UK Solvent Scheme of Arrangement in Switzerland and under the Lugano Conventions**

In recent years, various European companies have made use of the ability to restructure their debts using a UK solvent scheme of arrangement, even those not having their seat in the UK. The conditions and applicable jurisdictional framework under which the scheme of arrangement can be recognised in jurisdictions outside the UK are controversial. In Switzerland doctrine and jurisprudence on the issue are particularly scarce. This article aims to clarify the applicable rules of international civil procedural law as well as the requirements for recognition of a scheme of arrangement in Switzerland. It is held that recognition should be generally granted, either according to the 2007 Lugano Convention or, in a possible "no-deal Brexit" scenario, according to the national rules of private international law, or possibly even the 1988 Lugano Convention.

T. Helms: **Foreign surrogate motherhood and the limits of its recognition under Art. 8 ECHR**

On request of the French Court of Cassation the Grand Chamber of the European Court of Human Rights has given an advisory opinion on the recognition of the legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and its intended mother who is not genetically linked to the child. It held that Art. 8 ECHR requires that domestic law provides a possibility of recognition of a legal parent-child relationship with the intended mother. But it falls within states' margin of appreciation to choose the means by which to permit this recognition, the possibility to adopt the child may satisfy these requirements.

A few thoughts on the Guide to Good Practice on the grave-risk exception (Art. 13(1)(b)) under the

Child Abduction Convention, through the lens of human rights (Part I)

Written by Mayela Celis – The comments below are based on the author's doctoral thesis entitled "The Child Abduction Convention – four decades of evolutive interpretation" at UNED

As mentioned in a previous post, after many years in the making, the *Guide to Good Practice on the grave-risk exception (Article 13(1)(b)) under the Child Abduction Convention* (grave-risk exception Guide or Guide) has been published. Please refer to our previous posts here and here. This Guide to Good Practice deals with a very controversial topic indeed. The finalisation and approval of this Guide is without a doubt a milestone and thus, this Guide will be of great benefit to users.

For ease of reference, I include the relevant provision dealt with in the Guide. Article 13(1)(b) of the Child Abduction Convention sets out the following: "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that – […] b) there is a ***grave risk*** that his or her return would expose the child to ***physical or psychological harm*** or otherwise place the child in an ***intolerable situation***. […]" (our emphasis).

The comments on the grave-risk exception Guide will be divided into two posts. In the present post, I will analyse the Guide exclusively through the lens of human rights. In the second post, I will comment on some specific legal issues of the Guide but will also touch upon on some aspects of human rights law. These posts reflect only my personal opinion. Given the controversial nature of this topic, there might be other different and valid opinions out there so please bear that in mind.

At the outset, it should be noted that this Guide is only advisory in nature and thus nothing in the Guide may be construed as binding upon Contracting Parties to the 1980 Convention (and any other HCCH Convention) and their courts (paras

7 and 8 of the Guide) Therefore, courts have enough leeway to supplement it and take on board what they see fit.

Human rights law is gaining importance every day, also in private international law cases. However, apart from some fleeting references to the United Nations Convention on the Rights of the Child (pp. 16 and 56), there are no references to human rights case law in the Guide. Indeed, the increasing number of judgments of the European Court of Human Rights (ECtHR) is not mentioned in the Guide, even though dozens of these judgments have dealt with the grave-risk exception (Art. 13(1)(b)) of the Child Abduction Convention); thus there appears to be an "elephant in the room". We will try to respond in this post to the following questions: what has been the contribution of the ECtHR on this topic and what are the possible consequences of the absence of references to human rights case law in the Guide.

In this regard, I refer readers to our previous post regarding the interaction of human rights and the Child Abduction Convention here and my article entitled: The controversial role of the ECtHR in the interpretation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, with special reference to *Neulinger and Shuruk v. Switzerland* and *X v. Latvia* (in Spanish only but with abstracts in English and Portuguese in the Anuario Colombiano de Derecho Internacional). To view it, click on "*Ver artículo – descargar artículo*", currently pre-print version, published online in March 2020.

Before going into the substance of this post, it is perhaps important to clarify why the case law of the ECtHR in child abduction matters is of such great importance in Europe and beyond, perhaps for the benefit of our non-European readers. First, in addition to being binding upon ***47 States*** party to the European Convention on Human Rights, *which represent about half of the total number of Contracting Parties to the Child Abduction Convention (45%)*, the case law of the *ECtHR not only applies to child abduction cases between European States*. It will also apply, for example, if the requested State in child abduction proceedings is a party to the European Convention on Human Rights and the requesting State is not. Indeed, the geographical location of the requesting State and whether it is a party to the European Convention on Human Rights are not relevant. See for example, *Neulinger and Shuruk v. Switzerland* (Application No. 41615/07), Grand Chamber, where the requesting State was Israel, and *X v. Latvia* (Application No. 27853/09), Grand Chamber, where the requesting State was Australia, both of

which are not a party to the European Convention. Secondly, not only European citizens can launch proceedings before the ECtHR. All of this is nicely summarised in Article 1 of the European Convention on Human Rights, which sets out that "The High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention" (our emphasis).

In *X v. Latvia*, the Grand Chamber of the ECtHR has established a legal standard in the handling of child abduction cases where the 13(1)(b) exception has been raised (and indeed other exceptions of the Child Abduction Convention such as Articles 12, 13(1)(a), 13(2) and 20), which is the following:

"106. The Court [ECtHR] considers that a harmonious interpretation of the European Convention and the Hague Convention (see paragraph 94 above) can be achieved provided that the following two conditions are observed. Firstly, ***the factors*** capable of constituting an exception to the child's immediate return in application of ***Articles 12, 13 and 20 of the Hague Convention***, particularly where they are raised by one of the parties to the proceedings, ***must genuinely be taken into account by the requested court. That court must then make a decision that is sufficiently reasoned on this point***, in order to enable the Court to verify that those questions have been effectively examined. Secondly, ***these factors must be evaluated in the light of Article 8 of the Convention*** (see *Neulinger and Shuruk*, cited above, § 133)." (our empahsis)

[…]

"118. As to the need to comply with the short time-limits laid down by the Hague Convention and referred to by the Riga Regional Court in its reasoning (see paragraph 25 above), the Court reiterates that while Article 11 of the Hague Convention does indeed provide that the judicial authorities must act expeditiously, this does not exonerate them from the duty to undertake an ***effective examination*** of allegations made by a party on the basis of one of the exceptions expressly provided for, namely Article 13 (b) in this case." (our emphasis)

In addition, the ECtHR indicates that domestic courts must conduct "meaningful checks" to determine whether a grave risk exists (paragraph 116 of *X v. Latvia*), and to do so a court may obtain evidence on its own motion if for example, this is

allowed under its internal law.

Importantly, this case also underlines the need to secure "tangible" measures of protection for the return of the child (paragraph 108 of *X v. Latvia*).

Moreover, there are *at least two issues in the Guide* that could have benefited from a human rights analysis, namely the incarceration of (mainly) the abducting mother upon returning the child to the State of habitual residence and the separation of siblings.

With regard to the first issue, it should be noted that the fact that the mother will be ***incarcerated upon returning the child*** to the State of habitual residence could have serious consequences for the child. The Guide has correctly explained the different ways in which such an outcome could be avoided. However, the Guide concludes with the following: "*The fact that the charges or the warrant cannot be withdrawn is generally not sufficient to engage the grave risk exception*" (paragraph 67).

In my view, where *objective* reasons have been raised by the mother to refuse to return to the State of habitual residence, such as incarceration, there should be a human rights analysis in the light of Article 8 of the European Convention on Human Rights. While there might be some cases where incarceration may not be sufficient to refuse a return, there might be other cases where this would place the taking parent and the child in grave risk of harm or intolerable situation. By way of example, objective reasons for not returning could include a long incarceration or a disproportionate sanction, the fact the other parent cannot take care of the child upon the incarceration of the other parent, the inability to contest custody while imprisoned, etc. According to the ECtHR, an analysis should be undertaken as to whether these actions are necessary in a "democratic society". Accordingly, the decision of the mother not to return based on a whim should not be considered seriously. See, for example, the ECtHR cases, *Neuliger and Shuruk v. Switzerland* (Application No. 41615/07), Grand Chamber (as clarified by X v. Latvia (Application No. 27853/09), Grand Chamber)), and *B. c. Belgique* (Requête No. 4320/11). Arresting and handcuffing the mother at the airport has undoubtedly a tremendous impact on children; so all efforts should be geared via judicial co-operation and direct judicial communications to make sure that charges are dropped as mentioned in the Guide (first part of paragraph 67 of the Guide).

As regards the second scenario, it is important to note that the ***separation of siblings when one of them has successfully objected to being return under Article 13(2) of the Child Abduction Convention*** may inflict harm on the children and may be difficult to enforce. The Guide noted that every child should be considered individually and concluded that "*Consequently, the separation of the siblings resulting from the non-return of one child (regardless of the legal basis for the non-return) does not usually result in a grave risk determination for the other child*" (paragraph 74).

According to article 12 of the UN Convention on the Rights of the Child, the views of the child should be given due weight in accordance with the age and maturity of the child. By ordering the return of usually the younger sibling(s) and forcing the mother to make a choice between returning with one child and staying with the child who objected, a judge could not be giving enough weight to the views of the child objecting to being returned. This is especially the case when we are dealing with full siblings and all are subject to return proceedings. In my view, and given that the reason for not returning are the views, in particular, of the older child, this should be factored in when the judge exercises his or her discretion. See, for example, the ECtHR case, *M.K. c. Grèce* (Requête n° 51312/16). Obviously, if the separation of siblings is due to the action of the mother by not wanting to return, then a separation of the siblings would most likely not be a ground for refusing the return.

The underlying basis of the above is that the Child Abduction Convention is for the protection of children and not to vindicate the position of adults who are immersed in a legal battle or to merely sanction the abductor.

The standard in *X v. Latvia* should be kept in mind when dealing with international child abduction cases. Given that the grave-risk exception Guide is silent on this, practitioners would need to ***supplement the Guide with relevant literature and case law on human rights*** if they are dealing with a case in Europe. Practitioners outside Europe having a child abduction case which is being resolved in Europe may need to do the same in order to know what their possibilities of success and options are.

In this day and age, and as mentioned by the honorable Eduardo Vio Grossi, judge of the Inter-American Court of Human Rights, in a recent virtual forum ("Challenges to Inter-American Law"), the focus should not only be on sanctioning

States for violations of human rights but we should assist States in not getting sanctioned by providing the necessary guidance and if possible, paving the way.

Application of the Brussels I bis Regulation ratione materiae, interim relief measures and immunities: Opinion of AG Saugmandsgaard Øe in the case Supreme Site and Others, C-186/19

Written by María Barral Martínez, a former trainee at the European Court of Justice (Chambers of AG Campos Sánchez-Bordona) and an alumna of the University of Amsterdam and the University of Santiago de Compostela

The Hoge Raad Neederlanden (The Dutch Supreme Court), the referring court in the case Supreme Site Service and Others, C-186/19, harbours doubts regarding the international jurisdiction of Dutch courts under the Brussels I bis Regulation, in respect to a request to lift an interim garnishee order. An insight on the background of the case can be found here and here, while the implications of that background for admissibility of request for a preliminary ruling are addressed in section 1 of the present text.

In replying to a preliminary ruling request made by that court, AG Saugmandsgaard Øe issued his Opinion. Advocate General concluded that a flexible approach should be taken when interpreting the concept of "civil and commercial matters" within the meaning of Article 1(1) of the Brussels I bis Regulation. AG was of the view that an action for interim measures as the one

brought by SHAPE, aimed at obtaining the lifting of a garnishee order, qualifies as civil and commercial matters, within the meaning of Article 1(1), provided that such garnishee order had the purpose of safeguarding a right originating in a contractual legal relationship which is not characterised by an expression of public powers, a matter that is left to the referring court to verify. For presentation of AG reasoning and its analysis in relation to interim measures, see section 2.

Moreover, according to AG, alleged claims of immunity enjoyed under international law by one of the parties to the proceedings had no significance, when it comes to the analysis of the material scope of the Brussels I bis Regulation. Against this background, the case provides a good opportunity to explore jurisdictional issues in the face of immunities, such as the debate regarding international jurisdiction preceding the assessment of immunities, and what can be inferred from the case-law of the Court of Justice and the European Court of Human Rights in that respect. Next, it requires us to determine whether the case-law developed in relation to State bodies and their engagement in *acta iure imperii* can be applied mutatis mutandis to the international organisations. Finally, it revives the concerns on whether the scope of the Brussels I bis Regulation should be determined in a manner allowing to establish international jurisdiction under that Regulation even though enforcement against public authorities stands little chances, be that international organisations as in the present case. These issues are discussed in section 3.

1. Admissibility of the preliminary reference

Advocate General Saugmandsgaard Øe made some remarks on the admissibility of the preliminary ruling and on whether a reply of the Court of Justice would be of any avail to the referring court.

It should be recalled that at national level, two sets of proceedings were initiated in parallel. In the first set, – the proceedings on the merits – Supreme, the private-law companies, sought a declaratory judgment that it was entitled to the payment of several amounts by SHAPE, an international organisation. These proceedings were under appeal before the Den Bosch Court of Appeal because SHAPE challenged the first instance court's jurisdiction. In the second set – the proceedings for interim measures where the preliminary ruling originated from – SHAPE brought an action seeking the lift of the interim garnishee order and

requesting the prohibition of further attempts from Supreme to levy an interim garnishee order against the escrow account.

In the opinion of AG, the preliminary ruling was still admissible despite the fact that the Den Bosch Court of Appeal ruled on the proceedings on the merits granting immunity of jurisdiction to SHAPE in December 2019 – the judgment is under appeal before the Dutch Supreme Court. He opined that the main proceedings should not be regarded as having become devoid of purpose until the court renders a final judgment on the question whether SHAPE is entitled to invoke its immunity from jurisdiction, in the context of the proceedings on the merits and whether that immunity, in itself, precludes further garnishee orders targeting the escrow account (point 35).

2. Civil and commercial matters in respect of substantive proceedings or interim relief proceedings?

The Opinion addressed at the outset the question on whether the substantive proceedings should fall under the material scope of the Brussels I bis Regulation in order for the interim relief measures to fall as well within that scope. As a reminder, the object of the proceedings on the merits, is a contractual dispute over the payment of fuels supplied by Supreme to SHAPE, in the context of a military operation carried out by the latter.

As AG signalled, to answer the question several hypotheses have been put forward by the parties at the hearing held at the Court of Justice. The first hypothesis, supported by the Greek Government and Supreme, proposed that in order to determine if an action for interim measures falls within the scope of the Regulation, the proceedings on the merits should fall as well under the material scope of the Regulation. In particular, the characteristics of the proceedings on the merits should be taken into account. The second hypothesis, supported by SHAPE, considered that the analysis should be done solely in respect to the proceedings for interim measures. The European Commission and the Dutch and Belgian Governments opined that in order to determine if the action for interim measures can be characterised as civil and commercial matters, it is the nature of the right which the interim measure was intended to safeguard in the framework of the interim relief proceedings that matters.

Endorsing the latter hypothesis, AG indicated that an application for interim measures cannot be regarded as automatically falling within or outside the scope of the Brussels I bis Regulation, depending on whether or not the proceedings on the merits fall within that scope, simply because it is ancillary to the proceedings on the merits (point 51). To support his conclusion, AG followed the line of reasoning developed by the Court in the context of the instruments preceding the Brussels I bis Regulation. In that regard, the Court has held that to ascertain that provisional/protective measures come within the scope of the Regulation, it's not the nature of the measures that should be taken into account but the nature of the rights they serve to protect. To illustrate this: in Cavel I, the Court held that interim measures can serve to safeguard a variety of rights which may or may not fall within the scope of the now Brussels I bis Regulation (then the Brussels Convention) depending on the nature of the rights which they serve to protect. This has been confirmed in Cavel II: "ancillary claims accordingly come within the scope of the Convention according to the subject-matter with which they are concerned and not according to the subject-matter involved in the principal claim". Further, in Van Uden, the Court held that "provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights". This case-law has been also confirmed in recent judgments of the Court, namely in Bohez – where a penalty payment was imposed as a measure to comply with the main judgment – and Realchemie Nederland concerning an action brought for alleged patent infringement in the context of interim proceedings, where a prohibition in the form of payment of a fine was ordered.

In brief, what matters in this discussion on interim measures falling or not within the scope of the Brussels I bis Regulation, is not the relation between the main proceedings and the interim measures, the crucial factor being the **purpose – determined from a procedural law standpoint –** of the interim relief measure vis-à-vis the proceedings on the merits: **an interim measure falling within the scope of the Regulation has to safeguard the substantive rights at stake in the main proceedings**. In the present case, the substantive right in question is a credit arising from a contractual obligation that Supreme holds against SHAPE.

3. Whether immunities play a role in determining if an action can qualify as "civil and commercial matters" within the meaning of Article 1(1) of the Regulation

One of the particularities of the case is that in the second set of proceedings where the preliminary ruling originated, SHAPE and JFCB (NATO) have introduced an action for interim relief measures, based on immunity from execution. SHAPE alleged that its immunity from execution flowing from the 1952 Paris Protocol trumps any jurisdiction derived from that Regulation.

It is against this background that the Dutch Supreme Court asked the Court of Justice if the fact that an International Organisation claims to enjoy immunity from execution under public international law, bars the application of the Brussels I bis Regulation or has an impact on its application *ratione materiae*. In his Opinion, Advocate General considered that the referring court is concerned by the actions relating to "acts or omissions in the exercise of state authority" linked to the concept of "*acta iure imperii*" – a concept which is also used in international law in relation to the principle of State immunity.

The Opinion tackled the question of immunities under public international law and concluded that a dispute where an International Organisation is a party, should not be automatically excluded from the material scope of the Brussels I bis Regulation. Interestingly, some aspects of the reasoning that allowed to reach that conclusion echo the doctrinal debates on the interplay between the jurisdictional rules of EU private international law, on the one hand, and the immunity derived from public international law, on the other hand.

- ### Does immunity precede the jurisdiction under EU PIL?

At point 72, AG rejected the arguments advanced by the Austrian Government, who argued that the Brussels I bis Regulation should not apply to the case at hand. In the view of this government, if an international organisation takes part in a dispute, the immunity that this organisation enjoys on the basis of customary international law or treaty law, characterizes the nature of the legal relationship

between the parties. In other words, a criterion based on the nature of a party (*scil*. the fact that it is an international organization that is a party to proceedings) should suffice to decline jurisdiction under the Brussels I regime.

In that respect, AG made some interesting remarks: first, by applying the Brussels I bis Regulation to a dispute where an International Organisation is a party, there is no breach of Article 3(5) TUE and of the obligation to respect public international law enshrined in that provision. Second, if, based on the Brussels I bis regime, a national court declares its international jurisdiction over a dispute, potential immunity claims advance by the parties will not be affected, as they are to be considered at a later stage of the proceedings. AG departed from the premise that the assessment on immunities should take place after the national judge seised with the case looks into the substance of the merits, including party allegations. This is therefore, at a second stage, after the national court has decided over its international jurisdiction within the first stage, that the immunity needs to be ascertained and its limits set (point 69).

This approach resonates with the idea that national courts are not supposed to engage in an in-depth analysis of the substance at that very first stage, when they are determining their own jurisdiction. They should not be undertaking a mini-trial, ascertaining jurisdiction requires only a first approximation to the facts of the case, solely for the purpose of determining jurisdiction. In FlyLaL II, a case concerning jurisdictional issues pursuant to the Brussels I Regulation, in respect of an action for damages brought for infringement of competition law, the Court observed that at the stage of determining jurisdiction "the referring court must confine itself to a prima facie examination of the case without examining its substance". The statement draws on AG Bobek's Opinion presented in the aforementioned case: "[d]etermination of jurisdiction should be as swift and easy as possible. Thus, a jurisdictional assessment is by definition a prima facie one. […] The jurisdictional assessment will, in practice, require a review of the basic factual and legal characteristics of the case at an abstract level."

From the ECtHR case-law (see, most notably, Waite and Kennedy v. Germany) dealing with immunities of international organizations and the right to a remedy enshrined in Article 6 ECHR, a similar reading can be extracted. National courts deciding on granting of an immunity – be [it] immunity of jurisdiction or from execution – and performing the "reasonable alternative means" test, inevitably engage in a substantive analysis of the merits. **To ensure that the claimant's**

right to access justice is not breached, requires more than an abstract examination of the facts. This would seem to favour the idea **that determination of international jurisdiction precedes a substantive analysis of the circumstances of the case in respect to any alleged claim of immunities made by the parties**.

However, it is still not clear how this reasoning can be reconciled with judgments of the Court of Justice in the cases Universal Music International Holding and Kolassa. There, the Court of Justice held that according to the objective of the sound administration of justice which underlies the Brussels I Regulation, and respect for the independence of the national court in the exercise of its functions, a national court in the framework of ascertaining its international jurisdiction pursuant to the Brussels I regime, must look at all the information available to it. Although such an assertion seems to be construed in very general terms, one may well wonder what exactly a court assessing its international jurisdiction under the Brussels I bis Regulation is required to look at. Should it be a minimal review of the substance or a prima facie analysis strictly focused on the nature of the elements of the action – relevant in the context of the connecting factors used by the rules on jurisdiction –,including all the information available before the court?

If the answer would be the latter, that means that in the case at hand, the immunity from execution relied on by SHAPE in support of its action should be taken into account.

A reading of paragraphs 53 to 58 in the Court of Justice's recent judgment in Rina, hints that in order to establish its own jurisdiction under the Brussels I bis Regulation, a national court has to take into consideration all available information. In the case at issue, party allegations where a party (Rina) invokes immunity of jurisdiction. While at first glance this instruction does not steer away from the judgments in Universal Music International Holding and Kolassa, what the Court proposes here is definitely more complex than a first approximation to the facts of the case. At paragraph 55 the Court notes "a national court implementing EU law in applying [the Brussels I Regulation] must comply with the requirements flowing from Article 47 of the Charter. […] The **referring court must satisfy itself that, if it upheld the plea relating to immunity from jurisdiction, [the claimants] would not be deprived of their right of access to the courts**, which is one of the elements of the right to effective judicial protection in Article 47 of the Charter." If the national courts were to engage in

such analysis – in a similar fashion as the ECtHR established in regards to Article 6 ECHR – it will certainly go beyond a mere examination *in abstracto*, implying rather a deep dive on the merits.

Moreover, the judgment in Rina seems to suggest that the analysis of international law cannot be avoided even when it comes only to the question whether the Brussels I regime applies or not. At paragraph 60, the Court of Justice explained "[t]he principle of customary international law concerning immunity from jurisdiction does not preclude the national court seised from exercising the jurisdiction provided for by that regulation in a dispute relating to such an action, where that court **finds that such corporations have not had recourse to public powers** within the meaning of international law." Again, for the examination of these matters in the framework of determining international jurisdiction, a greater level of scrutiny is required. A national judge would have to dig dipper in the facts and party allegations to come to the conclusion that a certain party did not have recourse to public powers. Something that is everything but a swift and easy exercise.

Does the case-law developed in the context of State bodies apply to international organisations?

Be that as it may, while an immunity claim does not automatically rule out the application of the Brussels I bis Regulation according to AG Saugmandsgaard Øe, the key question in his analysis is to determine if actions related to *acta iure imperii* under Article 1(1) of the Regulation are applicable to international organisations. It flows from the Court of Justice well-settled case-law that disputes between a State body and a person governed by private law come within the scope of civil and commercial matters, if the public authority in question does not act in the exercise of its public powers. At point 75 of his Opinion, AG made a reference to the judgment in Eurocontrol and indicated that exceptions under Article 1(1) *in fine* can extend to acts and omissions carried out by an international organisation. He remarked that, the concept of "public powers" established under the Court's case-law, not only relates to State responsibility but refers also to those situations where a public authority acts under the umbrella of its public powers.

Advocate General moved then to analyse the Court of Justice case-law concerning

liability of the State for acts and omissions carried out in the exercise of sovereign authority. Here matters get a bit complicated.

On the one hand, **it remains to be seen how that case-law could be applied mutatis mutandis to international organisations**. Leaving aside the question of immunities and putting emphasis on the notion of "civil and commercial matters" within the meaning of Article 1(1) of the Brussels I bis Regulation, the acts and omissions of an international organization are strictly connected with the powers conferred to the organisation for its proper functioning. Thus, one could wonder whether a functional test would be more suitable to determine if the acts or omissions were carried out by an international organization in the exercise of its public powers: a demarcating line could be drawn between non-official (non-related to the mission of the organization) acts and omissions and those of official nature, therefore necessary to fulfil the organisation's mandate.

On the other hand, concerning the criteria applied by the Court when analysing if a public authority has exercised its powers of State authority, there is no "one size fits all" solution. As AG rightly pointed out at point 84 of his Opinion, the Court has still to sort out the interplay between different criteria: matters characterising the legal relationship between the parties, the subject-matter of the dispute and the basis of the action and the detailed rules governing the action brought.

To illustrate this point: in Préservatrice Foncière TIARD, the Court looked mainly at the legal relationship between the parties, while in Baten and Sapir and Others the Court did not refer to the legal relationship between the parties but focused on the subject-matter of the dispute and the basis of the action brought. Hence, the alternative or cumulative use of these criteria – or a flexible one- seem to reflect the need to provide an adequate response to the case-specific factual context of a particular case.

In that sense, AG pointed out that the criterion concerning the basis of the action is not relevant in all cases, it will be determinant in situations where is not established that the substantive basis of the claim is an act carried out in the exercise of public powers. For that reason, at 90, AG considered more appropriate that **the action is based on a right originating from an act of public authority or in a legal relationship characterized by a manifestation of public power**.

- **Does the perspective of anticipated recognition/enforcement influence the interpretation of the notion of "civil and commercial matters"?**

It is worth mentioning that some commentators (see also Van Calster, G., European Private International Law, Hart Publishing, 2016, p. 32) pointed out that, in the light of the judgment in Eurocontrol, the scope of application of the Brussels I bis Regulation should be interpreted by taking into account the perspectives of recognition and enforcement. Thus, if immunity bears no significance at the stage of determining jurisdiction, but it is later granted/recognised resulting in refusal of recognition and/or enforcement, concerns are raised regarding what is the practical use of exercising jurisdiction under the Brussels I bis Regulation against public authorities when there are little chances of recognition/enforcement.

On this point, the Spanish Supreme Court – in a case concerning the enforcement of a judgment rendered in Germany in favour of a private party against the Republic of Argentina –, held that a declaration of enforceability issued in relation to a general enforcement order does not breach the rules on immunity of execution. The Spanish Court precised that only when specific legal attachment measures are taken, a court should determine if the property in question is subject to execution. Thus, **the issue of immunity of execution and the assessment whether the property to be executed is for commercial or official purposes would be at stake at a second stage of the enforcement procedure, not interfering with the application of the Brussels I regime.**

Corona and Private International

Law: A Regularly Updated Repository of Writings, Cases and Developments

by Ralf Michaels and Jakob Olbing

Note: This repository will stay permanent at www.conflictoflaws.net/corona.
Please send additions to olbing@mpipriv.de

Updated: November 08, 2021

The coronavirus has created a global crisis that affects all aspects of life everywhere. Not surprisingly, that means that the law is affected as well. And indeed, we have seen a high volume of legislation and legal regulations, of court decisions, and of scholarly debates. In some US schools there are courses on the legal aspects of corona. Some disciplines are organizing symposia or special journal issues to discuss the impact of the pandemic on the respective discipline.

For a time Private international law has been vividly discussing the relevance of the crisis for the field, and of the field for the crisis Private international law matters are crucial to countless issues related to the epidemic – from production chains through IP over possible vaccines to mundane questions like the territorial application of lockdown regulations.

Knowledge of these issues is important. It is important for private international lawyers to realize the importance of our discipline. But it is perhaps even more important for decision makers to be aware of both the pitfalls and the potentials of conflicts of law.

This site, which we hope to update continually, is meant to be a place to collect, as comprehensively as possible, sources on the interaction of the new coronavirus and the discipline. The aim is not to provide general introductions into private international law, or to lay out sources that could be relevant. Nor is this meant to be an independent scholarly paper. What we try to provide is a one-stop place at which to find private international law discussions worldwide regarding to coronavirus.

For this purpose, we limit ourselves to the discipline as traditionally understood—jurisdiction, choice of law, recognition and enforcement, international procedure. Coronavirus has other impacts on transnational private law and those deserve attention too, but we want to keep this one manageable.

Please help make this a good informative site. Please share any reference that you have – from any jurisdiction, in any legislation – and we will, if possible, share them on this site. Please contact olbing@mpipriv.de

General

In the early beginning of the Pandemic, contributions from scholars, courts, international institutes and politicians where of a more general character as it was difficult to predict the scope and duration of the new situation.

The European Law Institute for example issued a set of Principles for the COVID-19 Crisis, covering a variety of legal topics such as Democracy (Principle 3) and Justice System (Principle 5) as well as Moratorium on Regular Payments, Force Major and Hardship, Exemption from Liability for simple Negligence (Principles 12 to 14). Ending with something everybody hopes for: Return to Normality (Principle 15).

The Secretary General of the Hague Conference recorded a short online message from his home addressing the most urgent topics. Ensuing, the Permanent Bureau developed a Toolkit for resources and publications relevant to the current global situation.

The university of Oxford‘s Blavatnik School of Government collects all measures by governments around the world in the “Coronavirus Government Response Tracker”.

A German journal is dedicated solely to the topic “COVID-19 and the Law”. The journal is interesting for academics and practitioners alike, since it publishes papers on specific COVID-19 related issues, as well as an extensive overview of German judgements.

An open access project by intersentia examines the COVID-19 legislation and its consequences in European states, bringing together contributions from over 85 highly regarded academics and practitioners in one coherent, open access resource.

Matthias Lehmann discusses the role of private international law on a number of issues – the impact of travel restrictions on transportation contracts, contract law issues for canceled events, canceled or delayed deliveries, but also liability for infections.

Online Workshops, Webinars and Conferences

In time of travel restrictions and social distancing the academic exchange is still

active and sometimes more diverse than bevor, since people from all around the world come together, as the great number of workshops and symposiums that are held online shows.

Mid November (17 to 19), the Mexican Academy of Private International and Comparative Law discusses during its XLIV seminar among other topics the impacts of the pandemic on international family as well as aspects surrounding vaccines. participants will discuss in Spanish and the online participation is free of charge.

Contrary to the regular sessions of The Hague Academy of International Law's Centre for Studies and Research, the upcoming edition is entirely online. The topic will be "Epidemics and International Law" and held from September 2020 to June 2021. The collective works will be published later by the Academy. You will find application and programme here.

The Minerva Center for Human Rights at Tel Aviv University hosted an international socio-legal (zoom-) workshop on 22-23 June 2021 to explore the impact of the Covid-19 crisis and its regulation on cross-border families. A call for papers expired on 28 February 2021.

Another series of events organized by the University of Sydney's Centre for Asian and Pacific Law will regularly discuss topics such as social justice, civil rights, trade and investment in light of (post) pandemic developments. Of that series one webinar on the aftermath of the pandemic in the Asia-Pacific region focussed on commercial dispute resolution and issues related to private international law.

Marc-Philippe Weller discussed in a workshop on December 1, 2020 about "Nationalism, Territorialism, Unilateralism: Managing the Pandemic Through Private International Law?" if the measures enacted due to the pandemic may have an effect on the connecting factors in European private international law. He had a particular focus on the determination of habitual residence.

A comparative analysis of reactions in Japan and Germany on COVID-19 in private and public law with scholars from both jurisdictions was the topic of an online conference (mostly in German) on August 2020. Recordings of the presentations are online.

During a live youtube conference on July 23, 2020 Humberto Romero-Muci

presented with several others his views on “Migrantes, pandemia y política en el Derecho Internacional Privado”. The video is still online.

A webinar organized by experts from MK Family Law (Washington) and Grotius Chamber (the Hague) discussed pertinent issues relating to international child abduction in times of COVID-19.

Matthias Lehmann presented his views on the application of force majeure certificates and overriding mandatory provisions n international contracts in an online-workshop on “COVID-19 and IPR/IZVR”.

Another webinar was held on “Vulnerability in the Trade and Investment Regimes in the Age of #COVID19”, which is available online, as part of the Symposium on COVID-19 and International Economic Law in the Global South.

The University of New South Wales held a talk on “COVID-19 and the Private International Law” in May, which you find on youtube.

As a follow-up of a webinar on PIL & COVID-19, Inez Lopez and Fabrício Polido give “some initial thoughts and lessons to face in daily life”

A group of Brazilian scholars organized an online symposium on Private International Law & Covid-19. Mobility of People, Commerce and Challenges to the Global Order. The videos are here.

The Organization of American States holds a weekly virtual forum on “Inter-American law in times of pandemic” (every Monday, 11:00 a.m., UTC-5h). One topic of many will be on “New Challenges for Private International Law” (Monday, June 15, 2020).

State Liability

Some thoughts are given to compensation suits brought against China for its alleged responsibility in the spread of the virus. One main issue here is whether China can claim sovereign immunity.

In the United States, several suits have been brought in Florida (March 12), Nevada (March 23) and Missouri (April 21) against the Peoples republic of China

(PRC), which plaintiffs deem responsible for the uncontrolled spread of the virus, which later caused massive financial damage and human loss in the United States. Not surprisingly officials and scholars in China were extremely critical (see here and here).

But legal scholars, including Chimène Keitner and Stephen L. Carter, also think such suits are bound to fail due to China's sovereign immunity, as do Sophia Tang and Zhengxin Huo. Hiroyuki Banzai doubts that the actions can succeed since it will be difficult to prove a causal link between the damages and the (in-) actions by the Chinese Gorvernment. Lea Brilmayer suspects that such a claim will fail since it would be unlikely, that a court will assume jurisdiction. The same conclusion is drawn by Angelica Bonfanti and Chimène Keitner after a thorough analysis of the grounds on which a liability of china could be based. An overview and detailed presentation of many class actions and suits filed by states can be found here.

Until now, only very little has happened concerning the American suits. Some suits where (voluntarily) dismissed or tossed. One suit against the PRC for damages amounting to $ 800 billion was ordered to be dismissed by the District Court, since the plaintiff failed to state a claim (*James-El v the Peoples Republic of China* (M.D.N.C. 2020) WL 3619870). For a general update on the lawsuits against the PRC from January 22, 2021 see here.

In an interview with a German newspaper Tom Ginsburg lays out the legal issues that will be faced, if the claims of state liability are brought in front of a German court. Fabrizio Marrella discusses the Italian perspective on that issue. Brett Joshpe analyzes more generally China's private and public liability in the domestic and international framework.

A Republican Representative is introducing two House Resolutions urging the US Congress to waive China's sovereign immunity in this regard; such a waiver has also been proposed by a Washington Post author. The claim has also found support by Fox News.

Interestingly, there is also a reverse suit by state-backed Chinese lawyers against the United States for covering up the pandemic. Guodong Du expects this will likewise be barred by sovereign immunity.

Martins Paparinskis shares the concerns about a successful litigation against

foreign states. However, he suggests to change the law of state responsibility fundamentally to be prepared for further international catastrophes such as the current pandemic.

In the UK, the conservative Henry Jackson Society published a report suggesting that China is liable for violating its obligations under the International Health Regulations. The report discusses ten (!) legal avenues towards this goal, most of them in public international law, but also including suits in Chines, UK and US courts (pp 28-30). Sovereign immunity is discussed as a severe but not impenetrable barrier.

Contract Law

Both the pandemic itself and the ensuing national regulations impede the fulfilment of contracts. Legal issues ensue. An overview of European international contract law and the implications of COVID-19 is given here and here. Two chapters of the book "*La pandemia da COVID-19. Profili di diritto nazionale, dell'Unione Europea ed internazionale*" edited by Marco Frigessi di Rattalma are dedicated to jurisdiction and applicable law in contract matters.

The UNIDROIT Secretariat has released a Note on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 health crisis.

Bernard Haftel highlights three different techniques to apply COVID-19 legislation to an international contract: as *lex contractus*, as *lois des police* and through consideration within the applicable law.

Gerhard Wagner presents COVID caused defaults under the aforementioned ELI principles.

If a contracting party is unable to perform its contractual obligations, incapacity to perform can be based on force majeure or hardship. Some contributions suggest to apply for force majeure certificates which are offered by most countries, for example by China, Russia. How such a certificate can influence contractual obligations under English and New York Law is shown by Yeseung Jang. The German perspective is given by Philip Reusch and Laura Kleiner. Further the South Korean, French and the Common Law perspective on force

majeure have been published. Bruno Ancel compares the French and American approach. The difficulty to implement appropriate force majeure clauses in a contract is shown by Matteo Winkler.

Drawing from recent cases and experiences Franz Kaps analyses the difficulties in the operation within ICC force majeure clauses and suggests how “state-of-the-art force majeure clauses” should be constructed to include an international pandemic.

Victoria Lee, Mark Lehberg, Vinny Sanchez and James Vickery go beyond force majeure implications on contracts in their expert analysis.

William Shaughnessy presents issues which might occur in international construction contracts.

Another crucial aspect is the application of overriding mandatory rules on international contracts. Ennio Piovesani discusses whether Italian decree-laws enacted in view of the pandemic can operate as overriding mandatory rules and whether that would be compatible with EU law. So does Giovanni Zarra on international mandatory rules. Aposotolos Anthimos adds the Greek perspective, Claire Debourg the French to the discussion.

The applicability of self-proclaiming mandatory provisions in Italian law in respect to package travels in general and the Directive (EU) 2015/15 on package travel in particular, is discussed by Fabrizio Marongiu Buonaiuti.

Matthias Lehmann considers more broadly possible private international law issues and responses under European law. José Antonio Briceño Laborí and Maritza Méndez Zambrano add the Venezuelan view.

The crisis hits in particular global value and production chains. Impacts are discussed by Tomaso Ferando, by Markus Uitz and Hemma Parsché and by Anna Beckers, though neither focuses specifically on private international law.

Caterina Benini explains a new Italian mandatory rule providing a minimum standard of protection for employees.

Klaus Peter Berger and Daniel Behn in their historical and comparative study on force majeure and hardship, highlight that such remedies are quite regular to find and fit to distribute the risk emanating from such a crisis evenly.

CISG

The CISG has long been of very little importance in international contract law but now is subject to many discussions. André Janssen and Johannes Wahnschaffe dedicate a detailed analysis to exemptions from liability and cases of hardship under the CISG.

Performance on advance purchase agreements on delivering the COVID-19 vaccines, have been a major political debate recently. While asking which law is applicable on such contracts Ben Köhler and Till Maier-Lohmann suspect, that if CISG is in fact the applicable law, the consequences would be far reaching and could be the very first time the CISG enters the "global centre stage". Unfortunately, a Belgian court deciding over a claim by the EU against AstraZeneca for the delivery of doses of vaccines, did not even consider the application of the CISG.

Corporate Law

If the questions of purchasing COVID-19 vaccines shifts to buying the entire company the issue at hand becomes more political. Arndt Scheffler analyses the situation in which a foreign investor tries to purchase a company, which is crucial for the domestic battle against the pandemic and the search for a vaccine.

Employment Law

Closed borders and practically everybody working from has its impact on employment law.

In export-oriented economies such as Germany, it is very common, that employees are posted abroad on a long-term basis. COVID-19 legislation shapes and influences the legal relation between employer and employee, but also between employee and host-country. Roland Falder and Constantin Franke-Fahle discuss these influences with particular attention to the question of the applicable law here.

Tort Law

Damages caused by an infection are mostly subject to tort law but can also arise in a contractual relation. Focusing on the applicable law on non-contractual liability Rolf Wagner explains, that sometimes damages can be claimed both, as contractual and as non-contractual. He stresses that as the substantive law on damages caused by an infection is still to evolve, applying foreign law is a particular challenge.

An extensive overview about the law applicable to damages caused by an COVID-19 infection under Indian international tort law is given by Niharika Kuchhal, Kashish Jaitley and Saloni Khanderia. Khanderia published a second article, concerning the need of a codification of Indian conflict of laws on tort in respect of a foreseeable surge in international tort proceedings, caused by the pandemic.

General implications of the coronavirus on product liability and a possible duty to warn costumers, without specific reverence to conflict of laws.

In Austria, a consumer protection association is considering mass litigation against the Federal State of Tyrolia and local tourist businesses based on their inaction in view of the spreading virus in tourist places like Ischgl. A questionnaire is opened for European citizens. Matthias Weller reports.

Florian Heindler discusses how legal measures to battle the virus could be applicable to a relevant tort case (either as local data or by special connection), by analyzing the hypothetical case of a tourist who gets infected in Austria.

Jos Hoevenars and Xandra Kramer discuss the potential of similar actions in the Netherlands under the 2005 Collective Settlement Act, WCAM.

Family Law

Implications also exist in family law, for example regarding the Hague Abduction Convention.

In an Ontario case (Onuoha v Onuoha 2020 ONSC 1815), concerning children taken from Nigeria to Ontario, the father sought to have the matter dealt with on an urgent basis, although regular court operations were suspended due to Covid-19. The court declined, suggesting this was “not the time” to hear such a motion, and in any way international travel was not in the best interest of the child. For the discussion see here.

Further sspects of travel restrictions in international abduction cases are analysed by Gemme Pérez.

A general overview of abduction in times of corona was published by Nadia Rusinova. Another article by Nadia by her covers recent case law and legislation on remote child related proceedings which were conducted during the last weeks around the world. She also highlights, that COVID-19 measures can impact Article 8 ECHR.

Also cases of international surrogacy come into mind which are affected by COVID-19, as Mariana Iglesias shows.

Personal Data

The protection of personal data in transnational environments has always been a controversial topic in conflict of laws. Jie Huang shows, that due to COVID-19 existing tensions between the EU, the USA and China are reflected in their conflict of laws approach.

The European Commission published a “toolbox for the use of technology and data to combat and exit from the COVID-19 crisis”, which was an opportunity for some contributions on the GDPR and Tracing Apps.

Economic Law

The crisis puts stress on global trade and therefore also economic law. Sophie Hunter discusses developments in the competition laws of various countries (though with no explicit focus on conflict of laws issues).

A list of authors from around the world analyses the interrelation between “Competition law and health crises” in its international context in the current issue Concurrences.

Intellectual Property

Due to lockdowns and school closures, online work and teaching has exorbitantly increased but, as Marketa Trimble stresses, with little notion of transnational copyright issues.

To tackle those a prominently endorsed letter to the World Intellectual Property Organization, emphasizes the need to ensure that intellectual property regimes should support the efforts against the Coronavirus and should not be a hindrance.

Public Certification

In times of lockdown and closed borders notarization and public certification become almost impossible. Therefore, various countries have adjusted their legislation. You will find an overview here.

The electronic Apostille Program (e-APP)experiences a new popularity, as a considerable number of countries have implemented new components of the e-APP. For more information see here.

Dispute Resolution

In Dispute resolution two main questions are being discussed.

On the one hand the question of jurisdiction as such, for example for claims suffered within contractual or non-contractual relationships. Rolf Wagner gives the European and German perspective presenting the possible courts of jurisdiction under Brussel I Regulation (recast), the Lugano Convention and the German code of civil procedure.

In a recent case by the Supreme Court of Queensland (AUS), the court examined

the impact of COVID-19 on a foreign jurisdiction clause. You can find Jie Huang's comments on the decision here.

One the other hand, it is being discussed to what extend the requirement of physical presence in courts can conform with social distancing and travel restrictions. As a more drastic reaction some courts suspended their activities except for urgent matters all together. Developments in Italy are discussed here, developments in English law here.

On the other hand, another possibility is the move to greater digitalization, as discussed comparatively by Emma van Gelder, Xandra Kramer and Erlis Themeli. The Hague Conference on Private International Law (HCCH) published a Guide to Good Practice on the Use of Video-Link under the 1970 Evidence Convention, discussed also with reference to Corona by Mayela Celis.

Using the pandemic, Gisela Rühl analyses why the potential of digitalization is so scarcely used in civil procedure and how it can be improved to serve the needs of a digital society.

Benedikt Windau analyses the German civil procedure and how international digital heraings could be possible within the existing law.

In litigation, virtual hearings become a prominent measure to overcame restrictions on physical presence. While in on some jurisdiction such hearings are possible, Luigi Malferrari discusses the question if such hearings should also be enabled before the CJEU.

Maxi Scherer takes the crisis as an opportunity to analyse virtual hearings in international arbitration. Complications and long-term effects of virtual arbitration are presented here. Mirèze Philippe however sees this development as a positive game changer not just in health aspect but also to protect the environment and saving time as well as travelling costs (further articles covering international arbitration and virtual hearings: here and here).

A very broad presentation of legislation in France, Italy and Germany in civil procedure, including cross border service and taking of evidence as well as its implications on international child abduction and protection, is given by Giovanni Chiapponi.

Jie Huang examines the case of substitute service under the Hague Service Convention during the pandemic in the case Australian Information Commission v Facebook Inc ([2020] FCA 531).

A US project guided by Richard Suskind collects cases of so-called “remote courts” worldwide.

The EU gives information about the “impact of the COVID-19 virus on the justice field” concerning various means of dispute resolution.

Gilberto A. Guerrero-Rocca analyses the impacts of COVID-19 on international arbitration in relation to the CISG.

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Remote Child-Related Proceedings in Times of Pandemic – Crisis Measures or Justice Reform Trigger?

by Nadia Rusinova

The coronavirus will have an enormous impact on how we consume, how we learn, how we work, and how we socialize and communicate. It already significantly impacts the functioning of the justice system – the COVID-19 pandemic and social distancing requirements have required courts to be flexible

and creative in continuing to carry out essential functions.

Six weeks ago, it was almost difficult to imagine that in a regular child-related proceeding the hearing could be conducted online, and that the child can be heard remotely. Is this the new normal in the global justice system? This post will first provide brief overview regarding the developments in the conduction of remote hearings, and discuss the limitations, but also the advantages, of the current procedures related to children. Second, it will touch upon the right of the child to be heard in all civil and administrative proceedings which concern its interest, pursuant to Article 12 of the United Nations Convention on the Rights of the Child and how this right is regarded in remote proceedings in the context of the COVID-19 situation. It will also highlight good practices, which are without doubt great achievements of the flexibility and adaptability of the professionals involved in child-related civil proceedings, which deserve to be appreciated and which may provide grounds for significant change in the future (e.g. by using remote tools much more often.)

In civil and administrative proceedings, which concern children, strict insistence on personal attendance is unlikely to be feasible during the Coronavirus pandemic, and may contravene current health guidance, putting both families and professionals at unacceptable risk. As a consequence, the number of children's hearings scheduled to take place during the Coronavirus pandemic have globally been reduced to only those required to ensure essential and immediate protection of children or to consider orders relating to restriction of liberty. So long as restrictions regarding social distancing remain in place all over the world, many children's hearings in the next months will be conducted remotely and digital facilities are being put in place to enable a wide range of people to participate remotely in virtual hearings.

I. What the recent experience on the remote hearings shows

Worldwide, over the past month, thousands of hearings took place remotely, many of them concerning children. How did the authorities comply with the current challenges and also with the right of the child to express its views?

Some countries, like Scotland, issued special rules as an amendment to the existing national law. In the context of the emergency, the provisions in the Coronavirus Act 2020 Guidance on looked-after children and children's hearings

provisions, issued by the Scottish Parliament as an update to the Coronavirus (Scotland) Bill, are designed to enable best use of very limited resources by local authorities, and the children's hearings system, so that efforts can be focused on safeguarding the welfare of Scotland's most vulnerable children, and on supporting families and careers who need it most. The provisions are also time-limited and will automatically expire within six months, unless the Scottish Parliament extends them for a further period of six month.

The American Bar Association has also prepared detailed rules on "Conducting Effective Remote Hearings in Child Welfare Cases" to distill some best practices and other recommendations for remote or "virtual" hearings, providing special considerations to the judges, and directions for all professionals dealing with child-related proceedings.

The case law of the domestic courts is not less intriguing. In one recent judgment of The Family Court of England and Wales – RE P (A CHILD: REMOTE HEARING) [2020] EWFC 32, delivered by Sir Andrew McFarlane, the issues surrounding the advantages and disadvantages of the remote hearing when the case concerns children are discussed in a very original way. The case concerns ongoing care proceedings relating to a girl who is aged seven. The proceedings are already one year old and they were issued as long ago as April 2019, but the possibilities for multiple appeals in the adversarial proceedings caused immense delay. It has been initiated by the local authority, which have made a series of allegations, all aimed at establishing the child has been caused significant harm as a result of fabricated or induced illness by its mother. The allegations are all fully contested by the mother, and a full final hearing is to take place in order to be decided if the child should be return to its mother or placed in long term foster care. Since April 2019 the child has been placed in foster care under an interim care order. The 15-day hearing was scheduled to start on Monday, 20 April, but the Covid-19 pandemic has led to a lockdown and most Family Court hearings that have gone ahead are being undertaken remotely, over the telephone or via some form of video platform.

II. Challenges

In this light it might be useful to identify some of the issues that the justice system faced in the attempts to comply with the special measures amid the pandemic and the lockdown order in disputes about children.

Must a hearing take place remotely, or this is just an option to be decided on by the court?

All the guidance available aims mostly at the mechanics of the process. The question whether any particular hearing should, or should not, be conducted remotely, is not specifically discussed. In any case, the access to justice principle should in some way provide for flexibility and practicability. In this sense, the fact that a hearing can be conducted remotely, does not in any way mean that the hearing must be conducted in that way.

As Sir McFarlane said, *"In pushing forward to achieve Remote Hearings, this must not be at the expense of a fair and just process."* Obviously, the question is how to strike a fair balance between keeping the principle of fair trial as paramount while not putting the child into an intolerable situation that might follow as a consequence of the limitations in this pandemic situation.

In which cases it is justified to hold a remote hearing?

Given the Government's imposition of the 'stay at home' policy in many countries, requests for an attended hearing are highly unlikely to be granted unless there is a genuine urgency, and it is not possible to conduct a remote hearing, taken as a cumulative condition together. If one of these elements is not present, the respective judge should assess the emergency in the particular case.

In general, all cases are pressing when the welfare of children is to be determined. However, some of it indeed call for urgency and it is to be analyzed on a case by case basis, in accordance with the claims of the parties and available evidence. In the discussed case RE P [2020] EWFC 32 the girl was already suffering significant emotional harm by being held "in limbo", and that she could only be released from this damaging situation of simply not knowing where she is going to live and spend the rest of her childhood, at least for the foreseeable future, by the court decision. As the judge says, *"she needs a decision, she needs it now and to contemplate the case being put off, not indefinitely but to an indefinite date, is one that (a) does not serve her interests, because it fails to give a decision now, but (b) will do harm itself because of the disappointment, the frustration and the extension of her inability to know what her future may be in a way that will cause her further harm."*

Another issue to be considered is to which extent the personal impression (for

which the face-to-face hearing is best suited to) and the physical presence in the courtroom as a procedural guarantee for fair trial in adversarial proceedings, are decisive in the particular case. In RE P [2020] EWFC 32 sir McFarlane holds that *"The more important part, as I have indicated, for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court."* This is a case for protection from violence, and taking into account the subjective aspect, the personal impression is crucial. Yet, it might be that other type of cases, with less impact on the life of the child, or when the balance between the urgency and the importance of personal attendance might affect the best interest of the child ,might still be held remotely. In the discussed case the judge refers explicitly to the need of the physical presence of the parties, and especially of the mother, for him to get personal impression, and to give her full opportunity to present her defense and to ensure fair trial. The Court therefore finds that a trial of this nature is simply not one that can be contemplated for remote hearing during the present crisis. It follows that, irrespective of the mother's agreement or opposition to a remote hearing, the judge holds that this hearing cannot "properly or fairly" be conducted without her physical presence in a courtroom.

A similar approach (with different outcome) has been taken in Ribeiro v Wright, 2020 ONSC 1829, Court of Ontario, Canada. The parties, currently in the process of divorce, and the plaintiff wishes to obtain a safeguard order so that the defendant's access rights are modified such that they are suspended and replaced by contacts via technological means (Skype, Facetime, etc.). Due to the ongoing divorce procedure at the stage of the application for the safeguard order, some evidence is available already. The judge recognizes that the social, government and employment institutions are struggling to cope with COVID-19 and that includes the court system. Obviously, despite extremely limited resources, the court will always prioritize cases involving children, but it is stated that parents and lawyers should be mindful of the practical limitations the justice system is facing. If a parent has a concern that COVID-19 creates an urgent issue in relation to a parenting arrangement, they may initiate an emergency motion under the domestic law – but they should not presume that raising COVID-19 considerations will necessarily result in an urgent hearing. In this case the judge

refuses to start emergency proceeding (which would be conducted remotely), takes into account the behavior of the parents and urge them to renew their efforts to address vitally important health and safety issues for their child in a more conciliatory and productive manner, asking them to return to court if more serious and specific COVID-19 problems arise.

In order to determine some general criteria to be applied when the emergency assessment is to be done, a good general example can be seen in the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions (Scotland). The Scottish Government seeks to empower professional staff and volunteer tribunal members to exercise sound judgment and make decisions to protect and support children and young people, based on available information and in partnership with families. It provides that this exercise of emergency powers should: i. be underpinned by a focus on children's, young people's, and families' human rights when making decisions to implement powers affecting their legal rights; ii. be proportionate – limited to the extent necessary, in response to clearly identified circumstances; iii. last for only as long as required; iv. be subject to regular monitoring and reviewed at the earliest opportunity; v. facilitate, wherever possible and appropriate, effective participation, including legal representation and advocacy for children, young people and family members, and vi. be discharged in consultation with partner agencies.

Furthermore, in the Scottish Children's Reporter Administration update paper on Children's Hearings System, issued on 20 April 2020, it is stated that the reporter assesses and considers each individual child's case and their unique circumstances, and the panel makes the best possible decision based on the information before them. Priority is given to hearings with fixed statutory timescales, or to prevent an order from lapsing. The UK Protocol Regarding Remote Hearings, issued on 26 March 2020, also sets some general criteria in par. 12 applicable to child-related proceedings, stating that it will normally be possible for all short, interlocutory, or non-witness, applications to be heard remotely. Some witness cases will also be suitable for remote hearings.

What form the "remote" hearing may take?

There is currently no 'single' technology to be used by the judiciary. The primary aim is to ensure ongoing access to justice by all parties to cases before the court, so the professionals and parties involved must choose from a selection of possible

IT platforms (e.g. Skype for Business, Microsoft Teams, Zoom, etc.) At present, many courts provide laptops to magistrates with secure Skype for Business and Microsoft Teams installed.

Remote hearings may be conducted using any of the facilities available. Generally, it could be done by way of an email exchange between the court and the parties, by way of telephone using conference calling facilities, or by way of the court's video-link system, if available. In the specific child related proceedings however, it should be noted that the UN General comment No. 12 (2009) on the right of the child to be heard sets one recommendation in par. 43 – the experience indicates that the situation should have the format of a talk rather than a one?sided examination. Therefore, the use of tools allowing conversational approach, like Skype for Business, BT MeetMe, Zoom, FaceTime or any other appropriate means of remote communication can be considered. If other effective facilities for the conduct of remote hearings are identified, the situation obviously allows for any means of holding a hearing as directed by the court, so there is considerable flexibility.

The timing of the hearing of the child

Naturally, if there are rules in place regarding the timely hearing of the child, in the current situation some adjustments could be accepted. In the domestic systems, when such provisions exist, respective temporary amendments could be a solution to facilitate the activity in these very challenging circumstances.

If we look again at the Coronavirus Act 2020 Guidance on looked-after children and children's hearings provisions, it provides for situations where it will not be practicable for there to be a hearing within three working days (as prescribed by the law), due to the likely shortage of social workers, reporters, decision-makers, children and families to attend an urgent hearing in the new area. As a result, the Act amends the time limit for some particular proceedings involving children up-to seven days. It is duly noted that in order to avoid unnecessary delays, the respective professionals involved should note these extended timescales, and prepare accordingly.

Is the objection by the parties to the hearing being held remotely decisive?

The pandemic situation is very potentially convenient for the parties who seek delays for one reason or another. As an example, the passage of time could

undoubtedly affect the court's decision to assign custody in parental disputes, or as pointed by the ECtHR in Balbino v. Portugal, the length of proceedings relating to children (and especially in child abduction proceedings) acquire particular significance, since they are in an area where a delay might in fact settle the problem in dispute.

The objections that deserve attention would be most likely based on two grounds: health reasons, related or not to COVID-19, and the technical issue of internet access. When we speak about health reasons, the first logical suggestion would be to request medical evidence. Sadly, in the coronavirus situation this is not the case – simply because one can have contracted it without any knowledge or symptoms, which puts the courts in difficult position having in mind the considerable danger if they take the wrong decision. Therefore, it is justified that the judges continue with the proceedings and do not accede to these kinds of applications, but to indicate that the party's health and the resulting ability to engage in the court process would be kept under review.

Regarding internet access, this might arise as a difficult issue. On one side, it is easy to say that the arrangements for the party to engage in the process, as they are currently understood, involve the party being in her/his home and joining the proceedings over the internet, and all that's needed is some basic internet access. It can be also said that the party can go to some neutral venue, maybe an office in local authority premises, a room in a court building, and be with an attorney that they are instructing, keeping a safe socially isolated distance. However, for objective reasons the internet access available might be not sufficient, and this should not lead to a violation of the principle of a fair trial, and the judge should also take these considerations seriously.

How is security and transparency addressed?

This section will briefly touch upon only two of a multitude of issues related to the security and transparency when dealing with remote hearings – the open hearings principle and the recording of the hearing.

Obviously, all remote hearings must be recorded for the purposes of making records of the respective hearing, and it goes without saying that the parties may not record without the permission of the court. Some of the solutions might be recording the audio relayed in an open court room by the use of the court's

normal recording system, recording the hearing on the remote communication program being used (e.g. BT MeetMe, Skype for Business, or Zoom), or by the court using a mobile telephone to record the hearing.

As to the second issue, remote hearings should, so far as possible, still be public hearings. Some of the proceedings concerning children are indeed not public, but this is not the rule. The UK Protocol Regarding Remote Hearings addresses how this can be achieved in times of pandemic: (a) one person (whether judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing a media representative to log in to the remote hearing; and/or (c) live streaming of the hearing over the internet, where broadcasting hearings is authorized in legislation. This way, the principles of open justice remain paramount.

It could be suggested that, in established applications moving to a remote hearing, any transparency order will need to be discharged and specific directions made. In the UK Court of protection remote hearings the authorities are satisfied that, to the extent that discharging the order in such a case engages the rights of the press under Article 10 ECHR, any interference with those rights is justified by reference to Article 10(2), having particular regard to the public health situation which has arisen, and also the detailed steps set out are designed to ensure that the consequences on the rights of people generally and the press in particular under Article 10 are minimized.

III. How to assess if a particular child-related hearing is suitable to take place online?

As noted by Sir McFarlane, whether or not to hold a remote hearing in a contested case involving the welfare of a child is a particularly difficult one for a court to resolve. A range of factors are likely to be in play, each potentially compelling but also potentially at odds with each other. The need to maintain a hearing in order to avoid delay and to resolve issues for a child in order for its life to move forward is likely to be a most powerful consideration in many cases, but it may be at odds with the need for the very resolution of that issue to be undertaken in a “thorough, forensically sound, fair, just and proportionate manner”. The decision to proceed or not may not turn on the category of case or seriousness of the decision, but upon other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the

personalities and expectations of the key family members and, in these early days, the experience of the judge or magistrates in remote working. It is because no two cases may be the same that the decision on remote hearings has been left to the individual judge in each case, rather than making it the subject of binding national guidance.

Therefore, it should be assessed on a case per case basis if a hearing that concerns a child can be properly undertaken over the remote system. Sometimes the proceedings prior to this moment are supporting the judge in allowing the hearing to go remotely – the allegations have been well articulated in documents, they are well known to the parties, the witnesses – members of the medical profession, school staff, social workers – gave or can give their evidence remotely over the video link and for the process of examination and cross-examination to take place. What normally goes wrong is the technology rather than the professional interaction of the lawyers and the professional witnesses. In this sense the case might be ready for hearing and the parties are sufficiently aware of all of the issues to be able to have already instructed their legal teams with the points they to make.

IV. The right of the child to be heard in the context of remote proceedings

It is natural that remote hearings and all means of online communication unavoidably affect the proceedings itself. The current situation, unprecedented as it is and with all the challenges described above, raises the question of specifically how the child should be heard, if at all, and is this an absolute right, considering that providing a genuine and effective opportunity for the child to express their views requires the court to take all measures which are appropriate to the arrangement of the hearing, having regard to the best interests of the child and the circumstances of each individual case?

To explore this right in the light of the COVID-19 pandemic, some background should be provided. As it is pointed in the UN General comment No. 12 (2009) on the right of the child to be heard, the right itself imposes a clear legal obligation on States' parties to recognize it and ensure its implementation by listening to the views of the child and according them due weight. This obligation requires that States' parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child. Something more – in par. 19 it says that *"Article 12, paragraph 1,*

provides that States parties "shall assure" the right of the child to freely express her or his views. "Shall assure" is a legal term of special strength, which leaves no leeway for State parties' discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully implement this right for all children."

The right of the child to be heard is regulated in the same sense in Article 24(1) of the Charter of the Fundamental Rights of the EU and Article 42(2)(a) of Regulation No. 2201/2003 (Brussels II bis). The Hague convention of 25 October 1980 on the Civil Aspects of International Child Abduction also provides in Article 13 that the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Brussels IIa recast (Regulation 1111/2019, in force as of August 2022) pays special attention to the strengthening of the right of the child to express his or her view, reinforcing it with special provision – Article 26 in Chapter III "International child abduction", in compliance with a detailed Recital 39. It states that the court may use "all means available to it under national law as well as the speci?c instruments of international judicial cooperation, including, when appropriate, those provided for by Council Regulation (EC) No 1206/2001" but "in so far as possible and always taking into consideration the best interests of the child" thus retaining some degree of discretion also in this regard.

In Joseba Andoni Aguirre Zarraga v. Simone Pelz (case C-491/10 PPU) however CJEU held that hearing a child is not an absolute right, but that if a court decides it is necessary, it must offer the child a genuine and effective opportunity to express his or her views. It also held that the right of the child to be heard, as provided in the Charter and Brussels II bis Regulation, requires legal procedures and conditions which enable children to express their views freely to be available to them, and the court to obtain those views. The court also needs to take all appropriate measures to arrange such hearings, with regard to the children's best interests and the circumstances of each individual case.

It is worth noting that in some cases the hearing of the child can be conducted indirectly or via representative, or where it is considered as harmful for the child it can be dispensed with altogether. In the case of Sahin v. Germany, on the question of hearing the child in court, the ECtHR referred to the expert's

explanation before the regional court in Germany. The expert stated that after several meetings with the child, her mother and the applicant, he considered that the process of questioning the child could have entailed a risk for her, which could not have been avoided by special arrangements in court. The ECtHR found that, in these circumstances, the procedural requirements implicit in Article 8 of the ECHR – to hear a child in court – did not amount to requiring the direct questioning of the child on her relationship with her father.

So far, the question how the right of the child to be heard is regarded in the remote hearings, that had to take place recently, is not widely discussed. Therefore, at this moment we should draw some conclusions from the available case-law and emergency rules. Naturally, this right itself cannot be waived and the views of children and young people should be taken into account when emergency placements are first made; the decision at any given time must take into account the best interests of the child. The most appropriate approach would be adjusting the available domestic proceedings, and at all times the local authorities should provide pertinent information to inform this decision and the child must be at the center of all decision making, which includes the social work team listening to the child's views.

How this might look in practice? First of all, the children as a rule should be offered the opportunity to join their hearing virtually and securely. Testing and monitoring are crucial in order to get as many children as possible able to attend. Good suggestion would be a letter giving them more information about how they can participate via their tablet laptop/PC or mobile phone, information sheet which will explain how they can join a virtual hearing, instructions to help them with the set up. This should be followed by a test to make sure everyone is prepared for the day of the hearing. In accordance with the domestic procedural rules, information about rights and reminder for the children and young people that they have the right to have a trusted adult, an advocate or lawyer attend the virtual hearing to provide support might be also useful.

However, it for sure would not be possible for every child to join its hearing remotely. In this case, they should still provide their views – e.g. by emailing the information to the local team mailbox and the judge will then ensure this information is given to the respective professionals involved in the procedure.

V. Conclusion

The rapid onset of the Covid-19 pandemic has been a shock to most existing justice systems These are times unlike any other, and extraordinary measures are being taken across the world. Many of us are already asking ourselves – why not earlier? And with those changes in place, can things go back to the way they were? Should a regular framework for the development of virtual courtrooms and remote hearings that enables all concerned, including the judges, to operate remotely and efficiently be created, and was it due even before the pandemic? There are no easy answers – but it is well-worth analyzing the options of applying and making full use of the existing online tools and resources in child-related proceedings in the future. Well summarized by Justice A. Pazaratz in *Ribeiro v Wright*: "None of us have ever experienced anything like this. We are all going to have to try a bit harder – for the sake of our children."

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