Child abduction in times of corona

By Nadia Rusinova

Currently large increases in COVID-19 cases and deaths continue to be reported from the EU/EEA countries and the UK. In addition, in recent weeks, the European all-cause mortality monitoring system showed increases above the expected rate in Belgium, France, Italy, Malta, Spain, Switzerland and the United Kingdom.

It is not unreasonable to predict that COVID-19 will be used increasingly as a justification in law for issuing non-return order by the Court in international child abduction proceedings, return being seen as a "grave risk" for the child and raised as an assertion under Article 13(b) of the Hague Convention.

What would be the correct response to these challenging circumstances, when the best interest of the child in child abduction proceedings calls for restoration of *status quo ante* under the Hague convention on the Civil Aspects of International Child Abduction (hereinafter: the Convention)? This post will focus on the recent judgment [2020] EWHC 834 (Fam), issued on 31 March 2020 by the High Court of England and Wales (Family Division) seen in the light of the ECtHR case law on the child abduction, providing brief analysis and suggesting answer to the question if the return of the child to the state of its habitual residence in the outbreak of COVID-19 can constitute grave risk for the child under Article 13(b) of the Convention, and how the practitioners and the Court should approach these assertions in the present pandemic situation.

The facts of *Re PT [2020] EWHC 834 (Fam)*

PT (the abducted child) and both of her parents are all Spanish nationals. PT was born in 2008 and had lived all of her life in Spain, until she was brought to England by her mother, HH, in February 2020. She is the only child of the parents' relationship. They separated in 2009. Following the parents' separation, legal proceedings were brought in Spain by the mother concerning PT's welfare. A judgment was issued in these proceedings by the Spanish Courts on 25 May 2012, providing for the mother to have custody and for parental responsibility for the child to be shared by both parties. The order provided for the father to have contact with PT on alternate weekends from after school on Friday until Sunday

evening. In addition, she was to spend half of each school holiday with each parent. The order also required that the parents should inform each other of any change in address thirty days in advance.

On or about 13 February 2020, the mother travelled to England with PT. The mother's partner (with whom she is expecting a child the following month) lives in the South East of England, and they have moved in with him. The evidence on behalf of the father is that the child was removed from Spain by the mother without his knowledge or consent.

The father asked the mother to return PT to Spain, but she refused to do so. The father travelled to the UK and met with the mother and PT at a shopping centre. However, the mother again refused to permit the child to return to Spain. She did however permit PT (and S) to spend a night with the father at his hotel in England.

The case first came before the Court on 10 March 2020 on a "without notice" basis. At that hearing the mother attended in person, and indicated that she would be seeking to defend the application on the basis of (1) the father's consent and / or acquiescence and (2) Article 13(b) of the Hague convention – claiming existence of a grave risk that a return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

On that occasion PT was, as directed by the judge, present in the Court vicinity to be interviewed by the CAFCASS (Children and Family Court Advisory and Support Service) Officer. She told CAFCASS that she had not wanted to come to England, and that she wanted to be with her father, although she did not want to be separated from her mother either. PT's clear wish was that she wanted to return to Spain with her father rather than stay in England.

The judgment

The Court is entirely satisfied on the evidence that PT is habitually resident in Spain as she had lived there all of her life until she was recently brought to the UK. In this case the Court ruled that PT has been wrongfully removed from Spain within the terms of Article 3 of the Convention and that none of the Article 13 defences have been made out. Therefore, return order for the summary return of PT to Spain has been made.

Comments

First of all, in such cases the Court should unavoidably take the challenge to identify the risks for the child in case of return in the context of the pandemic situation. Indeed, in the present case the formulation is rather simplified. Therefore and due to the lack of case law on this issue, and in order to be able to answer the question if the return of the child would pose a grave risk, we should take a look also at the recently published Guide to Good Practice on Article 13(1)(b) (hereinafter: the Guide) by the Hague Conference On Private International Law (HCCH) and the concept of "grave risk" in child abduction proceedings in general, as set by the ECtHR in its case law.

In general, the grave risk exception in child abduction cases is based on "the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation", as stated in the § 29 of the Explanatory report to the Hague Convention. The general assumption that a prompt return is in the best interests of the child can therefore be rebutted in the individual case where an exception is established. It is important to note that the exception provided for in Article 13(b) concerns only situations which go beyond what a child might reasonably be expected to bear (Ushakov v. Russia § 97, X v. Latvia § 116, Maumousseau and Washington v. France §§ 69 and 73, K.J. v. Poland §§ 64 and 67)

In § 46-48 of the discussed judgment the Court points final argument relates to the risk of physical harm that is presented by the current coronavirus pandemic in the following way:

"…This risk presents itself in two ways:

(1) The pandemic is more advanced in Spain than in the UK. As at the date of the preparation of this judgment (29 March) the official death toll stood at 1,228 in the UK and 6,528 in Spain. It could therefore be argued that PT would be at greater risk of contracting the virus in Spain than in the UK.

(2) The increased risk of infection that is posed by international travel at this time."

Did the Court explore all possible harm that the return order can bring, and since it is recognized that the risk is present, what specific kind of risk the return of the

child would constitute in the context of the pandemic situation – physical or psychological danger, or being placed in an intolerable situation?

The way the Court approached this issue is a very basic attempt to identify the risks that a return order in the outbreak of COVID-19 can bring to the child. As the Guide points in § 31, although separate, the three types of risk are often employed together, and Courts have not always clearly distinguished among them in their decisions. It is clear that the return could bring physical danger of contamination with COVID-19 together with all possible complications, despite the fact that child is not in the at-risk groups as are the elderly or other chronically ill people. But we should not underestimate the psychological aspect of the pandemic situation. As the coronavirus pandemic rapidly sweeps across the world, the World Health Organisation has already, a month earlier, stated that it is inducing a considerable degree of fear, worry, and concern in the population. It is therefore out-of-the-question that for a relatively mature child (in this case of 12 years old), whether the ability to watch, read or listen to news about COVID-19 can make the child feel anxious or distressed and therefore can, and most likely will, bring also psychological harm to it. In this sense the potential psychological harm is inevitable and whilst the physical harm can or cannot happen, and indeed the contamination cannot be foreseen, in any case with the return order (especially to a state with significant risk of increasing community transmission of COVID-19) the psychological integrity of the child will be put at immediate risk.

In order to explore how this risk can be adequately assessed in child abduction proceedings in the context of the COVID-19, we should look at § 62 of the Guide, where HCCH explicitly discusses risks associated with the child's health, stating that *"In cases involving assertions associated with the child's health, the grave risk analysis must focus on the availability of treatment in the State of habitual residence, and not on a comparison between the relative quality of care in each State".* How is this applicable to the pandemic situation, if at all? It seems like the only adequate response in these fast-changing unprecedented circumstances would be that the Court should indeed not compare the situations in both states, but still having in mind the nature of the COVID-19, to try to foresee the developments, relying on the general and country-specific health organizations reports, accessible nowadays online in a relatively easy way.

As a first step the Court should consider whether the assertions are of such a

nature, with sufficient detail and substance that they could constitute a grave risk, as overly broad or general assertions are unlikely to be sufficient. In this situation, without precedent in the history of the Convention's application, holding that *"Although the course of the pandemic is clearly more advanced in Spain than in the UK, I do not have any evidence from which I can draw a conclusion that either country is any more or less safe than the other… I am simply not in a possession to make any findings as to the relative likelihood of contracting the virus in each country. On the material before me, all that I can conclude is that there is a genuine risk that PT could contract the virus whether she remains in England or returns to Spain."* does not fulfil the obligation of the Court to assess the risk in full, in all its possible implications. The Court is obliged to conduct the step-by-step analysis, prescribed by and explained in the Guide, and to examine the types of risk for the child, assessing it separately and in the context of their deep interrelation in these specific circumstances.

Secondly, the wording of Article 13(b) also indicates that the exception is "forward-looking" in that it focuses on the circumstances of the child upon return and on whether those circumstances would expose the child to a grave risk. Therefore, ECtHR is clear that in any case (regardless the context and for sure not only in cases with history of domestic violence), where such assertions have been raised, the Courts should satisfy themselves that adequate safeguards and tangible measures are available in the country of return (Andersena v. Latvia §118, Blaga v. Romania §71).

In addition, as the Guide points in § 53, Article 13(b) analysis should be always be highly factually specific. Each Court determination as to the application or non-application of the exception is therefore unique, based on the particular circumstances of the case. A careful step-by-step analysis of an asserted grave risk is therefore always required, in accordance with the legal framework of the Hague convention, including the exception as explained in the Guide. When we discuss this issue, not only the Convention, but also Article 11(4) of Brussels IIa applies in answering the question of, what in the case of COVID-19 are "adequate safeguards". This is, without a doubt, a question difficult to answer to with certainty, as the case law of the ECtHR and the Guides do not contain any directions or good practices on the behaviour of the domestic authorities in times of pandemic.

In the present case the judge estimated as "tangible safeguards" the following

"number of undertakings", offered by the father, effective until the matter could be brought before the Spanish Court, and intended to support PT's return to Spain. They include: *(1) Lodging the final order in Spain; (2) Not pursuing any criminal charges against the mother for her wrongful removal of PT from Spain to England; (3) Seeking to mediate with the mother on PT's return in relation to the mother's access; (4) Agreeing to unrestricted indirect contact between PT and her maternal family (especially with the mother and S):(5) Agreeing to direct contact for PT with her mother in Spain and England, to the extent that is possible or appropriate from a public health perspective given the current global pandemic;(6) Meeting with the mother only at neutral and/or public places when picking or dropping PT off;(7) To pay PT's maintenance and school fees pending any further determination about maintenance by the Spanish Courts; and (8) To pay all the travelling costs (flights) for PT of travelling to and from England for the purposes of contact with the mother."*

It looks like the Court is indeed satisfied with the undertakings, but unfortunately, these examples are far from adequate protective measures when we consider the grave risk induced by return in the current pandemic situation. None are directed to prevention of the grave risk as raised by the mother, and none are related to the child's health. Better examples remain to be seen from the upcoming case law of the Courts, but in the current situation, a strong focus should remain on comprehensive testing and surveillance strategies (including contact tracing), community measures (including physical distancing), strengthening of healthcare systems and informing the public and health community. Therefore, following the Guide, such measures should at the minimum include rapid risk assessment upon arrival at the state of habitual residence, application of different types of available COVID-19 Rapid Tests, ensuring social distance and exploring online education possibilities, providing guarantees that the child will be isolated and distanced from potentially infected people (through evidence for appropriate living conditions upon return), etc. Strong focus should also be put on the possibilities for mental support for the child, bearing in mind the extremely stressful situation, related not only the COVID-19 but also to additional factors such as the separation from the other parent and the mental consequences from the forced social isolation which, as pointed above, would inevitably affect the mental wellbeing of the child.

The next question is who should prove the risk, and its gravity in this specific

situation? Following the ECtHR case law, the burden of proof traditionally lies with the party opposing the child's return (Ushakov v. Russia, § 97). In this case the abducting parent indeed shall prove the grave risk, but it is true that the COVID-19 situation itself and the wide-spread precautions and information contribute a lot to proving this risk. Yet, what in the current pandemic circumstances is still to be proved by the abducting parent?

According to § 49 of the Guide, even if a Court *ex officio* gathers information or evidence (in accordance with domestic procedures), or if the person or body which has lodged the return application is not actively involved in the proceedings, the Court must be satisfied that the burden of proof to establish the exception has been met by the party objecting to return. However, in these specific circumstances, the national and international situation is developing at such speed that any evidence that could be gathered would be likely to be immediately outdated. Something very convenient for the abducting parent, it would be almost enough if the Court *ex officio* conducts check on the actual COVID-19 information regarding the state of habitual residence of the child, ensuring it is current when issuing the return or non-return order. However, this does not relieve the opposing party from the procedural obligation to present evidence as accurately as possible, and it remains important that arrangements regarding the "tangible safeguards", discussed above, are offered and supported by evidence by the party which claims the return order.

There is a further discretionary ground in the Convention which permits a refusal of a return in certain circumstances where the child objects. According to Article 12 UNCRC, the child has the right to express its views freely, these views to be given due weight in accordance with age and maturity, and the Court should carefully examine them together with the other evidence (and not to provide stereotyped reasoning). The COVID-19 limitations raise the question should the child still be heard in this context and, if yes, how this should happen such that the risk for is minimised? Obviously, this right cannot and should not be waived in times when many procedural actions can take place online. It is worth to note that next to the existing legislation, Brussels IIa recast (Regulation 1111/2019, in force as of August 2022) pays special attention to the strengthening of the right of the child to express his or her view, reinforcing it with special provision – Article 26 in Chapter III "International child abduction", in compliance with a detailed Recital 39. No minimum age is prescribed, but also no rules who can conduct the

hearing of the child, how it must happen and where it should be conducted are set. Therefore, the hearing of the child should take place following the general conditions, and while the personal impression will indeed be reduced, and the possibilities to manipulate the child could potentially increase, the unlimited online tools to conduct the hearing eliminate the risk of contamination and offers acceptable solution for this emergency situation.

To get back to the discussed case – Re PT [2020] EWHC 834 (Fam), the Court is satisfied that the Art 13(b) defence has not been made out in this case. Many more comments could be made on the Courts assessment – the best interest of the child is not touched upon, the domestic violence is not discussed at all as an additional assertion, etc. One positive conclusion from procedural point of view is that the urgency has been taken into account, and that the Court made full use of the opportunities to conduct the proceedings online. Of course we cannot say that the return of a child during the COVID-19 pandemic constitutes a grave risk in all child abduction cases– but we can at least begin to build the good practices in this unprecedented time, when the "lockdown" will bring brand new meaning to the notion of "grave risk" under the Convention.

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The Hague Convention on Child Abduction and UK Overseas Territories: VB v TR

Written by Elijah Granet

In a recent decision of the Family Division of the English and Welsh High Court—*VB v TR (Re RR)* [2020] EWFC 28, Mr Justice Mostyn highlighted a lacuna in the protection of children from abduction under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the Convention'). As a result of what Mr Justice Mostyn (at para 7) refers to as a 'colonial anachronism', unconsented removals of children from the British overseas territory of Bermuda to the UK proper fall outside the remit of either the convention or domestic law.

Facts

VB and TR are parents from Bermuda with a young son, RR. In 2019, TR removed RR from Bermuda secretly, without the consent of VB, and in violation of Bermudian court orders. The UK ratified the 1980 Convention on the Civil Aspects of International Child Abduction in 1986 and implemented it domestically by way of the Child Abduction and Custody Act 1985. Section 28(1)(*c*) of that Act enables the UK to extend the effect of the Convention to Overseas Territories by means of an Order in Council. However, Bermuda, which enjoys full internal self-governance (with its own laws, parliament, and courts) instead passed the International Child Abduction Act 1988, which essentially transposed the 1985 Act into Bermudian law. As a consequence, the UK made an Article 39 Notification declaring that the Convention applied to Bermuda, which is now listed in the annex of authorities required by Article 18 of the Convention.

Decision

As both Bermuda and the UK are signatories to the Convention, one would expect that arrangements for the return of RR could be easily carried out. Mr Justice Mostyn notes (at para 12), if TR had gone to the USA (or indeed, any state other than the UK), the Convention would unquestionably applied as Bermuda is listed in the aforementioned annex of authorities. The problem arises because, for the

purposes of the Convention, the UK and Bermuda are a single state party; therefore, because there is no 'international' element to child abduction between the UK and Bermuda, the Convention is not considered to apply. This 'counterintuitive' (para 21) state of affairs has caused confusion, including a 2014 ruling which (mistakenly) held that Bermuda is not a party to the Convention.

Of course, there is no inherent problem with the Convention being inapplicable between different British jurisdictions. For example, if a parent who removed a child from Northern Ireland to England against a court order, the English court would automatically recognize the Northern Irish court order under the Family Law Act 1986, s 25, which provides for mutual enforcement of family court orders across the UK. However, that Act does not apply to Bermuda, because Bermuda is not a part of the United Kingdom (whatever the Convention might say). A Bermudian court is, for all intents and purposes, a foreign court in the eyes of the law of England and Wales.

Thus, there is a paradoxical and frustrating outcome: for the purposes of the Convention, Bermuda is part of the UK, but, for the purposes of English and Welsh family law, Bermuda is a foreign country. This is contrary to the intention of both the Bermudian and British Parliaments in implementing the Convention: namely, to prevent the unlawful abduction of children. The result is that Mr Justice Mostyn, rather than beginning with the presumption that RR should be returned (as he would under the Convention) or automatically implementing the Bermudian court's order (as he would with a court from a 'domestic' UK jurisdiction), was forced to essentially ignore the Bermudian court's order, and to circuitously employ a complex legal test under the Children Act 1989, s 1(1) to determine if it would be in the interests of the welfare of RR for him to be returned to Bermuda. Mr Justice Mostyn ultimately held that it was in the child's best interests to return to Bermuda, albeit at a time more conducive to international travel than the current pandemic. The only alternative route would be to employ the test for the recognition of foreign custodial orders set out by the Privy Council in *C v C (Jersey)* [2019] UKPC 40, which focuses on questions of public policy rather than the child's welfare.

Comment

The lacuna in the UK's regime for protecting against child abduction is, as Mr

Justice Mostyn correctly put it (at para 12), ‘an embarrassment’. The defect in this very important area of the law was so severe that the judge felt it appropriate to state (in the same paragraphs) , bluntly, ‘the law needs to be changed’—either to add Bermuda (and other overseas territories) to the domestic list of recognised Hague Convention authorities, or to extend the automatic recognition of orders under the Family Law Act to all British Overseas Territories. Either option would be a welcome and necessary respite from the current state of affairs, by which abduction from a territory party to the Convention (Bermuda) to another party (the UK) is not covered by the law. In a matter as serious as this, it is astonishing that, two decades after Bermuda joined the Convention, there is still no UK framework for ensuring the swift return of abducted children to their homes.

Choice of Australian Aboriginal Customary Law

The relationship between the conflict of laws and constitutional law is close in many legal systems, and Australia is no exception. Leading Australian conflict of laws cases, including, for example, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, which adopted a *lex loci delicti* rule for intra-Australian torts, are premised on public law concepts essential to our federation. These cases illustrate how the conflict of laws bleeds into other disciplines.

Love v Commonwealth [2020] HCA 3 is a recent decision of the High Court of Australia that highlights the breadth and blurry edges of our discipline. Most legal commentators would characterise the case in terms of constitutional law and migration law. The Court considered a strange question: can an Aboriginal Australian be an ‘alien’?

Policy background

Australia's disposition to migration is controversial to say the least. Our government's migration policies, which often enjoy bi-partisan support, are a source of embarrassment for many Australians. One controversial migration policy involves New Zealanders. Australia and New Zealand enjoy a very close relationship on several fronts, including with respect to private international law: see the *Trans-Tasman Proceedings Act 2010* (Cth). New Zealanders often enjoy privileges in Australia that are not afforded to persons of other nationality.

Yet recently, Australia began to deport New Zealanders who had committed crimes in Australia no matter how long they had lived in Australia. In February, New Zealand Prime Minister Jacinda Ardern said that the policy was 'testing' our countries' friendship. Australian Prime Minister Scott Morrison replied, '[w]e deport non-citizens who have committed crimes in Australia against our community'. Sections of the Australian community are seeking to change Australia's policy on point, which is effected by the *Migration Act 1958* (Cth).

Facts and issues

The Court heard two special cases together. As Kiefel CJ explained: '[e]ach of the plaintiffs was born outside Australia – Mr Love in Papua New Guinea and Mr Thoms in New Zealand. They are citizens of those countries. They have both lived in Australia for substantial periods as holders of visas which permitted their residence but which were subject to revocation. They did not seek to become Australian citizens'.

Section 501(3A) of the *Migration Act* requires the Minister for Home Affairs to a cancel a person's visa if they have been convicted of an offence for which a sentence of imprisonment of 12 months or more is provided. Each of the plaintiffs committed crimes and had their visas cancelled. The effect of which was that they became 'unlawful non-citizens' who could be removed from Australia.

The plaintiffs' cases turned on s 51(xix) of the *Commonwealth Constitution*, which provides:

> *The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to…*

naturalization and aliens…

The plaintiffs contended that they were outside the purview of the *Migration Act*, the *Australian Citizenship Act 2007* (Cth) and s 51(xix) because they each had a special status as a 'non-citizen, non-alien'. 'They say that they have that status because although they are non-citizens they cannot be aliens because they are Aboriginal persons': [3]. Each plaintiff arguably satisfied the tripartite test for Aboriginality recognised at common law and considered below. Thoms was even a native title holder.

The High Court was asked to consider whether each plaintiff was an 'alien' within the meaning of s 51(xix) of the *Constitution*. Kiefel CJ clarified that the question is better understood as follows: 'whether it is open to the Commonwealth Parliament to treat persons having the characteristics of the plaintiffs as non?citizens for the purposes of the *Migration Act*': [4].

The High Court split

The High Court's seven justices departed from usual practice and each offered their own reasons. The majority of four (Bell, Nettle, Gordon and Edelman JJ) answered as follows:

> *The majority considers that Aboriginal Australians (understood according to the tripartite test in Mabo v Queensland [No 2] (1992) 175 CLR 1 at 70) are not within the reach of the "aliens" power conferred by s 51(xix) of the Constitution. The majority is unable, however, to agree as to whether the plaintiff is an Aboriginal Australian on the facts stated in the special case and, therefore, is unable to answer this question.*

Arcioni and Thwaites explain: 'The majority rested their reasoning on the connection of Aboriginal Australians with Australian land and waters. Aboriginal Australians were a unique, sui generis case, such that Aboriginality may generate a class of constitutional members (non-aliens) who are statutory non-citizens'. The minority of Kiefel CJ, Gageler and Keane JJ dissented for different reasons. A common theme of those reasons was that 'alien' is the antonym of 'citizen'.

Is this a choice of law case?

The case is about constitutional law. It is also about status. 'Alienage or citizenship is a status created by law': [177] per Keane J. One understanding of the difference between the majority and minority is a difference in opinion as to the applicable law to determine status as 'alien' in this context.

According to Nettle J, 'status [as a member of an Australian Aboriginal society] is inconsistent with alienage': [272]. 'Aboriginal Australians are not outsiders or foreigners – they are the descendants of the first peoples of this country, the original inhabitants, and they are recognised as such': [335] per Gordon J. The majority appealed to the common law's recognition of native title rights underpinned by traditional laws and customs in support of their analyses (see, eg, [339]).

The minority denied that status as Aboriginal could determine whether a person has the status of an 'alien' within the meaning of the *Constitution*.

Recognition of non-state law?

Nettle J quoted (at [269]) the following passage from the native title case *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 445 [49] (Gleeson CJ, Gummow and Hayne JJ):

> *Laws and customs do not exist in a vacuum. They are, in Professor Julius Stone's words, 'socially derivative and non-autonomous'. As Professor Honoré has pointed out, it is axiomatic that 'all laws are laws of a society or group'. Or as was said earlier, in Paton's Jurisprudence, 'law is but a result of all the forces that go to make society'. Law and custom arise out of and, in important respects, go to define a particular society. In this context, 'society' is to be understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs.*

The status of the laws and customs of Australia's Aboriginal peoples has been the subject of case consideration for decades. In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267, for example, Blackburn J said:

> *The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me.*

Later, in *Mabo (No 2)*, the High Court finally recognised the significance of those laws to recognition of native title. In that case, the Court articulated a tripartite test for whether a person is an Aboriginal Australian: biological descent, self-identification, and recognition by the relevant Aboriginal community (see [291] per Gordon J). As explained further below, satisfaction of this test depends on application of traditional laws and customs. Arguably, satisfaction of the test requires recognition of the positive force of that non-state law.

Against that, Keane J held, '[t]he common law's recognition of customary native title does not entail the recognition of an Aboriginal community's laws': [202]. Rather, it goes the other way: Aboriginal laws are necessary for recognition of native title. Kiefel J also explicitly rejected recognition of Aboriginal customary law: '[i]t is not the traditional laws and customs which are recognised by the common law. It is native title … which is the subject of recognition by the common law, and to which the common law will give effect. The common law cannot be said by extension to accept or recognise traditional laws and customs as having force or effect in Australia': [37]. Arguably, this means that there is no choice of law at play in this case: there is just one law at issue, being the law of Australia.

Yet even in transnational cases within the traditional domain of the conflict of laws, Australian courts will only apply foreign laws via application of the *lex fori*: *Pfeiffer*, [40]–[41]; *Nygh's Conflict of Laws in Australia*, ch 12. For practical purposes, the majority approach does recognise Aboriginal non-state law as capable of application to resolve certain issues of (non-Aboriginal) Australian law.

A choice of law rule?

Nettle J came close to articulation of a new intra-Australian choice of law rule at [271]:

> *for present purposes, the most significant of the traditional laws and customs of an Aboriginal society are those which allocate authority to elders and other persons to decide questions of membership. Acceptance by persons having that authority, together with descent (an objective criterion long familiar to the common law of status) and self-identification (a protection of individual autonomy), constitutes membership of an Aboriginal society: a status recognised at the "intersection of traditional laws and customs with the common law".*

If there is a choice of law rule in there, its significance might be expressed through this syllogism:

- P1. Whether a person is capable of being deported after committing a serious crime depends on whether they are an 'alien'.
- P2. Whether a person is an 'alien' depends on whether they are 'Aboriginal'.
- P3. Whether a person is 'Aboriginal' depends on whether they satisfy the tripartite test in Mabo [No 2] with respect to a particular Aboriginal society.
- P4. Whether a person satisfies the tripartite test turns on the customary law of the relevant Aboriginal society.

Like questions of foreign law, '[w]hether a person is an Aboriginal Australian is a question of fact': [75] per Bell J. How does one prove the content of the relevant Aboriginal law? Proof of traditional laws and customs often occurs in native title cases. It was considered at [281] per Nettle J:

> *It was contended by the Commonwealth that it might often prove difficult to establish that an Aboriginal society has maintained continuity in the observance of its traditional laws and customs since the Crown's acquisition of sovereignty over the Australian territory. No doubt, that is so. But difficulty of proof is not a legitimate basis to hold that a resident member of an Aboriginal society can be regarded as an alien in the ordinary sense of the term. It means only that some persons asserting that status may fail to establish their claims. There is nothing new about disputed questions of fact in claims made by non-citizens that they have an entitlement to remain in this country.*

Minority critique of the choice of law approach

As a dissentient in the minority, Gageler J offered a compelling critique of what I construe to be the choice of law approach of the majority (at [137]):

> *To concede capacity to decide who is and who is not an alien from the perspective of the body politic of the Commonwealth of Australia to a traditional Aboriginal or Torres Strait Islander society or to a contemporary Aboriginal or Torres Strait Islander community, or to any other discrete segment of the people of Australia, would be to concede to a non?constitutional non?representative non?legally?accountable sub?national group a constitutional capacity greater than that conferred on any State Parliament. Yet that would be the practical effect of acceptance of either of the first and second variations of the plaintiffs' argument.*

The choice of non-state law is arguably made more controversial by the character of those laws' content. Nettle J explained at [276]: 'As is now understood, central to the traditional laws and customs of Aboriginal communities was, and is, an essentially spiritual connection with "country", including a responsibility to live in the tracks of ancestral spirits and to care for land and waters to be handed on to future generations'. Gordon J held at [290], '[t]hat connection is spiritual or metaphysical'. Tacit in the majority's mode of analysis, then, is that a person's spiritual or religious views can have an impact on their status as an 'alien', or otherwise, within the *Commonwealth Constitution*. (A once-Aboriginal non-citizen who lacks those spiritual views and renounces their membership of their Aboriginal society may still be an 'alien' following this case: see [279], [372].) From a secular perspective within an increasingly secular nation, that is a striking proposition.

Conclusion

This is not the first time that the relationship between the conflict of laws and issues affecting indigenous peoples has been considered. More generally, whether non-state law may be the subject of choice of law is a topic that has been considered many times before. One of the factors that makes *Love v*

Commonwealth unique, from an Australian legal perspective, is the majority's effective choice of Aboriginal customary law to determine an important issue of status without really disturbing the common law proposition that Aboriginal groups lack political sovereignty within the Australian federation (see [37], [102], [199]). COVID-19 may have stalled sought after changes to the Australian *Constitution* with respect to recognition of indigenous peoples (see (2019) 93 *Australian Law Journal* 929), yet it remains on the national agenda. In any event, Australia's very white judiciary may not be the best forum for recognition of the sovereignty of Australian Aboriginal and Torres Strait Islander peoples.

Competition Law and COVID 19

Written by Sophie Hunter

With more than 200 countries affected to date, the current crisis presents far reaching implications for competition law and policy on a global scale. This crisis is affecting developed and developing countries alike, especially by putting young competition authorities under a stress test of the resilience of their competition rules. As the pandemic of COVID19 spreads to every parts of the world, most recently the African continent, competition authorities are looking at whether relaxing their competition rules to allow for cooperation between key actors of the health sector and other essential economic sectors, like the airline industry. However, full or partial relaxation of competition rules may have adverse effects on industries, business and consumers by resulting in anti-competitive practices such as price fixing, excessive pricing and collusion between competitors.

Competition authorities have responded to this crisis in a piecemeal approach. While the European Commission was quick to a temporary framework[1] and relied on measures implemented during the 2008 financial crisis[2] , in the US, the FTC and DOJ only recently issued a guidance note based on previous emergency situations (Harvey and Irma hurricanes) to allow cooperation of competitors in the health sector, especially in the development of vaccines.[3] The UK has granted temporary exemptions from anti collusion rules to supermarkets.

An approach also adopted by the German competition authority to ensure continuity of food supplies. South Africa promptly enacted an overall sector wide block exemption for the health sector.[4] Some countries like France and China have toughened up their price regulations.[5]

With a surge in excessive pricing of health-related products such as masks and hand sanitizers, competition authorities are currently dealing with ongoing investigations in a wide range of jurisdictions, namely the UK, France, Brazil, Russia, Spain and Italy. Some have announced price controls over high demand items. This has already been done in France through a decree regulating the price of hand sanitizers to prevent retailers and pharmacists engaging in abusive price increases.[6] Enforcement of sanctions against anti-competitive conducts toughened up, especially from competition authorities in Kenya and China, which have already heavily put sanctions on retailers engaged in excessive pricing of health-related products.

In times of crisis, governments can allow specific exceptions for joint research projects because they understand the need for collaborative efforts between firms to, for instance, develop a vaccine. Such exceptions have already been granted during other pandemics such as Swine Flu in 2009, MERS in 2015 and influenza in 2019. Those exceptions may be exempted from competition rules. For instance, the European Commission has called for an increase effort in research and development at the European level to develop a vaccine against COVID 19 within an exceptional regulatory framework (as it already did in 2009). [7] In South Korea, similarly, the government encouraged the main pharmaceutical companies to work together on a vaccine through an emergency use authorisation that was established post MERS in 2015.[8]

Apart from exceptions, certain countries granted exemptions from anti collusion rules to businesses in specific economic sectors. The most far reaching measures were taken by South Africa with the COVID-19 Block Exemption for the Healthcare Sector 2020. It established price controls on everyday goods as well as a list which exempts hospitals, medical suppliers, laboratories and pathologists, pharmacies, and healthcare funders from engaging in anti-competitive collaboration.[9]Other temporary exemptions have been granted to the airline industry by Norway, the retail sector in Germany, banking in Australia, the distilled spirit industry in the US, education in Denmark and tourisms in Italy and Kazakhstan.

Competition authorities must enforce strict compliance to competition rules, even during this time of pandemic. Despite this, some leverage and legal leeway enacted by certain competition authorities demonstrates a willingness to allow for a temporary flexibility to mitigate the economic impact. This can be achieved through sector specific block exemptions, strict guidance on collaboration in times of emergency or enhanced legislation on price controls. This time of crisis creates a great opportunity for competition authorities around the world to engage in international cooperation to share best practices. Prompt responses to the crisis in developing countries demonstrates the ambition and dynamism of such agencies (Peru, South Africa, Kenya). Nevertheless, it remains to be seen how competition authorities will cope during the crisis with sustaining investigation, enforcement and compliance with competition rules.

[1] François-Charles Laprévote, Theodora Zagoriti, Giulio Cesare Rizza, The EU Commission adopts a Temporary Framework to support the economy in the context of the COVID-19 outbreak, 19 March 2020, e-Competitions Bulletin Preview, Art. N° 93837

[2] https://www.concurrences.com/fr/bulletin/special-issues/competition-law-covid-19/competition-policy-covid-19-an-overview-of-antitrust-agencies-responses

[3] https://www.competitionpolicyinternational.com/ftc-and-doj-announce-expedited-antitrust-procedure-for-coronavirus-public-health-efforts/

[4] Minister of Trade and Industry of South Africa, 'Covid-19 Block Exemption for the Health Care Sector, 2020 – South Africa' (2020) 657 Government Gazette 12.

[5] State Administration of Market Supervision (SAMR) of People's Republic of China, 'Urgent Notice of the General Administration of Market Supervision on Severely Cracking down on Price Violations in the Production of Preventive and Control Materials during the Epidemic Prevention and Control Period' (5 February 2020) <http://www.gov.cn/zhengce/zhengceku/2020-02/06/content_5475223.htm> accessed 22 March 2020.

[6] ‘Encadrement Des Prix Pour Les Gels Hydroalcooliques’ (*Economie.gouv.fr*, 2020) <https://www.economie.gouv.fr/dgccrf/encadrement-des-prix-pour-les-gels-hydroalcooliques-voir-la-faq> accessed 22 March 2020.

[7] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Pandemic (H1N1) 2009’ (15 September 2009) 1 <http://op.europa.eu/en/publication-detail/-/publication/9ec8052e-c269-4b57-9be9-4b40c5101d15/language-en> accessed 22 March 2020.

[8] https://www.reuters.com/article/us-health-coronavirus-testing-specialrep/special-report-how-korea-trounced-u-s-in-race-to-test-people-for-coronavirus-idUSKBN2153BW

[9] South African Government, ‘Guidelines – Coronavirus Covid-19 in South Africa’ (23 March 2020) <https://www.gov.za/coronavirus/guidelines> accessed 23 March 2020.

Access to justice in times of corona

Access to justice in times of corona

*When COVID-19 makes the case for greater digitalisation of justice**

***Written by Emma van Gelder, Xandra Kramer and Erlis Themeli**, with thanks to Elisabetta Silvestri (University of Pavia), Georgia Antonopoulou, Alexandre Biard and Betül Kas (*Erasmus University Rotterdam, ERC-Co project ‘Building EU civil justice: challenges of procedural innovations – bridging access

to justice')

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The disruption of society as a result of the pandemic has naturally also affected our justice system. While there is no total lockdown in The Netherlands, as of 16 March people working in non-vital sectors are required to stay at home, schools and universities are closed, and events and social gatherings are forbidden. These measures also meant that courts in the Netherlands had to restrict their daily activities. All courts were closed on 17 March and will stay closed in any case until 28 April 2020. This means that most court proceedings are postponed for the time being. To proceed with continuing obligations and proceedings, thereby ensuring ongoing access to justice, judiciaries around the world are increasingly adopting various forms of technology in their court procedures.

This blogpost sets out the Dutch approach of the judiciary to the COVID-19 crisis, and highlights some global examples of other approaches.

COVID-19's disrupting effect to the functioning of the court system

COVID-19 caused a sudden lockdown of courts. Court hearings are delayed, resulting in complaints that the backlog in the judiciary will grow, and attorneys have urged for more cases to be processed. Against the background of the health safety measures by the RIVM (National Institute for Public Health and the Environment), the public is temporarily no longer allowed to attend the few court hearings that still do take place. The lockdown of courts and offices emphasises the need for remote access to courts and better communication between courts and their constituents.

The adoption of a General Regulation during the COVID-19 crisis

The Dutch Judiciary has taken steps to respond to these problems by adopting a general regulation on case-handling by the Judiciary during the COVID-19 period. The starting point of this regulation is that the courts will continue to deal with *urgent* cases, which are divided into *serious* urgent cases and *other* urgent cases. Urgent cases include certain hearings in criminal cases, insolvency cases, and family cases, particularly those concerning child protection. Judges work with digital files and have secured remote access from home. Law firms are also expected to have their staff working from home whenever possible, though not all

law firms are closed.

The General Regulation deals among others with the attendance of courtroom hearings (Para. 1, sub 1.1 General Regulation), the use of secure email (Para. 1, sub 1.2 General Regulation) and closed hearings (Para. 1, sub 1.3 General Regulation). In principle oral hearings with the physical attendance of the parties will not take place during the COVID-19 period, unless the judge decides otherwise. Both *serious* and *other* urgent cases will take place as much as possible in writing or through telephone (video) connection. If the judge decides that an oral hearing with physical presence of the parties should take place, the guidelines of the RIVM are taken into account. Where possible, livestreaming will be used. Procedural guidelines that allow documents and messages to be sent through post or fax, can be sent via a safe email channel of the Judiciary.

Also there is a proposal pending on separate temporary 'urgent' COVID-19 legislation (spoedwetgeving *COVD-19 Justitie en Veiligheid*), proposed by the Minister of Legal Protection, Sander Dekker, and by the Minister of Justice and Security, Ferdinand Grapperhaus. This proposal was submitted to the House of Representatives (*tweede kamer)* on 8 April 2020. It will expire on the 1st of September 2020, but with the possibility to extend it's application. This proposal for legislation allows communication that normally is prescribed to take place physically, to take place through electronic means such as audio or video livestream. This enables annual general meetings to be held online or a testament by a notary to be signed online.

Positive side-effects: enhanced use of technology

Often, radical innovations are dictated by crisis. A positive side effect of the current health crisis is that it may boost the digitisation of the judiciary that has been severely hampered in the Netherlands (see our blogpost on EUCP; more extensively: Xandra Kramer, Erlis Themeli and Emma van Gelder, e-Justice in the Netherlands: The Rocky Road to Digitised Justice, 2018). To enable the functioning of the General Regulation, the IT department of the judiciary has extended the facilities for a telephone and video connection between the judiciary and external parties. Another side-effect boosting digitisation in the Dutch Judiciary regards the introduction of secure email to be used by parties and for filing procedural documents and communicating messages as of 9 April 2020. Several safeguards are required for the use of email, regarding the subject of the

email and the capacity of the attachments to the email. Regarding signatures, no digital signature is prescribed, but a 'wet' signature scanned and uploaded through PDF (see para. 1.2.4 under 6 of the General Ruling). The moment of receipt of the e-mail within the secured email system of the Judiciary counts as the time of receipt (see para. 1.2.5 of the General Regulation).

Perhaps the most important side effect of this crisis would be the experience with these implemented facilities. Using remote access to courts, secure emails, video conferencing and other electronic means for a protracted period will provide the Ministry of Justice and Security important lessons on how to better utilize these. Video conferencing is of course not new in the Netherlands, but it is not used at a wide scale, particularly not in civil cases.

Challenges

While these side-effects must be praised, in reality there are a number of challenges caused by this 'sudden' shift towards digitisation that cannot be neglected. The lack of face-to-face contact results in an absence or lesser extent of non-verbal cues such as body language, tone of voice, facial expression. Especially in family law cases – often involving emotional discussions – this may prove a challenge and can risk miscommunication. Another challenge relates to the identification of parties; if e-mail is used, it can be difficult to ensure that the documents are also received by the correct person. In the Netherlands, judicial officers play an important role in securing the correct service of documents. Another challenge – although less relevant in the Dutch context – relates to vulnerable users having no or limited access to the internet or having minimum skills with digital technology. The absence of an offline channel forms a challenge for access to justice in certain cases.

The exclusion of public attendance during a court hearing, challenges the principles of a public hearing and transparency. To counter these challenges, attendance of maximum of three journalists is still allowed, and more decisions are published on the website of the judiciary (rechtspraak.nl). For example, the website of the administrative law department (*Afdeling Bestuursrechstpraak)* of the Council of State, states that decisions are temporarily published online and posted on their internal website and *rechtspraak.nl*.

Also, across the Dutch borders, examples of challenges are found. For example,

small criminal cases in France – such as 'immediate appearances' (*comparution immédiate*), rarely allow for online hearings or other forms of digitalisation.

In Germany, since 2013 § 128a ZPO (German Civil Procedure Code) gives the possibility of using video-conferences for the oral negotiation and the hearing of evidence in civil litigation. Although all German states have equipped their judiciaries with the necessary technology, they are not widely used in practice. The current approach to face the corona crisis consists rather of the postponement of non-urgent proceedings. However, first signs towards a stronger move of the digitization of justice appears to be driven by the judiciary of Nord-Rhine-Westphalia.

Other global developments

Similar approaches to the COVID-19 crisis can be seen around the globe.

For instance, the UK has adopted the Coronavirus Act 2020 (hereinafter: Act). Regarding provisions on digitisation, Point 53 and 54 of the Act enshrine the expansion of the availability of live links in criminal proceedings and in other criminal hearings. Furthermore, point 55 and 56 of the Act rule that public participation in proceedings will be conducted by video or audio, and live links are used in magistrates' court appeals for requirements or restrictions imposed on a potentially infectious person. The Economist, quotes in a paper of 4 April 2020, that before the COVID-19 crisis, about 200 cases a day were being heard at least partially via conference-call and video link in the UK. By March 31st this number had increased to around 1800 cases.

Richard Susskind, launched a new website at the outset of the corona crisis, in order to create a platform to share experiences of 'remote' alternatives to traditional court hearings. The website provides an overview of interesting developments on a global level. In any event, Susskind can be delighted as he has noted a *sudden spike of sales* of his recent book 'Online courts and the future of justice'.

Also in Italy extensive measures for the administration of justice during the Covid-19 period are adopted. A recent statutory instrument (18 March 2020),which applies until 15 April 2020, rules that most cases are postponed and all deadlines provided for by laws are suspended. Exceptions apply to certain

urgent cases. From 16 April 2020 through June 30, other measures can be taken which comply with the health safeguards concerning COVID-19, for example court access can be limited. The Court of Cassation uses video technology to decide appeal cases. It required an adaption of the procedural rules to allow video connection for the judges unable to travel due to the COVID-19 crisis.

In Canada, some courts are encouraging counsel and the public to use alternative dispute resolution forms in order to reduce delays now that many court hearings are postponed for the time being. The use of technology in out-of-court dispute resolution is more widespread and accepted, resulting in various forms of online dispute resolution (ODR). For example, in the COVID-19 period, ODR procedures offer benefits of virtual hearings centralizing disputes regardless of geographical distances between parties, paperless processes, flexibility and convenience enabling parties to participate from their own home computer. Positive side-effects are cost and time reductions as online procedures eliminate *inter alia* travel costs. In any case, the Covid-19 crisis may lead to a 'wake-up' call among lawyers and parties to consider the ability of ODR/ADR as a viable option of dispute resolution.

In Colombia, on 19 March new procedural rules were enacted to allow for virtual conferences and videoconferencing in Colombian Courts.

In Brazil, Brazilian courts work with the Cisco system enabling videoconference for court proceedings.

Also in Kenya, digitalisation is welcomed, as a Kenyan Judge has used Zoom for remote hearings and is now planning to oversee more than 20 court hearings over video link, including verdicts, rulings on appeals as well as applications.

Conclusion

It remains to be seen if the rapid uptake of digitisation will continue after the COVID-19 crisis comes to an end. In any case, the present health crisis shows the ability to implement emergency legislation and of the judiciary to amend a vast array of procedures in a short period of time.

Jurisdiction over financial damages – the A-G Opinion in the Volkswagen Case before the CJEU

from Raphael de Barros Fritz, Hamburg

The assessment of a court's jurisdiction based on Art. 7 (2) of the Brussels Ibis Regulation in cases involving exclusively financial damages has been a continuous challenge (cf., e.g., ECJ, 12.09.2018, Case C-304/17 (*Löber*); ECJ, 16.06.2016, Case C-12/15 (*Universal*); ECJ, 28.01.2015, Case C-375/13 (*Kolassa*)). Against this background, the Advocate General's opinion in the Volkswagen emissions scandal case (*Campos Sánchez-Bordona*, Opinion of Advocate General delivered on 02.04.2020, Case C-343/19 (*Volkswagen*)) sets forth some important guidelines when determining a court's jurisdiction pursuant to Art. 7 (2) of the Brussels Ibis Regulation.

In the *Volkswagen* case, an Austrian consumer organization is pursuing claims for damages assigned by 574 purchasers of vehicles as well as a declaration establishing the liability of Volkswagen for as yet unquantifiable future damages. The assignors have all purchased their vehicles in Austria not directly from Volkswagen itself, but from either a commercial dealer or a private seller. The question is whether this gives the Austrian court called upon to decide the case jurisdiction under Art. 7(2) of the Brussels Ibis Regulation.

Assignees as direct victims

Before discussing the main question presented by the Austrian court, the Advocate General addresses two important preliminary issues. The first is whether the assignees are direct or merely indirect victims of Volkswagen's tortious behavior. It is well-settled in the ECJ's case-law that the place where the damages arose includes only the place where *initial* damages sustained by a

direct victim ensued. Thus, the damages being claimed cannot be merely the consequence of damages arising elsewhere (cf. ECJ, 19.09.1995, C-364/93 (*Marinari*), paragraphs 14 and 15; ECJ, 29.07.2019, Case C-451/18 (*Tibor-Trans*), paragraph 27). Since none of the assignees in the *Volkswagen* case have purchased vehicles directly from Volkswagen, one could argue that the assignees are only *indirect* victims of Volkswagen's tortious behavior (i.e., manipulation of the cars' engines) for their damages are only the consequence of the damages incurred by the commercial dealers and private sellers from whom they purchased theirs cars.

Yet the fact alone that a claimant has not established contractual relations with the tortfeasor does not necessarily makes him an indirect victim of the latter's behavior (ECJ, 29.07.2019, Case C-451/18 (*Tibor-Trans*)). In accordance with this ruling, the Advocate General also concludes that the lack of contractual relations between Volkswagen and the assignees does not necessarily precludes them from claiming damages as direct victims. He argues instead that the loss of value of the vehicles did not become a reality until the manipulation of the engines was made public. Therefore, neither the commercial dealers nor the private sellers who owned the cars before the assignees experienced any loss. As a result, the damages suffered by the assignees cannot be deemed as a mere consequence of the commercial dealers'/private sellers' damages and the ones among them who retained the vehicles as part of their assets at the time the defect has been made public are to be considered as the direct victims of Volkswagen's tortious actions (points 40 *et seq.*, 81).

The place where the damages arise

A second issue the Advocate General had to resolve was whether the place where the damages arose amounts to the place where the vehicles were physically located. He answers this in the negative (points 72 and 73). The location of the vehicles is – from the defendant's perspective – unforeseeable and does not establish a proximity between the court and the dispute. Thus, the place where the damages arose is the place where the act pursuant to which the vehicles became part of the purchasers' assets took place, i.e., the place where the transactions occurred (point 74). It is interesting to note that the Advocate General is referring here to a noticeable action (the transaction entered into by

the parties) in order to *physically* allocate damages which *per se* (because purely financial) are actually *non-physical* (point 53). Furthermore, it is no coincidence that the Advocate General briefly mentions bank accounts in his reasoning. For his line of argument in the *Volkswagen* case resembles to a great extent the ECJ's ruling in the *Universal* case, where the Court held that the place where the damages arose was the place where a settlement had been executed between the parties and not the place where the bank account was located from which the obligations arising out of the settlement had been paid (i.e., the place where – like the place where the purchased cars where located in the *Volkswagen* case – the loss had materialized) (ECJ, 16.06.2016, Case C-12/15 (*Universal*), paragraphs 31 and 32).

In addition to the ECJ's ruling in the *Universal* case, a comparison may be drawn between the Advocate General's reasoning in the *Volkswagen* case and Advocate General *Bobek*'s opinion in the *Löber* case. There, Advocate General *Bobek* submitted that a person incurs damages at the place where he or she enters into a legally binding and enforceable obligation to dispose of his or her assets in a detrimental manner and *not* at the place where the pecuniary loss becomes apparent (*Bobek, Opinion of Advocate General delivered on 08.05.2018, Case C-304/17 (Löber), points 73, 82*). Applied to the *Volkswagen* case, this reasoning means that the place where the damages arose cannot be allocated to the place where the cars were physically located and thus where the pecuniary losses became perceptible, but rather to the place where the assignees entered into a legally binding and enforceable obligation to pay the purchase price. This reasoning is also sound if one (as the Advocate General in the *Volkswagen* case) considers the damages incurred by the purchasers to be the (negative) difference between the price paid and the value of the tangible goods received in return (points 36 and 37). For if the parties, for example, enter into a contract to sell (i.e., a bilateral promise of sale) or a sales contract (i.e., a contract of sale) under a legal system like the German one, where a sales contract by itself does not transfer ownership in the subject-matter of the contract, the financial damages occurring due to the (negative) difference between the price paid and the value of the tangible goods received in return take place already at the moment in which the purchaser enters into the contract to sell or the contract of sale: from this moment on, the obligation to pay the purchase price is part of his assets and it is not compensated by his claim against the seller, creating thereby a (negative) balance in his estate. .

General principles for determining jurisdiction under Art. 7 (2) of the Brussels Ibis Regulation

With these issues out of the way, the Advocate General deals with the concrete question posed by the Austrian court.

He begins his analysis by throwing some light upon the reasoning of the ECJ in some of its previous rulings regarding the construction of Art. 7 (2) of the Brussels Ibis Regulation in cases involving pure financial damages. He suggests that what the ECJ was doing in reality in the cases *Löber*, *Universal* and *Kolassa* was to develop a two-prong approach for assessing a court's jurisdiction at the place where the damages arose: on the first step, a court called upon to decide a case must determine whether the damage arose at the place it sits. Once this has been done, the court must take into consideration the "other specific circumstances" of the case at hand in order to ascertain whether the rationale underlying Art. 7(2) of the Brussels Ibis Regulation supports its jurisdiction (points 56, 59).

It is, however, not possible to conclude with exactitude after reading the Advocate General's opinion whether he proposes to use this two-prong approach in *every* case involving financial damages or *only* in those cases where the fact pattern resembles the facts in the *Löber*, *Universal* and *Kolassa* cases. Two passages of the Advocate General's opinion suggest the latter. On point 59 he states that the second step of the approach proposed *may* be required for purely financial damages and on points 70 and 71 he seems to try to fit the facts of the *Volkswagen* case into the facts of the *Löber*, *Universal* and *Kolassa* cases in order to justify the application of the two-prong approach to the case at hand.

In addition to carving out the different steps a court must undertake in order to determine its jurisdiction under Art. 7 (2) of the Brussels Ibis Regulation, the Advocate General also clarifies some ambiguities in previous rulings of the ECJ pertaining to the second step of the forum court's analysis (cf., for example, ECJ, 16.06.2016, Case C-12/15 (*Universal*), paragraph 27; ECJ, 28.01.2015, Case C-375/13 (*Kolassa*), paragraph 47; ECJ, 16.01.2014, Case C-45/13 (*Kainz*), paragraph 24). He reasons that this second step *does not* authorizes the court of the forum to ascertain whether it is *best* placed, in terms of proximity and

foreseeability, to decide the matter as compared to the court of the place of the event giving rise to the damage (points 60-66, 80). Instead, the *sole* purpose of the examination of the "other specific circumstances" of the case is to *confirm (or reject)* the jurisdiction of the court of the place where the damage occurred based on the proximity of the court to the dispute (or the lack thereof) (point 80). For the court of the forum cannot disrupt the abstract *ex-ante* balancing of interests carried out by the legislator in Art. 7 (2) of the Brussels Ibis Regulation. The legislator, however, has deemed both the courts of the place where the event giving rise to the damages and the courts of the place where the damages have arisen as being equally suited for hearing a tortious case. Consequently, a national court cannot undermine this legislative intent by engaging in a comparison between the courts of these two places.

Conclusion

To sum up, the Advocate General's opinion touches on different issues of pivotal importance when assessing a court's jurisdiction under Art. 7 (2) of the Brussels Ibis Regulation. Besides laying down the two-prong approach to be followed by national courts in (at least some) of the cases involving purely financial losses when determining their jurisdiction pursuant to Art. 7 (2) of the Brussels Ibis Regulation, the Advocate General also discusses the question of whether a purchaser who acquired some goods without directly transacting with the tortfeasor can still be deemed as a direct victim of the latter's tortious behavior and how to precisely determine where a financial damage has arisen.

The A-G's opinion is here.

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.