Opening Pandora's Box – The interaction between human rights and private international law: the specific case of the European Court of Human Rights and the HCCH Child Abduction Convention

Written by Mayela Celis

It is undeniable that there is an increasing interaction between human rights and private international law (and other areas of law). This of course adds an additional layer of complexity to private international law cases, whether we like it or not. Indeed, States can be sanctioned if they do not fulfill specific criteria specified by the European Court of Human Rights (ECtHR). Importantly, the European Convention on Human Rights has been considered to be an instrument of European public order (*ordre public*), to which 47 States are currently parties.

I have recently published an 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*" and then click on "*Descargar el archivo PDF*", currently pre-print version, published online in March 2020.

Below I include briefly a few highlights and comments.

As its name suggests, this article explores the controversial role of the ECtHR in the interpretation of the HCCH Child Abduction Convention. It analyses two judgments rendered by the Grand Chamber: *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07) and *X v. Latvia* (Application no. 27853/09). And then it goes on to analyse three more recent judgments and in particular, whether or not they are in line with *X v Latvia*.

The article seeks to clarify the applicable standard that should be applied in child abduction cases as there has been some confusion as to the extent to which *Neulinger* applies and the impact of *X v. Latvia*. Indeed *Neulinger* seemed to suggest that courts should conduct a full examination of the best interests of the child during child abduction proceedings, which is blatantly wrong. *X v. Latvia* clarifies *Neulinger* and provides a detailed and thoughtful standard to avoid conducting "an in-depth examination of the entire family situation and of a whole series of factors…" but at the same time upholds the human rights of the persons involved and strikes, in my view and as noted by the Court, a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order.

The article then examines three recent judgments rendered by several chambers of the ECtHR (not the Grand Chamber): *K.J. v. Poland* (Application no. 30813/14), *Vladimir Ushakov v. Russia* (Application no. 15122/17), and *M.K. v. Grèce* (Requête n° 51312/16). *M.K. v. Grèce*, which was rendered in 2018, has put the ECtHR in the spotlight again. Surprisingly, this precedent has ignored the standard established in *X v. Latvia* and has followed only *Neulinger*. The precedents of the Grand Chamber of the ECtHR are binding on the chambers so it is stupefying that this could happen. Nevertheless, I have concluded that the outcome of the case is correct.

By way of conclusion, the legal community seems to be divided as to whether or not *X v Latvia* sets a good precedent. Human rights lawyers seem to regard this precedent favourably, whereas private international law lawyers seem to be more cautious. This article concludes that *X v. Latvia* was correctly decided for several reasons based on Article 13(1)(b), Article 3 of the HCCH Child Abduction Convention and the need to provide for measures of protection. Both human rights and private international law can interact harmoniously and complement each other. The efforts of the human rights community to understand the Child Abduction Convention are evident in the change of direction in *X v. Latvia*. Both human rights lawyers and private international law lawyers should make an effort to understand each other as we have a common goal and objective: the protection of the rights of the child.

Cross-border Corona mass litigation against the Austrian Federal State of Tyrol and local tourist businesses?

While the Corona Crisis is still alarmingly growing globally, first movers are apparently preparing for mass litigation of ski tourists from all over Europe and beyond against the Austrian Federal State of Tyrol and local businesses. The Austrian Consumer Protection Association (*Österreichischer Verbraucherschutzverein, VSV,* https://www.verbraucherschutzverein.at/) is inviting tourists damaged from infections with the Corona virus after passing their ski holidays in Tyrol, in particular in and around the Corona super-hotspot of Ischgl, to enrol for collective redress against Tyrol, its Governor, local authorities as well as against private operators of ski lifts, hotels, bars etc., see https://www.verbraucherschutzverein.at/Corona-Virus-Tirol/.

In Austria, no real "class action" is available. Rather, the individual claimants need to assign their claims to a lead claimant, often a special purpose vehicle (in this case the Association) which then institutes joint proceedings for all the claims. For foreign claimants who consider assigning their claims to the Association, the Rome I Regulation will be of relevance.

According to Article 14 (1) Rome I Regulation the relationship between assignor and assignee shall be governed by the law that applies to the contract between the assignor and assignee under the Regulation. So far, however, there seem to be only pre-contractual relationships between the Austrian Association inviting "European Citizens only" (see website) to register for updates by newsletters. These pre-contractual relationships will be governed by Article 12 (1) Rome II Regulation. "[T]he contract" in the sense of that provision will be the one between the Association and the claimant on the latter's participation in the collective action which may, but does not necessarily, include the contract on the

assignment of the claim and its modalities. It is the Association that is the "service provider" in the sense of Article 4 (1) lit. b Rome I Regulation. Its habitual residence is obviously in Austria, therefore the prospective contract as well as the pre-contractual relations to this contract will be governed (all but surprisingly) by Austrian law. Art. 6 does not come into play, since the service is to be supplied to the consumer exclusively in Austria, Article 6 (4) lit. a Rome I Regulation.

According to Article 14 (2) Rome I Regulation, the law governing the assigned claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged. As far as the Rome II Regulation is applicable *ratione materiae*, i.e. for claims against the businesses, its Article 4 will select (again all but surprisingly) Austrian law – no "distance delict" as the potentially delictual act and its harmful effects on the claimant's health both took place in Austria. Follow-up damages in other states are irrelevant for the law-selecting process.

In respect to delictual claims against Tyrol and its public entities and authorities, Recital 9 of the Rome II Regulation reminds us that, with a view to Article 1 (1) Sentence 2 of the Regulation (no applicability to *"acta iure imperii"*), "[c]laims arising out of *acta iure imperii* should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation." Rather, an autonomous rule of choice of law for liability of Austrian public entities will apply, and this rule will certainly select Austrian law.

There are certain advantages in bundling a multitude of claims in the "Austrian" way: First, the high amount of damages from the collection of claims allows seeking third-party funding. Second, costs for both the court and the lawyers are structured on a diminishing scale. While the collective proceedings are pending, prescription periods do not proceed in respect to claims participating in the joint action. And of course, the "class" of these active claimants has much more weight for negiations than an individual would have.

On the other hand, the jurisdiction at the consumer's domicile under Art. 18 Brussels Ibis Regulation will no longer be available, once the consumer has assigned his or her claim to another, e.g. a lead claimant. However, this is only

relevant in respect to the contractual claims of consumers and only as long as the conditions for directing one's business at the consumer's domicile under Article 17 (1) lit. c Brussels Ibis Regulation are fulfilled. The claims in question here mainly ground in non-contractual claims against public entities and private businesses, and they seem to be envisaged as independent civil follow-on proceeding after successful criminal proceedings – if these should ever result in convictions.

The allegation is that the respective public agencies and officers did not shut down the area immediately despite having gained knowledge about first Corona infections in the region, in order to let the tourism businesses go on undisturbed. These allegations are extended to local businesses such as ski lifts, hotels and bars etc., once they gained knowledge about the Corona risk. It will be an interesting question (of the applicable Austrian law of public and private liability for torts) amongst many others (such as those on causality) in this setting to what extent there is a responsibility of the tourist to independently react adequately to the risk, of course depending on the time of getting him/herself knowledge about the Corona risk. If there is such responsibility on the part of the damaged, the next question will be whether this could affect or reduce any tortious liability on the part of the potential defendants. Overall, all of that appears to be an uphill battle for the claimants.

Speaking of responsibilities, a more pressing concern these days is certainly how the European states, in particular the EU Member States and the EU itself, might organise a more effective mutual support and solidarity for those regions and states that are most strongly affected by the Corona Pandemic, in particular in Italy, Spain and France, these days. Humanitarian and moral reasons compel us to help, both medically and financially. Some EU Member States have started taking over patients from neighbouring countries while they are still disposing of capacities in their hospitals, but there could perhaps be more support (and there could have perhaps been quicker support). The EU has a number of tools and has already taken some measures such as the Pandemic Epidemic Purchase Programme (PEPP) by the European Central Bank (ECB). The European Stability Mechanism (ESM) could make (better?) use of its precautionary financial assistance via a Precautionary Conditioned Credit Line (PCCL) or via an Enhanced Conditions Credit Line (ECCL). Further, the means of Article 122 TFEU should be explored, likewise the possibilities for ad hoc-funds under Article 175

(3) TFEU. The European Commission should think about loosening restrictions for state aids.

All of these considerations go beyond Conflict of Laws, and this is why they are not mine but were kindly provided (all mistakes and misunderstandings remain my own) in a quick email by my colleague and expert on European monetary law, Associate Professor Dr. René Repasi, Erasmus University of Rotterdam, https://www.eur.nl/people/rene-repasi (thanks!).

However, cross-border solidarity is a concern for all of us, perhaps in particular for CoL experts and readers. Otherwise, a "European Union" does not make sense and will have no future.

Opinion of Advocate General Tanchev in the case C-249/19, JE: Application of the law of the forum under Article 10 of the Rome III Regulation

In his **Opinion** delivered today, Advocate General Tanchev presents his take on Article 10 of the Regulation No 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (commonly referred to as Rome III Regulation), under which '[w]here the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply'.

More specifically, the Opinion deals with the question lodged before the Court of Justice by a Romanian court, concerning the interpretation of the expression 'the law applicable pursuant to Article 5 or Article 8 [the Rome III Regulation] makes no provision for divorce'.

By its question, the referring court is, in essence, asking whether Article 10 of the Rome III Regulation must be interpreted in a strict sense, meaning that the recourse to the law of the forum can be made only where the foreign law designed as applicable does not recognize any form of divorce, or more broadly – the law of the forum should be applied when the foreign law designed as applicable under the Regulation permits a divorce, but does so in 'extremely limited circumstances involving an obligatory legal separation procedure prior to divorce, in respect of which the law of the forum contains no equivalent procedural provision'.

Even though the requests for a preliminary ruling concerning Article 10 of the Regulation were already presented in the cases **C-281/15, Sahyouni** and **C-372/16, Sahyouni II** (yet, in a different context, relating to the second limb of Article 10 – discrimination through lack of equal access to divorce), ultimately this provision has not been yet interpreted by the Court of Justice. Therefore, alongside the Opinion of AG Saugmandsgaard Øe delivered in the case **C-372/16, Sahyouni II**, which also addresses this provision, Opinion of AG Tanchev is certainly worthy of attention. While the very question referred to the Court did not seem to pose a particular difficulty, these are the supplementary considerations on the consequences of the proposed interpretation of Article 10 that certainly make this Opinion an interesting read.

Legal and factual context

Seized of a petition for divorce, the first instance court established the jurisdiction of the Romanian courts under Article 3(1)(b) of the Brussels II Regulation due to the common nationality of both spouses.

Since the parties seemingly had not chosen the law applicable to divorce and had been habitually resident in Italy, the first instance court considered that, pursuant to Article 8(a) of the Rome III Regulation, it is the Italian law that governs the grounds of divorce.

Yet, this court observed that, according to the Italian law, the dissolution of marriage can be pronounced only where there had been a legal separation of the spouses and at least three years have passed between this separation and the time at which the court have been seized by the applicant. It seems that in this regard the first instance court referred itself to Article 3(2)(b)of the Law No 898 of 1 December 1970 (Disciplina dei casi di scioglimento del matrimonio), mentioned in the Opinion presented by AG Bot in case **C-386/17, Liberato** (for multiple linguistic versions of this provision see point 20 of this Opinion).

However, the first instance court considered that since no provision is made for legal separation proceedings under Romanian law, those proceedings must be conducted before the Italian courts and therefore any application to that effect made before the Romanian courts is inadmissible.

The applicant lodged an appeal against the decision of the first instance court. In those circumstances, the second instance court presents its request for a preliminary ruling.

Opinion of Advocate General

According to the Opinion of AG Tanchev, it is manifest that Article 10 of the Rome III Regulation calls for a **strict interpretation in the sense that the expression 'where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce' relates only to situations in which the applicable foreign law does not recognise the institution of divorce** (see, most notably, point 19 of the Opinion). In order to reach this conclusion, the Opinion delves into literal, systemic, historical and teleological interpretation of the provision in question.

At point 37, the Opinion indicates that '[the] Italian law, as the applicable law, does not prohibit divorce; it merely subjects it to certain requirements, which is within its competence regarding its substantive family law'. Therefore, in the present case, there is no room for Article 10 of the Rome III Regulation to apply.

Yet, as mentioned in the introduction, the analysis does not stop here. At points 59 et seq. **the Opinion addresses the consequences of the advocated interpretation of Article 10.**

At points 62 and 63 the Opinion argues in following terms that the national courts seized of a petition for divorce **could have recourse to 'adaptation'** (see also point 68) :

62. First of all, pursuant to Section 1 of Chapter II of [the Brussels II bis Regulation], where the court of a Member State is seized of an application for divorce, it cannot decline jurisdiction (contrary to a court seized in the area of parental responsibility, which has discretion to address the courts of another Member State, under Article 15 of that regulation) and it is obliged to rule on that application for divorce.

63. I agree with the view of the German Government that the Member States participating in the enhanced cooperation implemented by [the Rome III Regulation] must ensure that both divorce and legal separation may be granted by their courts. Therefore, instead of considering that legal separation must first be established or ordered before the Italian courts, the Romanian courts should, to my mind, allow for such a procedure and apply, by analogy, national procedural rules relating to divorces or even adapt foreign (Italian) procedural rules relating to legal separation (in conjunction with Romanian national rules). Otherwise, the provisions of [the Rome III Regulation] would be partially ineffective.

Against this background, at points 65 and 66 the Opinion refers to the solution proposed by the Commission and favoured also by Advocate General:

65. By way of a concrete solution in the present case, the Commission proposed that the court seized apply the substantive conditions foreseen by the applicable law and forgo the application of any procedural conditions foreseen by that law, in circumstances where the procedural law of the forum does not allow for those procedural conditions to be met. Therefore, if, in a particular case, the substantive conditions for a legal separation order are fulfilled, the forum court may remedy the fact that that court itself cannot grant such an order by waiving that foreign procedural condition.

66. I concur. In my view, such a solution would be balanced and would correspond to the implicit intention of the Union legislature. First, it would not unduly encourage forum shopping, because it would require the substantive conditions of the applicable law to be fulfilled. The applicant would not be able to avoid those conditions by seizing another court under the very generous rules of [the Brussels II Regulation] and by asking for his or her own law to be applied (parties can avoid those conditions quite easily if they agree on the choice of the law of the forum).

On a side note…

It is although distant from the context of the present request for a preliminary ruling but nonetheless interesting to notice some points that may be inspirational in others contexts and in relation to the issues not covered by this request:

*• At point 69, while expressing itself in favour of 'adaptation', the Opinion states 'while [the Rome III Regulation] does not provide specifically for such an adaptation, neither does it expressly prohibit it'. In this regard, the Opinion draws inspiration from the Succession Regulation and from the twin Regulations Nos 2016/1103 and 2016/1104. It is yet to be seen **whether these considerations herald the recognition of adaptation as a general (and non-codified) instrument of EU private international law** and, therefore, such 'adaptation' could occur also in relation to, i.e., the Rome I and II Regulations.*

*• It is worth mentioning that it can be argued that, at points 62 and 63, the Opinion acknowledges the existence of a **link between, on the one hand, the obligation to exercise jurisdiction established under the Brussels II Regulation and, on the other hand, a substantive effect that should be (at least potentially) achievable under the law designed as applicable under Rome III Regulation**. It states 'pursuant to [the Brussels II Regulation], where the court of a Member State is seized of an application for divorce, it cannot decline jurisdiction […] and it is obliged to rule on that application for divorce […]'. Then '[the Member States bound by the Rome III Regulation] must ensure that both divorce and legal separation may be granted by their courts'. If anything, it will be interesting to follow the discussion on the implications of such interpretation of these Regulations.*

• Before delving into the consequences of the proposed interpretation of Article 10 of the Rome III Regulation, at points 59 to 61, the Opinion clarifies that the considerations relating to that issue are necessary 'in order to provide the national court with an appropriate [and useful] answer for the purpose of the application of [EU] law in the dispute before it'.Even though these considerations do not seem vital to answer the preliminary question (what makes them even more worthy of attention – if this is the case, they do not have to be necessarily addressed in the upcoming judgment), they may also be relevant in this as well as in other contexts for a very specific reason.

Before the first instance court, the applicant seeking divorce invoked Article 12 of the Rome III Regulation. The applicant claimed that the application of Italian law is manifestly incompatible with the public policy of the forum, thus making it necessary to exclude the application of the foreign law (point 15 of the Opinion).

If Article 10 of the Rome III Regulation must be considered lex specialis that overrides Article 12, the fact that the former provision is not relevant in the present case could make space for the latter to apply. One could wonder – as the appellant seemingly did – whether a requirement provided for in by a foreign law could be disapplied as contravening the public policy of the forum. The Opinion seems to provide some guidance relating to that issue. In fact, it addresses the public policy exception, yet in a different context.

At point 63, the Opinion provides that 'the Member States participating in the enhanced cooperation implemented by [the Rome III Regulation] must ensure that both divorce and legal separation may be granted by their courts'. At point 64 it argues that 'the referring court cannot refuse to rule on the application in the main proceedings on the basis of Article 12 of the above regulation (which is reserved for exceptional cases) on the ground that its national law does not provide for legal separation or for procedural rules for legal separation'.

Leaving aside the question whether it could be inferred from the lack of procedural scheme to pronounce legal separation that granting a divorce without the separation itself being pronounced is (or could be) contrary to the public policy of the forum (this is, of course, a distinct issue relating to the law of the forum and to the limits of the concept of public policy under the Rome III Regulation), the Opinion seems to recognize the aforementioned lex specialis relation. However, it also seeks to prevent the excessive reliance on the public policy exception with reference to a simple maladjustment of the law of the forum.

*• It seems that the doubts of the referring court result from the fact that the Italian law imposes a requirement that cannot be fulfilled under the Romanian law.Indeed, on the one hand, according to the **information** provided by the database managed by European Judicial Network, '[i]n Romanian law there is no concept of 'legal separation' but only of 'de facto separation' and the judicial division of property. This is a situation that must be proven before the court. In the event of the de facto separation having lasted for at least two years, this is a reason for judicially issuing a divorce.'On the other hand, the Italian law requires a judicial separation to be declared by a judgment that has acquired the force of law or a consensual separation that has been judicially confirmed (Article 3(2)(b)of the Law No 898 of 1 December 1970 read in the light of Article 150 of the Italian Civil Code).*

• At point 64, the Opinion seems to take the view that the requirement provided for in the Italian law according to which a separation has to be declared by a judgment or judicially confirmed is a 'procedural condition'. It will be interesting to see the evolution of case law and literature as to the classification of similar requirements in different contexts than that of Article 3(2)(b)of the Law No 898 of 1 December 1970 read in the light of Article 150 of the Italian Civil Code.The question remains open whether such other requirements are also of procedural nature (or, alternatively, even though it might ultimately boil down to the question of terminology: of formal nature or of substantive nature, yet they can be fulfilled only via the procedural framework of the State that imposes them and of the other States that provide for a judicially-pronounced separation, if one takes into account the recognition of a judgment on separation within the divorce proceedings) and, if they are truly of procedural nature, do they fall within the scope of the law designed as applicable under the Rome III Regulation.

Plaintiff’s Application for Leave to Proceed when no Appearance by Defendant: Recent Developments in New South Wales Australia

If a defendant is not present in Australia, **Uniform Civil Procedure Rules** ("UCPR") of New South Wales provides that service outside of Australia is permitted if the plaintiff's claim falls within UCPR Schedule 6 or if a leave is granted under UCPR rule 11.5. If a defendant does not respond within 42 days after being served successfully (rule 11.8), the plaintiff must apply for leave to proceed (rule 11.8AA). A defendant can challenge the jurisdiction of the court and apply to set aside service (rule 12.11). The court has discretion to decide whether to assume jurisdiction (rule 11.6).

AGC Capital Securities v Jaijaifu Modern Agriculture (HK) Limited [2019] NSWSC 62, a case decided by NSW Supreme Court in 2019 provides a test to determine a plaintiff's application for leave to proceed when no appearance by defendant. The test includes four components:

1. Whether the defendant has been properly served;
2. Whether the claim in the originating process falls within UCPR Schedule 6;
3. Whether it be demonstrated that there is a real issue to be determined (this requirement as being that the plaintiff has an arguable case being one that would be sufficient to survive an application for summary judgment); and
4. Whether this Court is not a clearly inappropriate forum.

The same test is adopted by ***Yoon v Lee [2017] NSWSC 1338*** and ***Rossiter v. Core Mining [2015] NSWSC 360***.

The application for leave in *AGC Capital Securities, Yoon,* and *Rossiter* is not related to UCPR r 11.5. r 11.5 is to determine whether a leave to serve outside of Australia should be granted. However, these three cases are cases where service outside of Australia has been completed. They are concerned with leaves under r 11.8AA, which provides:

UCPR 11.8AA Leave to proceed where no appearance by person

(1) If an originating process is served on a person outside Australia and the person does not enter an appearance, the party serving the document may not proceed against the person served except by leave of the court.

(2) An application for leave under subrule (1) may be made without serving notice of the application on the person served with the originating process.

R11.8AA does not specify a test. In Australia, the leading case for leave to proceed where no appearance by defendant is ***Agar v Hyde [2000] HCA 41***. In *Agar,* two rugby players at the NSW brought a personal injury claim against the International Rugby Football Board and several national representatives at the Board, alleging that the Board and its representatives own a duty of care for the plaintiffs. The defendants were served outside of Australia and applied to set aside the service. *Agar* holds that different tests should be adopted for the plaintiff's application for leave to proceed where no appearance by defendant and for the defendant's application to set aside the service.

According to *Agar,* the test for the plaintiff's application for leave to proceed when no appearance by defendant should focus on the jurisdictional nexus between the plaintiff's pleading and the forum and should not consider the merits of the case. The High Court considers:

"is the claim a claim in which the plaintiff alleges that he has a cause of action which, according to those allegations, is a cause of action arising in the State? The inquiry just described neither requires nor permits an assessment of the strength (in the sense of the likelihood of success) of the plaintiff's claim." (*Agar*, para 50)

The Court of Appeal required the plaintiff to establish a good arguable case. However, the High Court held that "[t]he Court of Appeal was wrong to make such an assessment in deciding whether the Rules permitted service out." (*Agar,* para 51) Instead, the High Court only requires the plaintiff to establish a *prima facie* case, saying

"[t]he application of these paragraphs of r1A depends on the nature of the allegations which the plaintiff makes, not on whether those allegations will be made good at trial. Once a claim is seen to be of the requisite kind, the proceeding falls within the relevant paragraph or paragraphs of PT 10 r 1A, service outside Australia is permitted, and prima facie the plaintiff should have leave to proceed." (*Agar,* para 51)

PT 10 r 1A is functionally equivalent to the current UCPR Sch 6 although their contents differ to some extent. In contrast, the test of "real issue to be determined" held in *AGC Capital Securities, Yoon, and Rossiter* is on the merits of the case, which is excluded by *Agar.*

Regarding the defendant's application to set aside the service, *Agar* adopts three common grounds:

• Service is not authorized by the rules (ie, does not fall within UCPR Sch 6 and not otherwise authorised),

• The Court is an inappropriate forum,

• The claim has "insufficient prospects of the success to warrant putting an overseas defendant to the time, expense and trouble of defending the claims." This requires the Court to assess the strength of the claim and the test is the same for summary judgment lodged by a defendant served locally.

These grounds are not exhaustive. For example, the defendant can apply to set aside the service based on an exclusive jurisdiction clause favouring a foreign court.

However, *AGC Capital Securities*, *Yoon,* and *Rossiter* do not concern the defendant's application to set aside the service. Further, the test of "real issue to be determined" in *AGC Capital Securities, Yoon,* and *Rossiter* is not the same as the "insufficient prospects of the success" in *Agar*. The test of "insufficient prospects of the success" has been embedded in UCPR 11.6(2)(c), while *AGC Capital Securities*, *Yoon*, and *Rossiter* are not concerned with this provision. They are brought on r11.8AA.

Comparing *Agar* on one hand and *AGC Capital Securities*, *Yoon,* and *Rossiter* on the other, the latter cases consider *forum non conveniens* when determining the plaintiff's application to proceed where no appearance by defendant. Is this consistent with *Agar?* This issue should be discussed from two aspects. First, *Agar* did not consider *forum non conveniens* under a clearly inappropriate forum doctrine because parties did not raise this issue. Therefore, it may argue that this issue was not considered by High Court in *Agar*. Second, *Agar* limits courts' consideration to jurisdictional nexus with the forum when determining the plaintiff's application to proceed where no appearance by defendant. Jurisdictional nexus refers to whether the service is authorized by the UCPR. However, broadly, jurisdictional nexus may cover *forum non conveniens* considerations.

Further, *AGC Capital Securities*, *Yoon*, and *Rossiter* seem to confuse the test for the plaintiff's application for leave to proceed where no appearance by defendant with the test for the defendant's application to set aside the service. The test of "real issue to be determined" requires the court to examine the merits of the plaintiff's claim. This is permitted when determining the defendant's application to set aside the service. However, when determining the plaintiff's application for leave to proceed where no appearance by defendant, *Agar* says the court should not assess the strength of the plaintiff's claim. Further, the test of "real issue to be determined" is not equivalent to the test of "insufficient prospects of the success" decided by *Agar* and embedded in UCPR r 11.6.

Could *AGC Capital Securities*, *Yoon*, and *Rossiter* be justified on policy grounds? A proposed argument is that leave to proceed involves leave, which requires an exercise of discretion; and providing leave to proceed in circumstances where there is "no real issue" would be a waste of limited court resources. However, the difficulty of this argument is that it conflates the leave to proceed with the motion for a summary judgment. If the plaintiff only asks a leave to proceed without applying for a summary judgment, there is no ground for the court to consider the test of "no real issue" *sua sponte*.

Could *AGC Capital Securities*, *Yoon*, and *Rossiter* be distinguished from *Agar?* In both *Yoon* and *Rossiter,* the court issued a summary judgment for the plaintiff. In *AGC Capital Securities*, the court directed the plaintiff to apply for a default judgment. *AGC Capital Securities, Yoon,* and *Rossiter* are proceedings where the defendants make no appearance. However, *Agar* is a proceeding where the defendant applied to set aside the service. Although *Agar* considered the test for the plaintiff's application to proceed where no appearance by defendant, it did so for the purpose of distinguishing this test from the test for the defendant's application to set aside the service. Therefore, in this aspect, it may argue that *AGC Capital Securities, Yoon,* and *Rossiter* are distinguishable from *Agar*, because they are the cases where the plaintiff applied for both a leave and a summary judgment. Therefore, the real issue for *AGC Capital Securities*, *Yoon,* and *Rossiter* is that the court conflated the test for the plaintiff's application to proceed where no appearance by defendant and the test for summary judgment.

AGC Capital Securities, Yoon, Rossiter, and *Agar* also bring up another question: why is the test for a plaintiff's application for leave when no appearance by defendant and the test for a defendant's application to set aside the service are different? Or should the tests be the same? In the plaintiff's application for leave to proceed, is the court supposed to take care of the non-responding defendant? The answer is negative partly because the common-law court is not an inquisitorial court in civil-law countries. More important, if the plaintiff only asks a leave to proceed without applying for a summary judgment, there is no ground for the court to consider whether there is real issue to be determined in the plaintiff's claim.

State immunity in global

COVID-19 pandemic:

State immunity in global COVID-19 pandemic: Alters, et. al. v People's Republic of China, et. al.

By Zheng Sophia Tang and Zhengxin Huo

1. Background

Four American citizens and a company filed the class-action against Chinese government for damages suffered as the result of the COVID-19 pandemic. None of the named plaintiffs were infected by the COVID-19 but they suffered financial loss due to the outbreak. The defendants include the People's Republic of China, National Health Commission of PRC, Ministry of Emergency Management of PRC, Ministry of Civil Affairs of PRC, Government of Hubei Province and Government of the City of Wuhan. The plaintiff argued that Chinese government knew COVID-19 was dangerous and capable of causing a pandemic yet covered it up for their economic self-interest and caused injury and incalculable harm to the plaintiffs. (**here**)

2. State Immunity and US Courts' Jurisdiction

The Defendant is a sovereign state and enjoys immunity from jurisdiction of other countries. Most countries, like the U.S., adopt the restrictive immunity approach, and apply exception to the immunity of a state when the disputed state's act, for example, relates to commercial activities or commercial assets, or constitutes tort. The Foreign Sovereign Immunities Act (FSIA) of 1976 provides the sole basis for obtaining jurisdiction on an action against a foreign state. (Argentine Republic v Amerada Hess Shipping Corp, 488 US 428) Plaintiffs relied on the Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. §§1602 et seq. §1605 states:
"(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
…
(5) …money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
(B)any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;"

This is not the first time for China to be sued in the US court under §1605(a)(5) of the FSIA (for example, see Youming Jin et al., v Ministry of State Security et al., 475 F.Supp. 2d 54 (2007); Jin v Ministry of State Security, 557 F.Supp. 2d 131 (2008); Walters v Industrial and Commercial Bank of China, 651 F.2d 280 (2011)), but given the impact of COVID-19 this case probably is the most influential one. The purpose of this provision is to provide the victim the right to claim damages against a foreign state for tortious activities that may be legalised by the foreign law. The U.S. court thus will apply the local law to interpret this provision. Some crucial concepts, such as "tortious act" and "discretionary function", are interpreted by the relevant US law. (Doe v Federal Democratic Republic of Ethiopia, 189 F.Supp. 3d 6 (2016)) However, since the FSIA is a unilateral domestic statute with clear impact in the foreign sovereign and international comity, it is inappropriate to apply the U.S. law, as the national law of a state of equal status, to determine if the foreign state has committed tort. This approach impliedly grants the U.S. and U.S. law the superior position over foreign states and foreign law. If the FSIA aims to protect humanity and basic rights of individuals that are universally recognised and protected, an international law standard instead of U.S. one should be more appropriate.

Anyway, although the U.S. has adopted the restrictive immunity approach and the U.S. standard to protect the tort victim against foreign government, this exception is applied with a high threshold, making the jurisdiction hurdle difficult to cross. Firstly, the alleged tort or omission must occur in the U.S. The Supreme Court in Argentine Republic v Amerada Hess Shipping, 488 US 428 (1989) articulated the "entire tort" rule, holding that the non-commercial tort exception "covers only torts occurring within the territorial jurisdiction of the United States" (Argentine v Amerada, 441) "Entire tort" means only when both tort action and damage occur in the US, jurisdiction may be asserted. (Cabiri v Government of Ghana, 165 F.3d 193 (2d Cir. 1999) Even if the damage caused by COVID-19 occurred in the U.S., the alleged tort conduct of Chinese government were conducted exclusively out of the territory of the U.S. Arguably, the Supreme

Court did not consider the situation where tort actions abroad may causing damages in the US in its 1989 judgment. However, there is no authority support extension of jurisdiction to cross-border tort.

Secondly, pursuant to the common law on tort, the plaintiffs should prove the defendants had a duty of care, breached this duty, and the breach caused the foreseeable harm. Chinese government undoubtedly owes the duty of care to Chinese citizens and residents. Does Chinese government owe any duty to non-residents? Such a duty cannot be found in Chinese domestic law. Relevant duties may be found in international conventions. Art 12 of the International Covenant on Economic, Social and Cultural Rights states a state member should recognise the right of everyone to enjoy the highest standard of health and should take steps necessary for "(t)he prevention, treatment and control of epidemic, endemic, occupational and other diseases". (Art 12(2)(c)) This duty applies to nationals and non-nationals alike. (Art 2(2)) However, none of the named plaintiffs in this suit were infected by COVID-19. The damage is sought for the damage to their commercial and business activities instead of physical or mental health. Furthermore, the International Health Regulation 2005 provides the state parties international obligations to prevent spreading of disease, such as thee duty to notify WHO of all events which may constitute a public health emergency of international concern within its territory within 24 hours of assessment of public health information (Art 6(1)) and sharing information (Art 8), but these obligations are not directly owed to individuals and cannot be directly enforced by individuals in ordinary courts. It is thus hard to argue Chinese government owes the plaintiff a duty of care.

Even if the plaintiffs seek damages for personal injury. It is difficult to prove China has breached the duty and the breach "caused" the COVID-19 outbreak in the US or other part of the world. Since COVID-19 is a new virus with many details remaining unknown, it takes time to truly understand the virus and be able to contain the spread of the disease. Therefore, when the first case of "a mysterious pneumonia" was discovered in Wuhan in December 2019, there was no enough knowledge and information to piece together an accurate picture of a yet-to-be-identified new virus, let alone to predict its risk of quick spreading and the later global pandemic. After the first case was identified on 31 December 2019, Wuhan airport started to screen passengers from 3 Jan 2020, WHO issued travel restriction instruction on 5 Jan, and COVID-19 was only identified on 7 Jan.

On 8 Jan, the first suspected case was reported in Thailand. It shows that the Chinese government responded quickly and the virus spread out of China before enough information was collected to understand it. After the seriousness of COVID-19 was confirmed, China has adopted the most restrictive measures, including lockdown the City of Wuhan and put the whole country under full or partial quarantine to contain the disease, which was a critical move to slow the spread of the virus to the rest of the world by two or three weeks. It is hard to argue that Chinese government has breached the duty. It is even harder to claim that the conduct of Chinese government caused the outbreak in the US. US confirmed the first case on 21 Jan, evacuated citizens out of Wuhan on 26 Jan and started visa travel ban on Chinese travellers on 8 Feb. Only 10 cases were confirmed in the US by 10 Feb. It suggests that the later outbreak in the US was not caused by the Chinese government. As of now, China is the only country in the whole world which has brought the COVID-19 pandemic back under control.

Finally, a foreign state does no loss immunity under §1605(a)(5) of the FSIA for discretionary conducts. The discretion shield aims to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. The exception … protects only governmental actions and decisions based on considerations of public policy." (Berkovitz v US, 486 U.S. 531, 546-37) Discretion is assessed by a two-limb test. Firstly, if the defendant followed any statute, regulation, or policy specifically prescribing a course of action, the conduct was non-discretionary. Secondly, if, in the absence of regulatory guide, the defendant's decision was grounded in social, economic, or political goals, such an action is deemed the exercise of discretion. (Berkovitz, 531) An exercise of power contrary to regulatory guidance is not shielded by the discretion exemption. (Doe v Ethiopia, 26) Measures adopted to prevent epidemic are largely discretion-based, which closely related to the local economy and culture.

3. Likely Response from China

As mentioned above, it is not the first case that China was sued before an American court; therefore, the likely response from China can be predicted. A general judgment is that the Chinese government will reiterate its position in case of need that it will accept no suit against it at a domestic American court, and China will not enter into appearance before the American court.

Unlike the U.S., China is one of the few countries that insist on absolute immunity approach. This has been clearly affirmed by the continuous assertion of absolute immunity by its central government in various occasions. (Russell Jackson et al. v People's Republic of China, 794 F.2d 1490, 1494 (11th Cir. 1986); Memorandum sent by the Chinese Embassy in Washington, DC, in Morris v. People's Republic of China, 478 F. Supp. 2d 561 (S.D.N.Y. 2007). It is worth mentioning that on 14 September2005, the then Chinese Foreign Minister signed the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (not yet in force), which is understood by some observers to be a signal that China is switching to endorse the restrictive approach in relation to the application of the principle of state immunity. Nonetheless, it is still too early to conclude that China has abandoned the absolute doctrine, and has chosen to embrace the restrictive doctrine, insofar as the Standing Committee of the NPC has not ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property so far, and there is no signal to suggest the NPC should do so in the foreseeable future.

In this light, it can be predicted that China will argue that it enjoys immunity from jurisdiction of domestic American court. To be more specific, if the U.S. District Court for the District of Southern Florida authorized the summons directed to the Defendant, China's possible response may be analysed as follows, depending on specific means of the service of process.

Firstly, if counsel to the Plaintiffs submitted the summons to the Chinese government by mail, a common practice of American lawyers, the Chinese government may choose to ignore it. Service in United States federal and state courts on foreign sovereigns and their agencies and instrumentalities is governed primarily by the FSIA. Since there is no special agreement for service of process between China and the U.S., pursuant to the FSIA, the Hague Service Convention to which both countries are party is the applicable instrument in this case. It is worth noticing that upon accession and ratification of the Hague Service Convention, China notified the Hague Conference on Private International Law of its objection, in accordance with Article 10, sub-paragraph (a) of the Convention, to service of process via postal channels; therefore, service by counsel to the Plaintiffs of a summons on the Defendant via mail will not be effective. Hence, ignoring the request advanced by counsel to the Plaintiffs is the most reasonable option for China.

Second, if the summons is served on the Chinese government through diplomatic channels, China will choose to turn it down by resorting to the Hague Service Convention. Pursuant to Article 13 of the Hague Service Convention, where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security. As China insists on absolute immunity approach, it is logic that China will refuse the request advanced by counsel to the Plaintiffs and returned the documents by Article 13 of the Hague Service Convention.

Last, but not least, as the present development suggests that the U.S. government is blaming China for the spread ofthe COVID-19, accusing China of delaying America's response, China would probably deem the lawsuit as a part of the American smear campaign to blame it. The possibility that China responds to this case via legal measures is further reduced. Therefore, we submit that there is a big chance that China may not enter into appearance before the court in Florida and would raise diplomatic protest.

Italian Self-Proclaimed Overriding Mandatory Provisions to Fight Coronavirus

By Ennio Piovesani. The author is a PhD Student at the Università degli Studi di Torino and at the Universität zu Köln.

1. **Summary**

The Italian Government has adopted a series of Decree-Laws [1] introducing measures to fight the emergency caused by the "new" Coronavirus.

These measures include "self-proclaimed" overriding mandatory provisions on the reimbursement of prices paid under transport, package travel and

accommodation contracts by specified persons affected by the Coronavirus.

2. **Arts. 28 of Decree-Law No. 9/2020 and 88 of Decree-Law No. 18/2020**

In particular, on 2.4.3020, the Italian Government adopted Decree-Law No. 9, titled "Urgent measures to support families, workers and businesses, in connection with the epidemiological emergency by COVID-19" [2].

Article 28 of Decree-Law No. 9/2020 provides for "Reimbursement of Travel Tickets and Travel Packages".

The first paragraph of Article 28 stipulates that, obligations arising from transport and package travel contracts, concluded by specified persons affected by the Coronavirus [3], are to be considered as impossible under Article 1463 of the Italian Civil Code [4].

Paragraphs 2 to 7 of Article 28 establish a specific procedure for obtaining and making the reimbursement of the price paid under the transport or package travel contract covered by the same Article.

The following paragraph 8 "proclaims":

"The provisions of the present article constitute overriding mandatory provisions within the meaning of Article 17 of Law of 31 May 1995, No. 218 ["Italian PIL Act"] [5, 6] and of Article 9 of Regulation (EU) No. 593/2008 of the European Parliament and of the Council, of 17 June 2008 ["Rome 1 Regulation"]".

On 17.3.2020, the Italian Government has adopted a new Decree-Law (dubbed "Heal Italy"), introducing new measures to fight the emergency caused by the Coronavirus [7].

Art. 88(1) of new Decree-Law No. 18/2020 extends the provisions of Art. 28 of Decree-Law No. 9/2020 to accommodation contracts.

3. **Short Comment**

As a short comment to the above, I note that it is not the first time that the Italian legislator enacts "self-proclaimed" overriding mandatory provisions [8].

However, as known, it is questionable whether, EU Member States can freely

enact similar provisions when they fall within the material scope of Union private international law instruments, such as the Rome 1 Regulation.

In fact, this practice appears to be particularly questionable in cases such as that at issue, where the self-proclaimed overriding mandatory provisions do not appear to be "crucial" for safeguarding public interests within the meaning of Article 9(1) of the Rome 1 Regulation, but rather appear to be exclusively purported to protect private interests (for however widespread they may be).

Notes

[1] In the Italian legal order, a Decree-Law is a provisional act having force of law, adopted in extraordinary cases of necessity and urgency by the Government. A Decree-Law must be "converted" into a Law within a period of 60 days from its publication, or otherwise it loses its effects. See, in particular, Art. 77 of the Costituzione della Repubblica Italiana, Gazzetta Ufficiale No. 298 of 27.12.1947, **www.gazzettaufficiale.it/eli/id/1947/12/27/047U0001/sg**.

[2] Decree-Law of 2.3.2020, No. 9, Misure urgenti di sostegno per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19, Gazzetta Ufficiale, Serie Generale No. 53 of 2.3.2020, **www.gazzettaufficiale.it/eli/id/2020/03/02/20G00026/sg**.

[3] See Art. 28(1)(a) to (f) of Decree-Law No. 9/2020.

[4] Article 1463 of the Italian Civil Code, headed "Total Impossibility", can be translated as follows: "In [case of] contracts with reciprocal performances, the party that is freed due to supervening impossibility of the performance owed cannot demand counter-performance, and must return that which he has already received, in accordance with the rules on undue payment". See, Royal Decree of 16.3.1942, No. 262, Approvazione del testo del Codice civile, Gazzetta Ufficiale, Serie Generale No. 79 of 4.4.1942, **www.gazzettaufficiale.it/eli/id/1942/04/04/042U0262/sg**.

[5] Law of 31.5.1995, No. 218, Riforma del sistema italiano di diritto internazionale privato, Gazzetta Ufficiale, Serie Generale No. 128 of 3.6.1995, Supplemento Ordinario No. 68, **https://www.gazzettaufficiale.it/eli/id/1995/06/03/095G0256/sg**.

[6] Article 17 of the Italian PIL Act, is the Italian (autonomous) private international law provision governing overriding mandatory provisions. Article 17, headed "Norms of necessary application", can be translated as follows: "Norms of necessary application. 1. Italian norms which, considering their object and their objective, must be applied notwithstanding reference to foreign law, prevail over the following provisions".

[7] Decree-Law of 17.3.2020, No. 18, Misure di potenziamento del Servizio sanitario nazionale e di sostegno economico per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID-19, Gazzetta Ufficiale, Serie Generale No. 70 del 17.3.2020, **https://www.gazzettaufficiale.it/eli/id/2020/03/17/20G00034/sg**.

[8] See, e.g., Article 32-ter of the Italian PIL Act.

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Comment by Pietro Franzina

States occasionally declare in their legislation that a particular provision ought to be treated as an overriding mandatory provision. The author of this post submits that this practice is 'questionable'. The post is short, and few hints are provided as to what would make this practice questionable, and in which way this should matter. The question raised by the practice described is, in my view, whether States are permitted to make this kind of statements, and what the legal effects of such statements are. I would be interested in knowing the author's views on this. There is little doubt that domestic legislators are entirely free to label a given provision in their legislation as 'overriding' insofar as this characterisation affects the operation of domestic conflict-of-laws rules. The provision so characterised will then trump the operation of the latter rules as lex specialis. Truly enough, as the author of the post observes, the picture is different when it comest to conflict-of-laws provisions enacted by the EU, because Member States are not permitted to derogate from such provisions. Treating a domestic provision of substantive private law as an overriding mandatory provision amounts, in fact, to derogating from the applicable conflict-of-laws rules (or altering their effects). Article 9 of the Rome I Regulation sets forth the conditions subject to which such a derogation (or alteration) is permitted: no mandatory provision may override the conflict-of-laws rules in that Regulation, unless it fits in the definition in Article 9(1). Things being

so, I guess the only real issue is whether a given provision, no matter how labelled by the enacting legislator, fits in the said definition. If it does, then it will lawfully interfere with the relevant EU provisions on conflicts of laws in the way provided for under Article 9 of the Rome I Regulation (or under the pertinent provisions in other EU texts, depending on the circumstances). I don't see how this would be questionable. Instead, if the substantive provision concerned does not fit in the Article 9(1) definition, then the non-application (or the altered application) of the applicable EU conflict-of-laws rules will simply amount to an infringement of EU law, and would bring about the consequences that such an infringement entails (the opening of an infringement procedure, the award of damages etc.). Here, too, I wouldn't speak of a 'questionable' practice: it'd be a violation of EU law. Domestic courts have authority to assess whether a given provision fits in the Article 9(1) definition. If they consider that it does not, they have the power to disregard any legislative statements to the contrary and enforce the relevant EU rules instead. Domestic courts may even ask the Court of Justice to take a stance on the matter by a request for a preliminary ruling. The rulings in Dieter Krombach (Case C-7/98) and Unamar (C?184/12) indicate that a similar course of action is indeed possible. The preceding remarks are of a general nature. It is not the purpose of this comment to discuss whether the particular measures that have been recently adopted in Italy to tackle the coronavirus crisis represent genuine overriding mandatory provisions within the meaning of Article 9(1), or not. On this point, too, however, I have strong reservations about the author's approach and findings.

Comment by Caterina Benini (PhD Student at the Università Cattolica del Sacro Cuore di Milano)

March 27, 2020, 3:47 pm

Ennio Piovesani contends that neither Article 28 of the Italian Decree-Law 9/2020 nor Article 88 of the Decree-Law 18/2020 are genuine overriding mandatory provisions for the purposes of the Rome I Regulation. He argues that the two provisions do not appear to be crucial for safeguarding public interests, since they exclusively protect private interests. I do not share his view.

Pursuant to Article 9(1) of the Rome I Regulation, overriding mandatory provisions are provisions that are regarded by the enacting State as crucial for the protection of public interests.

The test appears to have two prongs. One is subjective in nature, in the sense that it rests on a finding by the enacting State that the provision concerned is crucial. The other is objective, and requires assessing whether the provision pursues a public interest.

As to the first prong, one must arguably content itself with determining whether the provision ranks among those that the enacting State considers to be particularly important for the community it governs. By labelling the provision as an overriding mandatory rule, the enacting State shows precisely that it considers that provision to be crucial for its interests. Where this occurs, the first prong of the test is satisfied. Otherwise stated, self-characterisation by the enacting State, while not being enough for a provision to be regarded as an overriding mandatory provision for the purposes of Article 9(1), simplifies the task of courts and interpreters which consists in assessing whether the enacting State considers the provision to be crucial.

As to the second prong, one should assess whether, irrespective of any self-characterisation, the provision objectively pursues the protection of a public interest. This prong of the test is essential to preserve the effectiveness of the normally applicable EU conflict-of-laws rules. It is at this stage of the test that the nature of the interests protected by the provision comes into play. In this connection, contrary to Ennio Piovesani, I do not consider that the above Italian provisions are merely concerned with private interests, that is, the interests of the parties to the contracts concerned. By declaring that the spread of the epidemic makes the performance of obligations impossible within the meaning of Article 1463 of the Italian Civil Code, the legislator aimed at fostering the compliance with the governmental measures adopted to fight the coronavirus. It did so by exempting the parties from their obligations under transport and accommodation contracts, arguably on the assumption that this would reduce the risk that the concern for the unfettered performance of those obligations could undermine the strict compliance of the measures taken by the government to restrict the movement of people. Seen from this angle, the above provisions, while affecting as such the individual rights and obligations of the parties, are meant to safeguard the public health by reducing the movement of people and lowering the risk of any further spread of the virus.

Based on the foregoing, my view is that the above provisions should be labelled as overriding mandatory rules within the meaning of Article 9(1) of the Rome I

Regulation.

Comment by Margherita Salvadori

March 27, 2020, 7:46 pm

I would first like to thank Mr Piovesani for having signalled the newly adopted Italian provisions and for having raised this very interesting point.

A huge number of emergency rules have been enacted by the Italian government (v., a collection of this rules: https://www.gazzettaufficiale.it/dettaglioArea/12).

From a non-Italian perspective, it should be underlined, as already noted, that all the rules found in the Decree-Laws will need to be "converted" into Law by the Parliament. This is an aspect of particular importance, since in that moment the Italian Parliament will have the chance to consider all the emergency rules with perhaps greater attention.

However, it is necessary to immediately consider whether these rules are compatible within the EU framework.

This is particularly important for all the provisions that have an impact on fundamental freedoms of the European Union, including freedom of services and goods, and an impact on the intra-EU instruments. Furthermore, uniform EU law exists in the fields covered by the emergency rules and even if each Member State may be allowed to take emergency rules, the following provisions should be consistent with EU law

Some of the matters covered by the emergency rules are already governed by EU law protecting companies and families. In my view, what should be truly "overriding mandatory" is that, in the current emergency, EU Member States take shared solutions in said matters of EU law, including transport, travel package and accommodation contracts.

Comment by Ennio Piovesani

March 27, 2020, 8:36 pm

My comment was perhaps too short and I would like to: 1. provide some more information on the refund procedure introduced by the self-proclaimed overriding

mandatory provisions; 2. clarify the reasons why I consider the practice of self-proclaiming questionable; 3. add some remarks as to the compatibility of the provisions at issue with Union law; 4. share my views on the possible interests underlying the same provisions.

1. As mentioned, the self-proclaimed overriding mandatory provisions introduce a procedure for the refund of prices paid under transport (namely, carriage of persons), package travel and accommodation contracts. This newly introduced procedure is more favourable to the carrier, travel organiser or innkeeper, for the reasons that follow: Arts. 28(2) and 88(1) introduce a time-limit within which the passenger/guest must notify his request of refund to the carrier/innkeeper; Arts. 28(3) and 88(1) leave to the carrier/innkeeper the choice of refunding either by returning the price paid or by issuing a credit note (referred to as "voucher") to be used within one year; Art. 28(4) introduces the possibility for the travel organiser to refund the traveller through a voucher to be used within one year. Incidentally, "Corona-vouchers" (as dubbed by certain companies) have been implemented also in the legislation of other EU Member States to support tour operators who are suffering "strains on liquidity […] because of missing new bookings coupled with reimbursement claims" (EU Commission, Information on the Package Travel Directive in Connection With the Covid-19, 19.3.2020, revised version, replaces the version of 5.3.2020 – see further on the point below).
2. I question the practice of self-proclaiming for the following reasons. In the first place, as noted, self-proclaiming provisions which do not fit within the definition of Art. 9(1) may lead to an infringement of Union law . In particular, in the case of the Rome 1 Regulation, the infringement would concern the conflict rules contained in the Regulation discarded by the alleged overriding mandatory provision. The risk of infringing Union law which the national legislator takes when self-proclaiming seems to me sufficient to consider the practice questionable. That said, it is understood that Art. 9(1) also covers provisions that protect individual/private interests, as far as the main objective is to promote a collective/public interest. Therefore, in the second place, I share Mankowski's fear that self-proclaiming entails the "theoretical-dogmatic danger" that individual/private interests be "par ordre du mufti" transformed into

super-individual/public interests (Bar/Mankowski, IPR, Vol. I,2nd edn. 2003, mn. 99). Thirdly, still from a broader perspective, I might beover-pessimistic, but I also fear that self-proclaiming may trigger a race to the bottom and a proliferation of overriding mandatory provisions, which should instead remain a limited number. In my eyes these are the reasons why this practice may be referred to as questionable, or, at best as risky.

3. Apart from the compatibility with Art. 9 Rome 1 Regulation, the self-proclaimed provisions could be incompatible with other provisions of Union law, namely those contained in the Regulations on passengers' rights and inthe Package Travel Directive. In particular, as concerns transport contracts, I note what follows. If I understand correctly, Art. 28(1) provides that the carrier's obligation is impossible under Art. 1463 Italian Civil Code, when the passenger cannot travel because self-isolated, quarantined, hospitalized, or otherwise confined due to the coronavirus (and the containment measures taken by the Italian authorities to fight the pandemic). Termination of contract under Art. 1463 Italian Civil Code occurs ex lege, without the need for any activity by the parties or the judge. Accordingly, the judge merely ascertains that total impossibility occurred, with a decision having ex tunc (retroactive) effects. Take for instance the case where a passenger was quarantined and later the flight company, for independent reasons, cancelled the flight. Considering that, following Art. 28(1), the carrier's obligation became impossible under Art. 1463 before the flight's cancellation, I wonder whether the passenger will be able to rely on Regulation (EC) No. 261/2004.Therefore, I fear that the self-proclaimed overriding mandatory provisions may by incompatible with the Regulations on passengers' rights, in particular to the extent that they seem to prevent passengers from resorting to the more-favourable refund procedures provided for in the same Regulations. Moreover, as concerns package travel contracts, I note what follows. The Package Travel Directive is a full harmonization directive (see Art. 4 thereof). Following AG Wahl's opinion delivered in the cited Unamar case (see, particularly, points 40-43 thereof), I doubt as to the validity of self-proclaiming overriding mandatory provisions in matters governed by full harmonisation directives such as the Package Travel Directive. That said, by allowing refund through a voucher in cases referred to in Art. 12(2) Package Travel Directive, Art. 28(4) appears to be less favourable to the traveller. In fact, with reference to the Corona-vouchers implemented in

Belgium in the field of package travel contracts, Mr. Didier Reynders (European Commissioner for Justice) has recently underlined the measure's incompatibility with Union law (Un voucherplutôt qu'un remboursement? Didier Reynders recadre la Belgique sur lesvoyages organisés annulés, http://www.rtbf.be, 25.3.20120). For the record, Belgium has not felt the need of self-proclaiming the provisions in question overriding mandatory (see 19 MARS 2020. – Arrêté ministériel relatif auremboursement des voyages à forfait annulés, Publié le 2020-03-20, Numac2020040676, http://www.ejustice.just.fgov.be/eli/arrete/2020/03/19/2020040676/moniteur).

4. Finally, some thoughts on the public interests which the self-proclaimed overriding mandatory provisions allegedly promote. I'm not convinced that the provisions are aimed at promoting the containment measures adopted by the Italian Government. If this were the case, then I would doubt that said provisions could be considered as "crucial" for the purpose of safeguarding the relevant public interest (here: limiting the circulation of persons). In fact, that public interest appears to be sufficiently and well-protected by the containment measures alone. Incidentally, infringing the containment measures leads to a criminal (now administrative) sanction. Rather, considering that the self-proclaimed overriding mandatory provisions allow for refund with Corona-vouchers (rather than in money), in my view, the interest underlying the provisions may be that of supporting companies belonging to the tourism sector, which — as noted above — are suffering strains on liquidity due to the coronavirus emergency. Perhaps I might have been once more too concise. In any case, given the large number of issues involved, I refer any other consideration to a separate article.

Service of Documents on

Insurance Companies: The ECJ in the Corporis/Gefion Insurance Case

The Court of Justice of the European Union on 27th February 2020 delivered its judgment in ***Corporis/Gefion Insurance*, Case C-25/19**. The case concerned rules surrounding service of documents in a specific, yet increasingly common context.

Corporis is a Polish insurance company, who was assigned damages by the owner of a vehicle following a car accident for the value of 30 euro. *Gefion* was the Danish insurance company covering the risk related to the accident. Under the **Solvency II Directive**, insurance undertakings may provide services in other Member States without having there an agency or an establishment – yet, for compulsory motor insurance coverages they must appoint a representative with "*sufficient powers to represent the undertaking … including the payment of such claims, and to represent it or, where necessary, to have it represented before the courts and authorities of that Member State in relation to those claims*" (Art 152). The Polish representative of *Gefion* was *Crawford Polska*.

When *Corporis* wanted to start judicial proceedings, it served legal documents upon the prospective defendant, in Denmark. Documents were not translated, and the recipient of the documents, according to Art 8 of the **Service of Documents Regulation (no. 1393/2007)**, refused to accept service on the ground that it was in not in the condition to understand the content of the documents.

Polish courts suspended proceedings, requesting *Corporis* advanced payment for translation for 1.500 euro. Failing such payment, the court dismissed the case.

On appeal, the court of appeal questioned whether the Service of Documents Regulation was applicable, as its recital 8 states that it "*should not apply to service of a document on the party's authorised representative in the Member State where the proceedings are taking place regardless of the place of residence of that party*".

The Court of Justice was thus called to rule on whether the rules on the

appointment of representatives contained in the Solvency II Directive and the scope of application of the Service of Documents Regulation as reconstructed in light of its recital extend the competence and duties of said representative to receive service of documents in the language of that specific host State for which he has been appointed.

The Court of Justice has confirmed that the Service of Documents Regulation is not applicable to service of a document on the party's authorized representative in the Member State where the proceedings are taking place (para 28 f). The applicability of the regulation is set aside in light of its recital 8, according to which it should not be applied "*to service of a document on the party's authorised representative in the Member State where the proceedings are taking place regardless of the place of residence of that party*". This sets the difference from the previous case law of the court, namely the **Alder judgment Case C-325/11**, where there was no local representative of the foreign defendant, nor a legal obligation to appoint such a representative.

Yet, in the Court's eye, the non-application of the Service of Documents Regulation in the case at hand does not mean that EU law remains silent in general. The Solvency II Directive creates a harmonized regime for the pursuit of insurance activities between Member States. Amongst its goals, not only the promotion of cross-border services, but the protection of persons as well. The necessity for an insurance undertaking to appoint a representative in a State where it decides to offer services without opening an agency or an establishment is pre-ordered at the protection of persons; even though the Solvency II Directive is silent on the matter, according to the Court, not recognizing the right to victim to serve documents in his own language to the representative with whom it has already taken preliminary steps would, in essence, deprive the provisions of their *effet utile*.

Interestingly, in terms of legal narrative, the matter is mostly constructed in positive terms. The Court speaks of the "*possibility for that representative to accept service*" (para 37); it stress the negative consequences of excluding "*the powers* [of the] *representative to accept service of documents*" (para 42). Evidently, from the perspective of the foreign insurance company and its representative, this is more a matter of legal obligation to accept service.

The approach and the perspective followed by the Court becomes apparent in the

conclusion. The Court does not clearly say that the representative has an obligation to accept service – it says that the rules on appointment in the Solvency II Directive include the power to receive service of documents. An argumentative style that appears to little prejudice to the conclusion: insurance companies now know that when they appoint a representative in another Member State under Artt. 152 Solvency II Directive, persons will have the possibility to serve documents to that representative, and avoid a cross-border service of documents.

Mareva injunctions in support of foreign proceedings

In *Bi Xiaoqing v China Medical Technologies* [2019] SGCA 50, the Singapore Court of Appeal provided clarity on the extent of the court's power to grant Mareva relief in support of foreign proceedings.

The first and second respondents were companies incorporated in the Cayman Islands and the British Virgin Islands. The action was pursued by the liquidators of the first respondent against the appellant, a Singapore citizen, who was formerly involved in the management of the respondents and allegedly misappropriated funds from them.

Hong Kong proceedings were commenced first and a worldwide Mareva injunction was granted against, inter alia, the appellant. The terms of the Hong Kong injunction specifically identified assets in Singapore.

Two days after the Hong Kong injunction was obtained, the respondents commenced action in Singapore and applied for a Mareva injunction to prevent the defendants from disposing of assets in Singapore. The action in Singapore covered substantially the same claims and causes of action as those pursued in Hong Kong. After the grant of a Mareva injunction on an *ex parte* basis, the respondents applied to stay the Singapore proceedings pending the final determination of the Hong Kong proceedings on the basis that Hong Kong was the most appropriate forum for the dispute. The High Court granted the stay and

confirmed the Mareva injunction in *inter partes* proceedings.

The issues before the Court of Appeal were: (1) whether the court had the power to grant a Mareva injunction and (2) whether it should grant the Mareva injunction. In other words, the first question dealt with the existence of the court's power to grant a Mareva injunction and the second question dealt with the exercise of the power.

The Singapore court's power to grant an injunction can be traced back to section 4(10) of the Civil Law Act which is in these terms: "A Mandatory Order or an injunction may be granted or a receiver appointed by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made." The Court of Appeal clarified that section 4(10) of the Civil Law Act should be read as conferring on the court the power to grant Mareva injunctions, even when sought in support of foreign proceedings. Two conditions had to be satisfied: (1) the court must have *in personam* jurisdiction over the defendant; and (2) the plaintiff must have a reasonable accrued cause of action against the defendant in Singapore.

Given the stay of the Singapore proceedings, the Court of Appeal had to consider if the Singapore court still retained the power to grant Mareva relief. There had been conflicting first instance decisions on this point: see *Petroval SA v Stainsby Overseas Ltd* [2008] 3 SLR(R) 856 cf *Multi-Code Electronics Industries (M) Bhd v Toh Chun Toh Gordon* [2009] 1 SLR(R) 1000. The Court of Appeal preferred the *Multi-Code* approach, taking the view that the court retains a residual jurisdiction over the underlying cause of action even when the action is stayed. This residual jurisdiction grounds the court's power to grant a Mareva injunction in aid of foreign proceedings. Further, a party's intentions on what it would do with the injunction had no bearing on the existence of the court's power to grant the Mareva injunction.

Party intentions, however, was a consideration under the second question of whether the court should exercise its power to grant the injunction. Traditionally, a Mareva injunction is granted to safeguard the integrity of the Singapore court's jurisdiction over the defendant so that, if judgment is rendered against the defendant, that jurisdiction is not rendered toothless. The court commented that

where it appears that the plaintiff is requesting the court to assume jurisdiction over the defendant for the collateral purpose of securing and safeguarding the exercise of jurisdiction by a foreign court, the court should not exercise its power to grant Mareva relief. On the facts, the court held that it could not be said that the respondents had such a collateral purpose as there was nothing on the facts to dispel the possibility that the respondents may later request for the stay to be lifted. This conclusion suggests that the court would generally take a generous view of litigation strategy and lean towards exercising its power in aid of foreign proceedings.

Given the requirement that the plaintiff must have a reasonable accrued cause of action against the defendant in Singapore, a Mareva injunction is not free-standing relief under Singapore law. The court emphasized that a Mareva injunction in aid of foreign court proceedings is still ultimately premised on, and in support of, Singapore proceedings. This stance means that service in and service out cases may end up being treated differently. If the defendant has been served outside of jurisdiction and successfully sets aside service of the writ, there would no longer be an accrued cause of action in Singapore on which to base the application for a Mareva injunction. See for example, *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] SGHC 64, [2018] 4 SLR 1420 (see previous post **https://conflictoflaws.net/2018/mareva-injunctions-under-singapore-law/**). On the other hand, if the defendant had been served as of right within jurisdiction and the action is stayed (as in the present case), the court retains residual jurisdiction to grant a Mareva injunction.

After a restrictive court ruling in relation to the court's power to grant free-standing Mareva relief in aid of foreign arbitrations, the legislature amended the International Arbitration Act to confer that power to the courts. It remains to be seen if the legislature would act similarly in relation to the court's power to grant free-standing Mareva relief in aid of foreign proceedings.

To a certain extent, this lacuna is plugged by the recent amendments to the Reciprocal Enforcement of Foreign Judgments Act ("REFJA") (see previous post **https://conflictoflaws.net/2019/reform-of-singapores-foreign-judgment-rules/**). Under the amended REFJA, a judgment includes a non-monetary judgment and an interlocutory judgment need not be "final and conclusive". In the Parliamentary Debates, the minister in charge made the point that these specific

amendments were intended to enable the court to enforce foreign orders such as Mareva injunctions. Only judgments from certain gazetted territories qualify for registration under the REFJA. To date, HK SAR is the sole listed gazetted territory although it is anticipated that the list of gazetted territories will expand in the near future. While the respondents had in hand a Hong Kong worldwide Mareva injunction, the amendments to REFJA only came into force after the case was decided.

The judgment may be found at: **https://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/ca-188-2018-j—bi-xiaoqiong-pdf.pdf**

Coronavirus, force majeure certificate and private international law

Coronavirus outbreak and force majeure certificate

Due to the outbreak, China has adopted a number of public health measures, including closing schools and workplaces, limiting public gatherings, restricting travel and movement of people, screening , quarantine and isolation. At least 48 cities were locked down by 14 Feb 2020. (here) More than two thirds of China's migrant workers were unable to return to work, (see here) leaving those firms that have restarted operation running below capacity.

Coronavirus and the emergency measures significantly affect economic activates in China. The China Council for the Promotion of International Trade (CCPIT), a quasi-governmental entity, issued 3,325 force majeure certificates covering the combined contract value of $38.5bn to exempt Chinese companies from their contractual obligations.

Issuing force majeure certificates is a common practice of trade councils or

commercial chambers in the world. These certificates are proof of the existence of relevant events that may constitute force majeure and impinge the company's capacity to perform the contract. The events recorded in the certificates would include the confirmation of coronavirus outbreak, the nature, extent, date and length of governmental order for lockdown or quarantine, the cancellation of any transportation, etc. These certificate, however, are not legal documents and do not have direct executive or legal effects. They only attest the factual details instead of certifying those events are indeed force majeure in law. They are also called 'force majeure factual certificate' by the CCPIT. The CCPIT states in its webpage that:

The force majeure factual certificate is the proof of objective, factual circumstances, not the 'trump card' to exempt contractual obligations. The CCPIT issues relevant force majeure factual certificates to Chinese enterprises that are unable to perform contracts due to the impact of the new coronavirus epidemic. The certificate can prove objective facts such as delayed resumption of work, traffic control, and limited dispatch of labour personnel. An enterprise can request for delaying performance or termination of the contract based on this certificate, but whether its obligation can be fully or partially exempt depends on individual cases. The parties should take all the circumstances and the applicable law into consideration to prove the causal link between 'the epidemic and its prevention and control measures' and the 'failure to perform'.

Force Majeure in Different Governing Law

The force certificate is thus mainly used to demonstrate to the other party the existence of certain factual difficulties that hamper performance and seek understanding to privately settle the dispute. If the disputes are brought to the court, the court should consider whether the outbreak and the relevant emergency measure constitute force majeure events pursuant to the governing law, treating the force majeure certificate as evidence of fact. There is no international uniform doctrine of force majeure and different countries adopt different doctrines to allocate contractual risk in unforeseeable change of circumstances. China is a member of the UN Convention on the International Sale of Goods (CISG), which shall apply if the other party has its place of business in another contracting state, or the parties choose CISG by agreement. Article 79 of the CISG provides that a party is exempted from paying damages if the breach is due to an impediment beyond its control, and either the impediment could not

have been reasonably foreseen at the time of the conclusion of the contract, or the party could not reasonably avoid or overcome the impediment or its consequences. Although the disease outbreak is unforeseeable, it can only be an impediment if it makes performance impossible. Therefore, if the outbreak only makes production more difficult or expensive, it is not an impediment. There is no consensus as to whether an event that makes performance excessively burdensome can also be counted as an impediment in CISG. In addition, the impediment must uncontrollable. If a Chinese firm could not perform its contractual obligation due to the compulsory lockdown ordered by its local government, this event is out of control. The same applies if a firm manufacturing facial masks cannot deliver on time due to government requisition. On the other hand, when the Chinese State Council announced the extension of the Chinese New Year holiday to 2 Feb 2020, it was not a compulsory ban and if a firm 'chose' not to operate during the extension without additional compulsory order from any authorities, substantive risk of infection in its place of business, or irreparable labour shortage, the impediment may not be considered as uncontrollable. For the same reason, if a company decided to lock down after a worker tested positive for coronavirus in order to reduce the risk of spreading the disease among its workers, without the high risk and with alternative and less extreme prevention measures available, the impossibility to perform may be considered 'self-inflicted' instead of 'uncontrollable'. Consideration should always be given to the necessity and proportionality of the decision. Furthermore, if the local government imposed compulsory prohibition for work resumption to prevent people gathering, a firm cannot claim uncontrollable impediments if working in distance is feasible and possible for the performance of the contract.

If the other party is not located in a CISG contracting state, whether the coronavirus outbreak can exempt Chinese exporters from their contractual obligations depends on the national law that governs the contracts. Most China's major trade partners are contracting states of CISG, except India, South Africa, Nigeria, and the UK. Chinese law accepts both the force majeure and hardship doctrines. The party that breaches the contract may be discharged of its obligations fully or partially if an unforeseeable, uncontrollable and insurmountable causes the impossibility to perform. (Art 117 of the Chinese Contract Law 1999) The party can also ask for the alternation of contract if un unforeseeable circumstance that is not force majeure makes performance clearly inequitable. (Art 26 of the SPC Contract Law Interpretation (II) 2009) The 'force

majeure factual certificate' can also be issued if CCPIT considers a event not force majeure but unforeseeable change of circumstances in Art 26 of the Interpretation (II). For example, in Jiangsu Flying Dragon Food Machinery v Ukraine CF Mercury Ltd, CCPIT issued the certificate even after recognising that the poorly maintained electricity system of the manufacturer that was damaged by the rain was not a force majeure event. In contrast, other national law may adopt a more restrictive standard to exempt parties their obligations in unforeseeable circumstances. In England, for example, the court will not apply force majeure without a force majeure clause in the contract. A more restricted 'frustration' may apply instead.

Jurisdiction and Enforcement

In theory, a Chinese court should apply the same approach as other jurisdictions to apply the governing law and treat the force majeure certificates issued by CCPIT as evidence of fact. in practice, Chinese courts may prefer applying Chinese law if the CISG does not apply and the parties do not choose the law of another country, grant more weight to the CCPIT certificate than other courts, and be more lenient to apply the force majeure criteria to support Chinese companies' claim in relation to the coronavirus outbreak.

Finally, if the dispute is heard in a non-Chinese court or international arbitral tribunal, the judgment holding the Chinese company liable need to be enforced in China unless the Chinese company has assets abroad. Enforcing foreign judgments in China is generally difficult, though there are signs of relaxation. If judgments can be enforced pursuant to bilateral treaties or reciprocity, they may be rejected based on public policy. The question is whether the coronavirus outbreak and the government controlling measures can be public policy. According to the precedents of the Supreme People's Court, (eg. *Tianrui Hotel Investment Co., Ltd. (Petitioner) v. Hangzhou Yiju Hotel Management Co., Ltd. (Respondent)*, (2010) Min Si Ta Zi 18) breach of mandatory administrative regulations *per se* is not violation of public policy. But public policy undoubtedly includes public health. If Chinese courts consider the Chinese company should not resume production to prevent spread of disease event without compulsory government order, the public policy defence may be supported.

Indigenous Claims to Foreign Land: Update from Canada

By Stephen G.A. Pitel, Faculty of Law, Western University

In 2013 two Innu First Nations sued, in the Superior Court of Quebec, two mining companies responsible for a mega-project consisting of multiple open-pit mines near Schefferville, Quebec and Labrador City, Newfoundland and Labrador. The Innu asserted a right to the exclusive use and occupation of the lands affected by the mega-project. They claimed to have occupied, since time immemorial, a traditional territory that straddles the border between the provinces of Quebec and Newfoundland and Labrador. They claimed a constitutional right to the land under s. 35 of the *Constitution Act, 1982*.

The mining companies and the Attorney General of Newfoundland and Labrador each moved to strike from the Innu's pleading portions of the claim which, in their view, concerned real rights over property situated in Newfoundland and Labrador and, therefore, fell under the jurisdiction of the courts of that province.

In *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, the Supreme Court of Canada held (by 5-4 majority) that the motion to strike failed and that the Quebec court had jurisdiction over the entire claim advanced by the Innu.

Quebec's private international law is contained in Book Ten of the Civil Code of Quebec. Jurisdiction over the mining companies was based on their being domiciled in Quebec. However, as a special rule of jurisdiction, Division III governs what are called real and mixed actions (para. 18). The general rule is that Quebec has jurisdiction to hear a real action only if the property in dispute is situated in Quebec (art. 3152). In the case of a mixed action, Quebec must have jurisdiction over both the personal and real aspects of the matter: see *CGAO v Groupe Anderson Inc.*, 2017 QCCA 923 at para. 10 (para. 57). These rules required the court to properly characterize the Innu's action.

The majority held that the claim was a mixed action (para. 56). This was because the Innu sought both the recognition of a *sui generis* right (a declaration of Aboriginal title) and the performance of various obligations related to failures to respect that right. However, the claim was not a "classical" mixed action, which would require the court to have jurisdiction over both the personal and real aspects of the matter. Rather, this was a "non-classical" mixed action that involved the recognition of *sui generis* rights and the performance of obligations (para. 57). Put another way, the nature of the indigenous land claims made them different from traditional claims to land. Accordingly, the claim did not fall within the special jurisdiction provisions in Division III and jurisdiction could simply be based on the defendants' Quebec domicile.

The majority was influenced by access to justice considerations, being concerned about requiring the Innu to litigate in both Quebec and Newfoundland and Labrador. It noted that "[t]he Innu have argued that separating their claim along provincial borders will result in higher — perhaps prohibitive — costs caused by "piecemeal" advocacy, and inconsistent holdings that will require further resolution in the courts. … These are compelling access to justice considerations, especially when they are coupled with the pre-existing nature of Aboriginal rights" (paras. 46-47).

The dissenting reasons are lengthy (quite a bit longer than those of the majority). Critically, it held that "Aboriginal title and other Aboriginal or treaty rights are "real rights" for the purposes of private international law, which is to say that they *resemble* or are at least *analogous* to the domestic institution of real rights" (emphasis in original) (para. 140). Labeling them as *sui generis* was not sufficient to avoid the jurisdictional requirement for a mixed action that the land had to be in Quebec: "the fact that Aboriginal title is *sui generis* in nature does not mean that it cannot be a proprietary interest or a real right strictly for the purposes of private international law" (para. 155).

In the view of the dissent, " if Quebec authorities were to rule directly *on the title* that the Innu believe they hold to the parts of Nitassinan that are situated outside Quebec, the declarations would be binding on *no one*, not even on the defendants … , precisely because Quebec authorities lack jurisdiction in this regard" (emphasis in original) (para. 189).

On the issue of access to justice, the dissent stated that "access to justice must be

furnished within the confines of our constitutional order. Delivery of efficient, timely and cost-effective resolution of transboundary Aboriginal rights claims must occur within the structure of the Canadian legal system as a whole. But this is not to suggest that principles of federalism and provincial sovereignty preclude development by superior courts, in the exercise of their inherent jurisdiction, of innovative *yet* constitutionally sound solutions that promote access to justice" (emphasis in original) (para. 217). It went on to proffer the interesting procedural option that both a Quebec judge and a Newfoundland and Labrador judge could sit in the same courtroom at the same time, so that the proceedings were heard by both courts without duplication (para. 222).

There are many other issues in the tension between the majority and the dissent, including the role of Newfoundland and Labrador as a party to the dispute. It was not sued by the Innu and became involved as a voluntary intervenor (para. 9).

The decision is very much rooted in the private international law of Quebec but it has implications for any Indigenous claims affecting land in any legal system. Those systems would also need to determine whether their courts had jurisdiction to hear such claims in respect of land outside their territory. Indeed, the decision offers a basis to speculate as to how the courts would handle an Indigenous land claim brought in British Columbia in respect of land that straddled the border with the state of Washington. Is the court's decision limited to cases that cross only internal federation borders or does it extend to the international realm? And does there have to be a straddling of the border at all, or could a court hear such a claim entirely in respect of land in another jurisdiction? The court's decision leaves much open to interesting debate.