Foreign Sovereign Immunity and International Comity at the U.S. Supreme Court

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Ruth Bader Ginsburg and the Conflict of Laws

by Tobias Lutzi, University of Cologne

Since the sad news of her passing, lawyers all around the world have mourned the loss of one of the most iconic and influential members of the legal profession and a true champion of gender equality. Through her work as a scholar and a justice, just as much as through her personal struggles and achievements, Ruth Bader Ginsburg has inspired generations of lawyers.

On top of being a global icon of women's rights and a highly influential voice on a wide range of issues, Ginsburg has also expressed her views on questions relating to the interaction between different legal systems, both within the US and internationally, on several occasions. In fact, two of her early law-review articles focus entirely on two perennial problems of private international law.

Accordingly, readers of this blog may enjoy to go through some of her writings in this area, both judicial and extra-judicial, in an attempt to pay tribute to her work.

Jurisdiction

In one of Ginsburg's earliest publications, *The Competent Court in Private International Law: Some Observations on Current Views in the United States* (20 (1965) Rutgers Law Review 89), she retraces the approach to the adjudication of persons outside the forum state in US law by reference to both the common law and continental European approaches. She argues that

> *[t]he law in the United States has […] moved closer to the continental approach to the extent that a relationship between the defendant or the particular litigation and the forum, rather than personal service, may function as the basis of the court's adjudicatory authority.*

Ginsburg points out, though, that each approach includes 'exorbitant' bases of judicial competence, which 'provide for adjudication resulting in a personal judgment in cases in which there may be no connection of substance between the litigation and the forum state.'

> *Bases of judicial competence found in the internal laws of certain continental states, but generally considered undesirable in the international sphere, include competence founded exclusively on the nationality of the plaintiff – for example, Article 14 of the French Civil Code – and competence (to render a personal judgment) based on the mere presence of an asset of the defendant when the claim has no connection with that asset-a basis found in the procedural codes of Germany, Austria, and the Scandinavian countries. Equally undesirable in the view of continental jurists is the traditional Anglo-American rule that personal service within the territory of the forum confers adjudicatory authority upon a court even in the case of a defendant having no contact with the forum other than transience*

The 'most promising currently feasible remedy' for improper use of these 'internationally undesirable' bases of jurisdiction, she argues, is the doctrine of *forum non conveniens*.

> *At the least, a plaintiff who chooses such a forum should be required to show some reasonable justification for his institution of the action in the forum state rather than in a state with which the defendant or the res, act or event in suit is*

more significantly connected.

Applicable Law

As a Supreme Court justice, Ginsburg also had numerous opportunities to rule on conflicts between federal and state law.

In *Honda Motor Co v Oberg* (512 U.S. 415 (1994)), for instance, Ginsburg dissented from the Court's decision that an amendment to the Oregon Constitution that prevented review of a punitive-damage award violated the Due Process Clause of the federal Constitution, referring to other protections against excessive punitive-damage awards in Oregon law. In *BMW of North America, Inc v Gore* (517 US 559 (1996)), she dissented from another decision reviewing an allegedly excessive punitive-damages award and argued that the Court should 'resist unnecessary intrusion into an area dominantly of state concern.'

According to Paul Schiff Berman (who provided a much more complete account of Ginsburg's relevant writings than this post can offer in *Ruth Bader Ginsburg and the Interaction of Legal Systems* (in Dodson (ed), *The Legacy of Ruth Bader Ginsburg* (CUP 2015) 151)), her 'willingness to defer to state prerogatives in interpreting state law [...] may surprise those who focus on Justice Ginsburg's Fourteenth Amendment jurisprudence in gender-related cases.'

The same deference can also be found in some of her writings on the interplay between US law and other legal systems, though. In a speech to the International Academy of Comparative Law, she argued in favour of taking foreign and international experiences into account when interpreting US law and concluded:

> *Recognizing that forecasts are risky, I nonetheless believe the US Supreme Court will continue to accord "a decent Respect to the Opinions of [Human]kind" as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being [...] require trust and cooperation of nations the world over. And humility because, in Justice O'Connor's words: "Other legal systems continue to innovate, to experiment, and to find . . . solutions to the new legal problems that arise each day, [solutions] from which we can learn and benefit."*

Recognition of Judgments

Going back to another one of Ginsburg's early publications, in *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments* (82 (1969) Harvard Law Review 798), Ginsburg discussed the problem of the hierarchy between conflicting judgments from different states and made a case for 'the unifying function of the full faith and credit clause'. As to whether anti-suit injunctions should also the clause, she expressed a more nuanced view, though, explaining that

> *[t]he current state of the law, permitting the injunction to issue but not compelling any deference outside the rendering state, may be the most reasonable compromise […].*
>
> *The thesis of this article, that the national full faith and credit policy should override the local interest of the enjoining state, would leave to the injunction a limited office. It would operate simply to notify the state in which litigation has been instituted of the enjoining state's appraisal of forum conveniens. That appraisal, if sound, might induce respect for the injunction as a matter of comity.*

Ginsburg had an opportunity to revisit a similar question about thirty years later, when delivering the opinion of the Court in *Baker v General Motor Corp* (522 US 222 (1998)). Although the Full Faith and Credit Clause was not subject to a public-policy exception (as held by the District Court), an injunction stipulated in settlement of a case in front of a Michigan court could not prevent a Missouri court from hearing a witness in completely unrelated proceedings:

> *Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth.*
>
> *This conclusion creates no general exception to the full faith and credit command, and surely does not permit a State to refuse to honor a sister state judgment based on the forum's choice of law or policy preferences. Rather, we simply recognize that, just as the mechanisms for enforcing a judgment do not travel with the judgment itself for purposes of Full Faith and Credit […] and just as one State's judgment cannot automatically transfer title to land in another State […] similarly the Michigan decree cannot determine evidentiary issues in*

> *a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court.*

According to Berman, this line of reasoning is testimony to Ginsburg's judicial vision of 'a system in which courts respect each other's authority and judgments.'

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The above selection has been created rather spontaneously and is evidently far from complete; please feel free to use the comment section to highlight other *interesting* parts of Justice Ginsburg's work.

Child Abduction Convention case and national procedural provisions determining who can be a party to the proceedings – currently under scrutiny in Poland

Is a national procedural provision determining who can act as a party to the proceedings capable of temporarily preventing the return of a child ordered within the framework of the HCCH 1980 Child Abduction Convention? This question has been recently answered in the affirmative, as illustrated by the recent developments in a case being currently under scrutiny of both the Polish Constitutional and Supreme Courts.

Context of the case…

A child is born in Poland. Soon after her birth, her mother takes her to Belgium where the child's father lives. The couple separates when the girl is one year old. The woman and her daughter return to Poland.

A procedure conducted within the framework of the HCCH 1980 Child Abduction Convention is pending before a Polish District Court since December 2017. By its decision of January 2018, the District Court orders the return of the child. An appeal against the decision is dismissed by a Regional Court in June 2018.

After the expiration of a delay for the voluntary return of the child, the father lodges an application for a forced return. The application succeeds and the proceedings for the enforcement of the return are initialized. The return of the child, however, does not happen.

As we learn from media coverage of the case at hand, in November 2019, a Belgian court grants exclusive parental care to the father. In what can only be considered as a sudden and tragic event, the day before that ruling was delivered, the child's mother had passed away. From then on, the girl's grandmother takes care of her.

The child's grandmother lodges an application to join the proceedings in which the decisions of January and June 2018 were adopted. In parallel, she lodges an application to join the proceedings on the enforcement of the return. It is being argued that the grandmother is the child's closest known relative and her factual caretaker and as such she fulfills the requirements needed to be considered as an 'interested person' within the meaning of Article 510(1) of the Polish Code of Civil Procedure. According to that provision '[a]n interested person is anyone whose rights are affected by the outcome of proceedings; such person may join the case at any stage before it is closed at second instance. On joining the case an interested person becomes a party. An order refusing to allow an interested person to join the case may be appealed'.

The application to join the proceedings in which the decisions of January and June 2018 were handed down is dismissed in January 2020. It is decided that the grandmother lacks 'legal interest' to join the proceedings as the outcome of these proceedings does not concern her rights. The appeal brought against this decision is dismissed in June 2020.

… brought before the Constitutional Court …

The grandmother's legal counsels lodge a constitutional complaint before the Polish Constitutional Court. Under Polish law, a constitutional compliant allows to challenge a provision that served as a basis for a final decision on the applicant's freedoms, rights or obligations specified in the Constitution and to request a determination of that provision's non-conformity with the Constitution.

In the constitution complaint in question, the grandmother's counsels are challenging the aforementioned Article 510(1) of the Polish Code of Civil Procedure. They argue that **by not allowing for the participation in the proceedings of the child's grandmother, her relative and sole factual caretaker, this procedural provision violates, inter alia, the applicant's dignity** (Article 30 of the Polish Constitution), **right to legal protection of her family life** (Article 47 read in conjunction with Article 18 of the Constitution according to which 'family' – alongside 'marriage', 'motherhood' and 'parenthood' – shall be placed under the protection and care of the Republic of Poland) **as well as the right to a fair trial** not barring access to legal protection enshrined in Articles 45(1) and 77(2).

According to the statement of reasons for the complaint, the procedural provision in question is preventing the grandmother from initiating proceedings allowing to determine her rights and from being heard within the proceedings initiated at the request of other applicants. Against this background, while the decision of June 2018 is final, in its judgment of 22 November 2017, III CZP 78/17, the Polish Supreme Court considered that even a final decision ordering the return of a child may be amended, if the best interests of the child concerned so require. It is however unclear whether this is exactly the legal route that the child's grandmother is intending to take.

The constitutional complaint is not directly arguing that the aforementioned procedural provision violates Article 72 of the Polish Constitution which serves as an equivalent of the 'child's best interest clause' known from legal instruments (still, one should keep in mind that the grandmother is the applicant, not the child). Yet, alongside the Charter of Fundamental Rights of the EU [see its Article 24(2)] and Article 3(1) of the UN Convention on the Rights of Children, Article 72 is invoked in the statement of reasons for the complaint.

Interestingly, **in the constitutional complaint, the applicant's counsels are asking for a suspension of the execution of the decision of January 2018 by which the return of the child was ordered**. According to the Act of 30 November 2016 on the Organisation of the Constitutional Court and the Mode of Proceedings Before the Constitutional Court and – more precisely – its article 79(1), '[the Constitutional Court] may issue a provisional decision about the suspension of the execution of a determination in the case with regard to which a constitutional complaint has been lodged with the [Court], if the execution of a judgment […] could cause **irreversible consequences** resulting in serious damage for the complainant, or when the said suspension is justified by an **important public interest** or a different important interest of the applicant'.

In the reported case, the counsels argue that the return of the child would lead to irreversible consequences for the applicant. Irrespectively of the outcome of the constitutional complaint, the return of the child would provoke a total destruction of her family life in its present form. Given the profound emotional relation with the child, the child's return would be an intolerable damage to the applicant's dignity and integrity as human being. Moreover, according to the counsels, an important public interest also pleads in favour of the suspension. The child is deeply integrated in her social and family environment and she does not speak the language her father uses, while the latter does not speak Polish.

By its order handed down in late August 2020, the Constitutional Court suspends the enforcement of the decision ordering the return of the child to Belgium, at least until the final ruling on the constitutional complaint is delivered in the case now enregistered under no. SK 76/20.

… as well as before the Supreme Court

While it is not the object of our main interest here, it is worth noticing that back in June 2020, an 'extraordinary complaint' was introduced by the General Public Prosecutor against the decision handed down by the Regional Court in June 2018.

An 'extraordinary complaint', introduced back in 2018, may be lodged by the selected public authorities before the Supreme Court to challenge a final judgment.

As we learn from the press release of the Prosecutor's office, the 'extraordinary complaint' at hand seemingly challenges the decision of June 2018 on account of incorrect assessment of the Regional Court that the return of the child would not result in a psychological harm and not place her in an intolerable situation. That arguably incorrect assessment lead to a manifestly incorrect application of Article 13(b) of the HCCH 1980 Child Abduction Convention. Moreover, it seems that it is being argued that a child's return can be ordered only after a thorough examination of the child's situation and the exclusion of circumstances in which there would be a serious risk that the return of the child would expose him/her to physical or mental harm or otherwise place him/her in an intolerable situation. Failing such examination, an order violates the constitutional incarnation of 'child's best interest clause' (Article 72 of the Polish Constitution).

The COVID pandemic: Time to 'ramp-up' India's conflict of law rules in matters of tort? (by Kashish Jaitley, Niharika Kuchhal and Saloni Khanderia)

Research demonstrates that the permanent income loss for the Asia-Pacific region, including India, from the impact of COVID-19 to be $620 billion as of March 24, 2020. It is undeniable that the pandemic has not only resulted in the loss of human health and life but has also adversely affected the Indian economy. A United Nations labour report states that the Coronavirus has impacted tens of millions of informal sector workers as of 8th April 2020, and is predicted to put around 2 billion more people at risk. The Indian economy has been severely hit since most of the Indian population consists of daily wage workers. On 24th March 2020, the Prime Minister invoked his powers under Sec.6(2)(i) of the National Disaster Management Act, 2005, to enforce a lockdown for an initial

period of 21 days in the country with effect from 25th March 2020. The "total" lockdown has now been extended until 3 May 2020 and, will be treated under *force majeure* as per the Government order. The current scenario where India is put under what is reported to be the "world's most stringent lockdown" (also referred to as Lockdown 2.0) has forced millions of persons out of work, with the hardest hit being the poor, including the daily wage earners and migrant workers. Besides, airports, private clinics and most other shops providing daily essentials have shut.

Drawing from the situation in other countries, India reflected on its own capacity to prevent pandemic considering the resources available in the country. This is a country of 1.3 billion people and the healthcare system in place is very fragile. The latest National Health Profile 2019, released in October 2019, shows India's public expenditure on health has been less than 1.3% of the GDP for many years. The investment in public healthcare is one of the lowest in the world as the country is more driven towards private investment in healthcare. This will result in human cost because the treatment cost, which involves vaccines, tests and medical facilities, will be more than what most of the population will be able to afford. Looking at the lack of accessibility and affordability to medical care the Prime Minister has announced a public charitable trust under the name of 'Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund' (PM CARES Fund)' with the Prime Minister as the Chairman of the trust. In face of such a high-risk situation, the WHO Country Office for India is working closely with the Ministry of Health and Family Welfare (MoHFW) to strengthen surveillance, build the capacity of the health system and optimize the 'window of opportunity' created by mandatory physical distancing in India. Even though such rampant measures have been taken, India is still not fully equipped to deal with a full-scale pandemic.

The outbreak and the consequent Government decision have resulted in an overwhelming financial/economic loss to the Indian population. People have been banned from leaving homes and supply to all 'non-essential' commodities has been cut-off to prevent a further spread of the deadly virus, which originated in Wuhan, China. The recent times additionally witnessed the Indian Government's order to blacklist the 960 foreigners who participated in the Tablighi Jamaat Meetings as they became a key source for the spread of Coronavirus in India. These foreigners violated the terms of their tourist visas by attending an Islamic

congregation at the Nizamuddin Market in New Delhi in March. The foreigners were found in different states all over the country and as on 2nd April, 245 COVID-19 cases and about 12 deaths in the country were found to have links with the Tablighi Jamaat Meeting.

Recently, citizens of the United States filed a class-action suit filed against the Chinese Government for damages suffered as a result of "incalculable harm" done to the plaintiffs. Whether the near future will see a similar class-action suit by Indian citizens against the Chinese Government and the 960 Tablighi Jamaat foreigners, remains to be seen.

Under India's conflict of law rules, which remain uncodified, an Indian court can assume jurisdiction by being the place where the cause of action – in this case, the tort occurred. Sections 9 and 86 of the Code of Civil Procedure 1908 empowers the courts in India to try all suits, which result in damage caused by negligence, including those initiated by Indian citizens against foreign entities. At the same time, India lacks any coherent mechanism to identify the applicable law that will govern damages arising from such transnational torts. Rigidly following the common law principles, India continues to hold fast to the traditional principle of 'double actionability' – a rule, which has long been discarded by all other common law jurisdictions including Australia and Canada.

Under the present rules, the plaintiff(s) suing before an Indian court will have to prove that the act of the Chinese government in concealing the nature of the virus and failing to take appropriate steps to contain it, was actionable under the Chinese and Indian law – upon which, the suit will be governed concurrently by the Chinese and the Indian law of tort.

Under the Indian law of torts, the plaintiffs will need to prove a breach in a duty of care on the part of the Chinese government and the Tablighi Jamaat attendees who were foreign nationals, which caused the tort of negligence. The Indian law of torts is based on the principles of Common Law as iterated in *Rajkot Municipal Corpn. v. Manjulben Jayantilal Nakum* (1992 ACJ 792). According to the common law principles as evolved by the House of Lords, negligence signifies failure in executing a degree of care which should have been exercised by the doer. The essentials for establishing negligence under the Indian law may be summarized as follows. Firstly, that the defendant owed a "legal" duty of care towards the plaintiff. Secondly, that there was a breach of this duty; and thirdly, that the

plaintiff experienced damage (including economic loss) as a result of such breach by the defendant.

In the international realm, China's 'duty of care' towards India and its citizens may be traced through the relevant provisions of the International Covenant on Economic, Social and Cultural Rights and the International Health Regulations of 2005. Under Article 12(2)(c) of the International Covenant on Economic, Social and Cultural Rights, the Chinese government was under a duty to take measures for the "(t)he prevention, treatment and control of epidemic, endemic, occupational and other diseases" for nationals and non-nationals alike. However, this provision does not extend to economic loss. In particular, China's duty of care towards non-nationals may be recognised under the International Health Regulations of 2005 as well. As per Article 6 of the IHR, China was required to notify the WHO of the "events which may constitute a public health emergency of international concern within its territory". Hence, China owed a legal duty of care towards its non-nationals. This legal duty towards the non-nationals can further be extended to infer as a duty towards other countries and their nationals.

Since China failed to notify the World Health Organisation according to the International Health Regulations of 2005 within sufficient time despite the given indications towards the public health concern, it has negligently breached its duty of care towards the rest of the world. Dr. Li Wenliang was the first to create awareness and intimate the Chinese Government about the hazardous virus. Instead of adopting effective measures, the Chinese Government reprimanded the scientist. This is depictive of the negligent conduct of the Chinese Government.

On the other hand, the legal duty of care of the 960 foreigners can be established under section 14 of the Foreigners Act, 1946 insofar they had partaken in a religious activity which violates the terms of their tourist visas. Besides, sections 6(2)(i) and 10(2)(l) of the Disaster Management Act, 2005 will also be applicable due to their failure to adhere to social distancing guidelines issued by the government in wake of the COVID-19 outbreak.

At the same time, having regard to the present principles of the Indian conflict of law, no claim before an Indian court for damages in relation to the outbreak will sustain unless the plaintiffs are simultaneously able to prove negligence on the part of the Chinese government and/or under *each of the laws* of tort of 960 Tablighi Jamaat attendees. Suits initiated in relation to the pandemic in India

could, therefore, act as a revolutionary moment for India to ramp-up its conflict of law principles – especially in matters arising from cross-border torts.

That said, the spread of COVID -19 has undoubtedly been one of the most challenging times for the judiciary in all the countries. Countries like the Netherlands and Germany have proven its judiciary to be effective and efficient during the times of crisis by adapting to the digital mode in adjudicating disputes. In the largest democracy of the world, India, the judiciary has always remained under challenge due to the overwhelming number of litigation matters approaching courts every day.

The humongous load of backlog along with current lockdown had come as a huge blow and stir to the judicial system in India. The Supreme Court has, thus, decided that vital matters before it would be conducting video conferencing. The digitalisation of the judiciary has been a huge respite especially in the case of granting bails and avoiding overcrowding of the prison to control the spread of the virus. All other smaller courts (including the High Court are shut during the lockdown).

State immunity in global COVID-19 pandemic:

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

By Zheng Sophia Tang and Zhengxin Huo

1. Background

Four American citizens and a company filed the class-action against Chinese government for damages suffered as the result of the COVID-19 pandemic. None of the named plaintiffs were infected by the COVID-19 but they suffered financial loss due to the outbreak. The defendants include the People's Republic of China,

National Health Commission of PRC, Ministry of Emergency Management of PRC, Ministry of Civil Affairs of PRC, Government of Hubei Province and Government of the City of Wuhan. The plaintiff argued that Chinese government knew COVID-19 was dangerous and capable of causing a pandemic yet covered it up for their economic self-interest and caused injury and incalculable harm to the plaintiffs. (**here**)

2. State Immunity and US Courts' Jurisdiction

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

This is not the first time for China to be sued in the US court under §1605(a)(5) of the FSIA (for example, see Youming Jin et al., v Ministry of State Security et al., 475 F.Supp. 2d 54 (2007); Jin v Ministry of State Security, 557 F.Supp. 2d 131 (2008); Walters v Industrial and Commercial Bank of China, 651 F.2d 280 (2011)), but given the impact of COVID-19 this case probably is the most influential one. The purpose of this provision is to provide the victim the right to claim damages against a foreign state for tortious activities that may be legalised by the foreign

law. The U.S. court thus will apply the local law to interpret this provision. Some crucial concepts, such as “tortious act” and “discretionary function”, are interpreted by the relevant US law. (Doe v Federal Democratic Republic of Ethiopia, 189 F.Supp. 3d 6 (2016)) However, since the FSIA is a unilateral domestic statute with clear impact in the foreign sovereign and international comity, it is inappropriate to apply the U.S. law, as the national law of a state of equal status, to determine if the foreign state has committed tort. This approach impliedly grants the U.S. and U.S. law the superior position over foreign states and foreign law. If the FSIA aims to protect humanity and basic rights of individuals that are universally recognised and protected, an international law standard instead of U.S. one should be more appropriate.

Anyway, although the U.S. has adopted the restrictive immunity approach and the U.S. standard to protect the tort victim against foreign government, this exception is applied with a high threshold, making the jurisdiction hurdle difficult to cross. Firstly, the alleged tort or omission must occur in the U.S. The Supreme Court in Argentine Republic v Amerada Hess Shipping, 488 US 428 (1989) articulated the “entire tort” rule, holding that the non-commercial tort exception “covers only torts occurring within the territorial jurisdiction of the United States” (Argentine v Amerada, 441) “Entire tort” means only when both tort action and damage occur in the US, jurisdiction may be asserted. (Cabiri v Government of Ghana, 165 F.3d 193 (2d Cir. 1999) Even if the damage caused by COVID-19 occurred in the U.S., the alleged tort conduct of Chinese government were conducted exclusively out of the territory of the U.S. Arguably, the Supreme Court did not consider the situation where tort actions abroad may causing damages in the US in its 1989 judgment. However, there is no authority support extension of jurisdiction to cross-border tort.

Secondly, pursuant to the common law on tort, the plaintiffs should prove the defendants had a duty of care, breached this duty, and the breach caused the foreseeable harm. Chinese government undoubtedly owes the duty of care to Chinese citizens and residents. Does Chinese government owe any duty to non-residents? Such a duty cannot be found in Chinese domestic law. Relevant duties may be found in international conventions. Art 12 of the International Covenant on Economic, Social and Cultural Rights states a state member should recognise the right of everyone to enjoy the highest standard of health and should take steps necessary for “(t)he prevention, treatment and control of epidemic,

endemic, occupational and other diseases". (Art 12(2)(c)) This duty applies to nationals and non-nationals alike. (Art 2(2)) However, none of the named plaintiffs in this suit were infected by COVID-19. The damage is sought for the damage to their commercial and business activities instead of physical or mental health. Furthermore, the International Health Regulation 2005 provides the state parties international obligations to prevent spreading of disease, such as thee duty to notify WHO of all events which may constitute a public health emergency of international concern within its territory within 24 hours of assessment of public health information (Art 6(1)) and sharing information (Art 8), but these obligations are not directly owed to individuals and cannot be directly enforced by individuals in ordinary courts. It is thus hard to argue Chinese government owes the plaintiff a duty of care.

Even if the plaintiffs seek damages for personal injury. It is difficult to prove China has breached the duty and the breach "caused" the COVID-19 outbreak in the US or other part of the world. Since COVID-19 is a new virus with many details remaining unknown, it takes time to truly understand the virus and be able to contain the spread of the disease. Therefore, when the first case of "a mysterious pneumonia" was discovered in Wuhan in December 2019, there was no enough knowledge and information to piece together an accurate picture of a yet-to-be-identified new virus, let alone to predict its risk of quick spreading and the later global pandemic. After the first case was identified on 31 December 2019, Wuhan airport started to screen passengers from 3 Jan 2020, WHO issued travel restriction instruction on 5 Jan, and COVID-19 was only identified on 7 Jan. On 8 Jan, the first suspected case was reported in Thailand. It shows that the Chinese government responded quickly and the virus spread out of China before enough information was collected to understand it. After the seriousness of COVID-19 was confirmed, China has adopted the most restrictive measures, including lockdown the City of Wuhan and put the whole country under full or partial quarantine to contain the disease, which was a critical move to slow the spread of the virus to the rest of the world by two or three weeks. It is hard to argue that Chinese government has breached the duty. It is even harder to claim that the conduct of Chinese government caused the outbreak in the US. US confirmed the first case on 21 Jan, evacuated citizens out of Wuhan on 26 Jan and started visa travel ban on Chinese travellers on 8 Feb. Only 10 cases were confirmed in the US by 10 Feb. It suggests that the later outbreak in the US was not caused by the Chinese government. As of now, China is the only country in the

whole world which has brought the COVID-19 pandemic back under control.

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

3. Likely Response from China

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

Unlike the U.S., China is one of the few countries that insist on absolute immunity approach. This has been clearly affirmed by the continuous assertion of absolute immunity by its central government in various occasions. (Russell Jackson et al. v People's Republic of China, 794 F.2d 1490, 1494 (11th Cir. 1986); Memorandum sent by the Chinese Embassy in Washington, DC, in Morris v. People's Republic of China, 478 F. Supp. 2d 561 (S.D.N.Y. 2007). It is worth mentioning that on 14 September2005, the then Chinese Foreign Minister signed the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (not yet in force), which is understood by some observers to be a signal that China is switching to endorse the restrictive approach in relation to the application of the principle of state immunity. Nonetheless, it is still too early to conclude that China has abandoned the absolute doctrine, and has chosen to embrace the restrictive doctrine, insofar as the Standing Committee of the NPC has not ratified the

United Nations Convention on Jurisdictional Immunities of States and Their Property so far, and there is no signal to suggest the NPC should do so in the foreseeable future.

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

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

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

Last, but not least, as the present development suggests that the U.S. government is blaming China for the spread ofthe COVID-19, accusing China of delaying America's response, China would probably deem the lawsuit as a part of the

American smear campaign to blame it. The possibility that China responds to this case via legal measures is further reduced. Therefore, we submit that there is a big chance that China may not enter into appearance before the court in Florida and would raise diplomatic protest.

Cultural Identity in Private International Family Law

The era of globalization is characterized by the dynamic movement of people across borders and migration in various parts of the world. The juxtaposition and coexistence of different ethnic, cultural or religious groups within society poses the challenge of accommodating divergent legal, religious and customary norms. Of key concern is how far the fundamental values of the receiving state ought to be imposed on all persons on the soil, and to what extent the customs, beliefs and the cultural identity of individuals belonging to minority groups should be respected. This challenge arguably requires reconsidering and reevaluating the conventional methods of private international law that are grounded in the territorial "localization" of legal relationships. Against this background, *Yuko Nishitani* (Professor at Kyoto University, Japan) envisaged studying various conflict of laws issues from the viewpoint of cultural identity in private international family law and delivered a lecture at the Hague Academy of International Law on "*Identité culturelle en droit international privé de la famille*", which has been published in *Recueil des cours,* Vol. 401 (2019), pp. 127-450.

In her lecture, Nishitani first analyzes the notion and meaning of cultural identity in private international law, after comparatively delineating legal developments in major legal systems (Chapter I). The author posits that, while the notion of cultural identity should not be

understood as its own legal category, it serves as a guiding principle and theoretical foundation in justifying certain solutions in private international law (Chapter II).

In multiethnic and multicultural societies, the belonging of individuals to states, regions, communities or other groups is gradually relativised and redefined. In light of the recent effects of globalization, the author contemplates the appropriate methods for determining the personal law to cater for the cultural identity of individuals, overcoming the conventional dichotomy between the principle of nationality and the principle of habitual residence (Chapter III). Considering the multiplication of relevant legal and social norms, the author also considers the interaction between state law and customary, religious or cultural non-state norms to seek solutions for "conflict of norms" in a broader sense (Chapter IV).

On the other hand, for the sake of coherence and security of the legal system, the state exercises control, where necessary, to preclude effects of foreign legal institutions. It is essential to define the functioning of public policy and fundamental rights so as to set limits to respect for cultural identity (Chapter V). Finally, the author reflects on alternative conflict of laws methods geared toward administrative and judicial cooperation between sovereign states, with a view to accommodating the cultural identity of individuals (Chapter VI).

At the end of her lecture, the author highlights the importance of constructive dialogue between different cultures, given that humanity has a long history of success in mutually developing, exchanging and enriching its diverse cultures.

More information about the author and the book are available here (in French).

Private International Law and

Venezuelan Academia in 2019: A Review

by José Antonio Briceño Laborí, Professor of Private International Law, Universidad Central de Venezuela y Universidad Católica Andrés Bello

In 2019 the Venezuelan Private International Law (hereinafter "PIL") academic community made clear that, despite all the difficulties, it remains active and has the energy to expand its activities and undertake new challenges.

As an example of this
we have, firstly, the different events in which our professors have
participated and the diversity of topics developed by them, among which the following stand out:

- XI
  Latin American Arbitration Conference, Asunción, Paraguay, May 2019 (Luis
  Ernesto Rodríguez – How is tecnology impacting on arbitration?)
- Conferences for the 130th
  Anniversary of the Treaties of Montevideo of 1889, Montevideo, Uruguay, June
  2019 (Eugenio Hernández-Bretón and Claudia Madrid Martínez – The recent
  experience of some South American countries not part of Montevideo Treaties in comparative
  perspective to them. The case of Venezuela).
- OAS XLVI Course on
  International Law. Rio de Janeiro, Brazil, August 2019 (Javier Ochoa Muñoz – Effectiveness
  of foreign judgements and transnational access to justice. Reflections from global
  governance).
- The Role of Academia in Latin
  American Private Intertnational Law, Hamburg, Germany, September 2019 (Javier

Ochoa Muñoz – The Legacy of Tatiana Maekelt in Venezuela and in the Region).

- XIII ASADIP Annual Conference
  2019: Transnational Effectiveness of Law: Recognition and enforcement of foreign judgments, arbitral awards and other acts (Claudia Madrid Martínez –
  Transnational Efficacy of Foreign Judgments – Flexibilization of Requirements; Eugenio
  Hernández-Bretón – Transnational Effectiveness of Provisional Measures; and
  Luis Ernesto Rodríguez – New Singapore Convention and the execution of international agreements resulting from cross-border mediation).

However, this year's three
most important milestones for our academic community occurred on Venezuelan soil. Below we review each one in detail:

1. **Celebration of the 20th Anniversary of the Venezuelan PIL Act**

The
Venezuelan
PIL Act, the first autonomous legislative instrument on this subject in the continent, entered into force on February 6, 1999 after a six months *vacatio legis* (since it was enacted in the Official Gazette of the Republic of Venezuela on August 6, 1998).

This instrument has a
long history, as its origins date back to the Draft Law on PIL Norms written by professors Gonzalo Parra-Aranguren, Joaquín Sánchez-Covisa and Roberto Goldschmidt in 1963 and revised in 1965. The Draft Law was rescued in 1995 on the occasion of the First National Meeting of PIL Professors. Its content was updated and finally a new version of the Draft Law was sent by the professors to the Ministry of Justice, which in turn sent it to the Congress, leading to its enactment (for an extensive overview of the history of the Venezuelan PIL Act and its content, see: Hernández-Bretón, Eugenio, Neues venezolanisches Gesetz über das Internationale Privatrecht, *IPRax* 1999, 194 (Heft 03); Parra-Aranguren,

Gonzalo, The Venezuelan Act on Private International Law of 1998, *Yearbook of Private International Law*, Vol. 1 1999, pp. 103-117; and B. de Maekelt, Tatiana, Das neue venezolanische Gesetz über Internationales Privatrecht, *RabelsZ*,
Bd. 64, H. 2 (Mai 2000), pp. 299-344).

To celebrate the 20th
anniversary of the Act, the Private International and Comparative Law Professorship of the Central University of Venezuela and the "Tatiana Maekelt" Institute of Law with the participation of 7 professors and 9 students of the Central University of Venezuela Private International and Comparative Law Master Program.

All the expositions
revolved around the Venezuelan PIL Act, covering the topics of the system of sources, vested rights, ordre public, in rem rights, consumption contracts, punitive damages, jurisdiction matters, international labour relations, recognition and enforcement of foreign judgements, transnational provisional measures and the relations between the Venezuelan PIL Act and international arbitration matters. The conference was both opened and closed by the professor Eugenio Hernández-Bretón with two contributions: "The Private International Law
Act and the Venezuelan university" and "The 'secret history' of the Private International Law Act".

- **Private International and Comparative Law Master Program's Yearbook**

On
the occasion of the XVIII National Meeting of Private International Law Professors, the Private International and Comparative Law Master's Degree Program
of the Central University of Venezuela launched its website and the first issue of its yearbook. This
specialized publication was long overdue, particularly in the Master's Program context which is focused on educating and training researchers and professors in the areas of Private International Law and Comparative Law with a strong theoretical

foundation but with a practical sense of their fields. The Yearbook will allow professors, graduates, current students and visiting professors to share their views on the classic and current topics of Private International Law and Comparative Law.

This first issue included the first thesis submitted for a Master's Degree on the institution of *renvoi*, four papers spanning International Procedural Law, electronic means of payment, cross-border know-how contracts and International Family Law, sixteen of the papers presented during the Commemoration of the Twentieth Anniversary of the Venezuelan Private International Law Act's entry into force, and two collaborations by Guillermo Palao Moreno and Carlos Esplugues Mota, professors of Private International Law at the University of Valencia (Spain), that shows the relation of the Program with visiting professors that have truly nurtured the students' vision of their area of knowledge.

The Call of Papers for the 2020 Edition of the Yearbook is now open. The deadline for the reception of contributions will be April 1st, 2020 and the expected date of publication is May 15th, 2020. All the information is available here.
The author guidelines are available here. Scholars from all over the world are invited to contribute to the yearbook.

- **Libro Homenaje al Profesor Eugenio Hernández-Bretón**

On December 3rd, 2019 was launched a book to pay homage to Professor Eugenio Hernández-Bretón. Its magnitude (4 volumes, 110 articles and 3298) is a mirror of the person honored as we are talking about a highly productive and prolific lawyer, professor and researcher and, at the same time, one of the humblest human beings that can be known. He is truly one of the main reasons why the Venezuelan Private International Law professorship is held up to such a high standard.

The legacy of Professor Hernández-Bretón is recognized all over the work. Professor

of Private International Law at the Central University of Venezuela, Catholic University Andrés Bello and Monteávila University (he is also the Dean of the Legal and Political Sciences of the latter), Member of the Venezuelan Political and Social Sciences Academy and its President through the celebration of the Academy'a centenary, the fifth Venezuelan to teach a course at The Hague Academy of International Law and a partner in a major law firm in Venezuela (where he has worked since his law school days) are just some of the highlights of his career.

The contributions collected for this book span the areas of Private International Law, Public International Law, Comparative Law, Arbitration, Foreign Investment, Constitutional Law, Administrative Law, Tax Law, Civil Law, Commercial Law, Labor Law, Procedural Law, Penal Law, General Theory of Law, Law & Economics and Law & Politics. The book closes with six studies on the honored.

The contributions of Private International Law take the entire first volume. It includes the following articles:

- Adriana Dreyzin de Klor – El Derecho internacional privado argentino aplicado a partir del nuevo Código Civil y Comercial (The Argentine Private International Law applied from the new Civil and Commercial Code).
- Alfredo Enrique Hernández Osorio – Objeto, contenido y características del Derecho internacional privado (Purpose, content and characteristics of Private International Law).
- Andrés Carrasquero Stolk – Trabajadores con elevado poder de negociación y Derecho applicable a sus contratos: no se justifica restricción a la autonomía de las partes (Workers with high bargaining power and applicable law to their

contracts: no restriction to party autonomy is justified).

- Carlos
  E. Weffe H. – La norma de conflicto. Notas sobre el método en el Derecho internacional privado y en el Derecho internacional tributario (The conflict
  norm. Notes on the method in Private International Law
  and in International Tax Law).
- Cecilia
  Fresnedo de Aguirre – Acceso al derecho extranjero en materia civil y comercial: cooperación judicial y no judicial (*Access to foreign law in civil and commercial matters: judicial and non-judicial cooperation*).
- Claudia
  Madrid Martínez – El rol de las normas imperativas en la contratación internacional contemporánea (The role of peremptory norms in contemporary
  international contracting).
- Didier
  Opertti Badán – Reflexiones sobre gobernabilidad y Derecho internacional privado (Reflections on governance and Private International Law).
- Fred
  Aarons P. – Regulación del internet y el derecho a la protección de datos personales en el ámbito internacional (Internet regulation and the right to personal data protection at international level).
- Gerardo
  Javier Ulloa Bellorin – Interpretación del contrato: estudio comparativo entre
  los principios para los contratos comerciales internacionales del UNIDROIT y el
  derecho venezolano (Contract interpretation: comparative study between the
  UNIDROIT Principles on International Commercial Contracts and Venezuelan law).
- Gilberto
  Boutin I. – El recurso de casación en las diversas fuentes del Derecho internacional privado panameño (Cassational complaint in the various sources of
  Panamanian Private International Law).

- Guillermo
  Palao Moreno – La competencia judicial internacional en la nueva regulación
  europea en materia de régimen económico matrimonial y de efectos patrimoniales de
  las uniones registradas (International jurisdiction in the new European
  regulation on the economic matrimonial regime and the property effects of
  registered partnerships).
- Héctor
  Armando Jaime Martínez – Derecho internacional del trabajo (International Labor
  Law).
- Javier
  L. Ochoa Muñoz – El diálogo de las fuentes ¿un aporte del Derecho internacional
  privado a la teoría general del Derecho? (The dialogue
  of sources: a contribution from private international law to the general theory
  of law?
- Jorge
  Alberto Silva – Contenido de un curso de Derecho internacional regulatorio del
  proceso (Content of a course on international law regulating the process).
- José
  Antonio Briceño Laborí – La jurisdicción indirecta en la ley de derecho
  internacional privado.
- José
  Antonio Moreno Rodríguez – Los Principios Unidroit en el derecho paraguayo (The
  UNIDROT Principles in Paraguayan law).
- José
  Luis Marín Fuentes – ¿Puede existir una amenaza del Derecho uniforme frente al
  Derecho interno?: ¿podríamos hablar de una guerra anunciada? (Can
  there be a threat to national law from uniform law? Could we talk
  about an announced war?).

- Jürgen
  Samtleben – Cláusulas de jurisdicción y sumisión al foro en América Latina (Jurisdiction
  and submission clauses in Latin America).
- Lissette
  Romay Inciarte – Derecho procesal internacional. Proceso con elementos de extranjería
  (International Procedural Law. Trial with foreign elements).
- María
  Alejandra Ruíz – El reenvío en el ordenamiento jurídico venezolano (*Renvoi*
  in the Venezuelan legal system).
- María
  Mercedes Albornoz – La Conferencia de La Haya de Derecho Internacional Privado
  y el Derecho aplicable a los negocios internacionales (The Hague Conference on
  Private International Law and the applicable Law to International Business).
- María
  Victoria Márquez Olmos – Reflexiones sobre el tráfico internacional de niños y
  niñas ante la emigración forzada de venezolanos (Reflections on international
  child trafficking in the face of forced migration of Venezuelans).
- Mirian
  Rodríguez Reyes de Mezoa y Claudia Lugo Holmquist – Criterios atributivos de
  jurisdicción en el sistema venezolano de Derecho internacional privado en materia de títulos valores (Attributive criteria of jurisdiction in the
  Venezuelan system of Private International Law on securities trading matters).
- Nuria
  González Martín – Globalización familiar: nuevas estructuras para su estudio (Globalization
  of the family: new structures for its study).
- Peter Mankowski – A very

special type of renvoi in contemporary Private International Law. Article 4 Ley de Derecho
Internacional Privado of Venezuela in the light of recent
developments.

- Ramón
  Escovar Alvarado – Régimen aplicable al pago de obligaciones en moneda extranjera (Regime applicable to the payment of obligations in foreign currency).
- Roberto
  Ruíz Díaz Labrano – El principio de autonomía de la voluntad y las relaciones
  contractuales (The party autonomy principle and contractual relations).
- Stefan
  Leible – De la regulación de la parte general del Derecho internacional privado
  en la Unión Europea (Regulation of the general part of Private International
  Law in the European Union).
- Symeon c. Symeonides – The Brussels
  I Regulation and third countries.
- Víctor
  Gregorio Garrido R. – Las relaciones funcionales entre el forum y el ius en el
  sistema venezolano de derecho internacional privado (The functional relations
  between forum and ius in the Venezuelan system of private international law.

As we see, the contributions
are not just from Venezuelan scholars, but from important professors and researchers from Latin America, USA and Europe. All of them (as well as those included
in the other three volumes) pay due homage to an admirable person by offering new ideas and insights in several areas of law and related sciences.

The book will be
available for sale soon. Is a must have publication for anyone interested in

A never-ending conflict: News from France on the legal parentage of children born trough surrogacy arrangements.

As reported previously, the ECtHR was asked by the French *Cour de cassation* for an advisory opinion on the legal parentage of children born through surrogacy arrangement. In its answer, the Court considered that the right to respect for private life (article 8 of ECHR) requires States parties to provide a possibility of recognition of the child's legal relationship with the intended mother. However, according to the Court, a State is not required, in order to achieve such recognition, to register the child's birth certificate in its civil status registers. It also declared that adoption can serve as a means of recognizing the parent-child relationship.

The ECtHR's opinion thus confirms the position reached by French courts: the *Cour de cassation* accepted to transcribe the birth certificate only when the intended father was also the biological father. Meanwhile, the non-biological parent could adopt the child (See for a confirmation ECtHR, C and E v. France, 12/12/2019 Application n°1462/18 and n°17348/18).

The ECtHR advisory opinion was requested during the trial for a review of a final decision in the *Mennesson* case. Although it is not compulsory, the *Cour de cassation* has chosen to comply with its recommendations (Ass. plén. 4 oct. 2019, n°10-19053). Referring to the advisory opinion, the court acknowledged that it had an obligation to provide a possibility to recognize the legal parent-child relationship with respect to the intended mother. According to the *Cour de cassation*, the mere fact that the child was born of a surrogate mother abroad did not in itself justify the refusal to recognize the filiation with the intended mother

mentioned in the child's birth certificate.

When it comes to the mean by which this recognition has be accomplished, the *Cour de cassation* recalled that the ECtHR said that the choice fell within the State's margin of appreciation. Referring to the different means provided under French law to establish filiation, the Court considered that preference should be given to the means that allow the judge to exercise some control over the validity of the legal situation established abroad and to pay attention to the particular situation of the child. In its opinion, adoption is the most suitable way.

However, considering the specific situation of the Mennesson twins who had been involved in legal proceedings for over fifteen years, the Court admitted that neither an adoption nor an apparent status procedure were appropriate as both involve a judicial procedure that would take time. This would prolong the twins' legal uncertainty regarding their identity and, as a consequence, infringe their right to respect for private life protected by article 8 ECHR. In this particular case, this would not comply with the conditions set by the ECtHR in its advisory opinion: "the procedure laid down by the domestic law to ensure that those means could be implemented promptly and effectively, in accordance with the child's best interest".

As a result and given the specific circumstances of the Mennessons' situation, the *Cour de cassation* decided that the best means to comply with its obligation to recognize the legal relationship between the child and the intended mother was to transcribe the foreign birth certificate for both parents.

The *Cour de cassation's* decision of October 2019 is not only the final act of the *Mennesson* case, but it also sets a *modus operandi* for future proceedings regarding legal parentage of children born trough surrogate arrangements: when it comes to the relation between the child and the intended mother, adoption is the most suitable means provided under domestic French law to establish filiation. When such an adoption is neither possible nor appropriate to the situation, judges resort to transcribing

the foreign birth certificate mentioning the intended mother. Thus, adoption appears as the principle and transcription as the exception.

Oddly
enough, the Court then took the first chance it got to reverse its solution and choose not to follow its own *modus operandi.*

By two decisions rendered on December 18th 2019 (Cass. Civ. 1ère, 18 déc. 2019, n°18-11815 and 18-12327), *the Cour de cassation* decided that the intended non-biological father must have its legal relationship with the child recognized too. However, it did not resort to adoption as a suitable means of establishing the legal relationship with the intended parent. Instead, the court held that the foreign birth certificate had to be transcribed for both parents, while no references were made to special circumstances which would have justified resorting to a transcription instead of an adoption or another means of establishing filiation.

The Court used a similar motivation to the one used in 2015 for the transcription of the birth certificate when the intended father is also the biological father. It considered that neither the fact that the child was born from a surrogate mother nor that the birth certificate established abroad mentioned a man as the intended father were obstacles to the transcription of the birth certificate as long that they complied with the admissibility conditions of article 47 of the Civil Code.

But
while in 2015 the Court referred to the fact that the certificate "did not contain facts that did not correspond to reality", which was one of the requirements of article 47, in 2019 this condition is no longer required.

Thus,
it seems that the *Cour de cassation* is no longer reluctant to allow the full transcription of the foreign birth certificate of children born of surrogate arrangements. After years of constant refusal to transcribe the birth certificate for the non-biological parent, and just a few months after the ECtHR advisory opinion accepting adoption as a suitable means to legally recognize the parent-child relationship, this change of view was unexpected.

However,

by applying the same treatment to both intended parents, biological and non-biological,
this reversal of solution put into the spotlight the publicity function of the transcription into the French civil status register. As the *Cour de cassation* emphasized, a claim for the transcription of a birth certificate is different from a claim for the recognition or establishment of filiation. The transcription does not prevent later proceedings directed against the child-parent
relationship.

But

the end is still not near! On January 24th,
during the examination of the highly sensitive Law of Bioethics, the *Sénat* (the French Parliament's upper house) adopted an article prohibiting the full transcription
of the foreign birth certificates of children born trough surrogate arrangements. This provision is directly meant to "break" the *Cour de cassation's*

solution of December 18th 2019. The article will be discussed in front of the *Assemblée nationale*, the lower house, and the outcome of the final vote is uncertain.

The
conflict over the legal parentage of children born trough surrogate arrangements is not over yet. To be continued…

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 1/2020: Abstracts

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

articles:

H. Schack: **The new Hague Judgment Convention**

This contribution presents the new Hague Convention on the recognition and enforcement of foreign judgments in civil or commercial matters adopted on 2 July 2019 by the Hague Conference on Private International Law. This Convention simple with a positive list of accepted bases for recognition and enforcement supplements the 2005 Hague Convention on choice of court agreements. The benefit of the 2019 Convention, however, is marginal, as its scope of application is in many ways limited. In addition, it permits declarations like the "bilatéralisation" in Art. 29 further reducing the Convention to a mere model for bilateral treaties. If at all, the EU should ratify the 2019 Convention only after the US have done so.

F. Eichel: **The Role of a Foreign Intervener in Establishing a Cross-Border Case as a Requirement for the Application of European Legislation on Civil Procedure**

The Small-Claims Regulation (No. 861/2007) is only applicable in crossborder cases. The European Court of Justice (ECJ) in its judgment in ZSE Energia has decided that the foreign seat of an intervener does not turn an otherwise purely domestic case into a cross-border case. The IPRax article agrees with this decision, but criticizes the reasons given by the ECJ. Without specific need, the ECJ stated that the participation of an intervener would be inconsistent with the Small-Claims Regulation at all, although general procedural issues are governed by the procedural law of the lex fori (cf. article 19 Small-Claims Regulation). In addition, the article analyses the impact of the ECJ's ruling on other European legal acts such as the European Order for Payment Regulation (No. 1896/2006), the European Account Preservation
Order Regulation (No. 655/2014), the Directive on the right to legal aid (RL 2002/8/EC), and the Mediation Directive (RL 2008/52/EC).

C.A. Kern/C. Uhlmann: **When is a court deemed to be seised under the Brussels Ia Regulation? Requirements to be met by the claimant and pre-action correspondence**

In the aftermath of the VW-Porsche takeover battle, an investor based on

the Cayman Islands announced to sue Porsche SE in the High Court of England and
Wales. Probably in an attempt to secure a German forum, Porsche initiated a negative declaratory action in the Landgericht Stuttgart. However, the complaint could not be served on the investor for lack of a correct address. The German Federal Supreme Court held that Porsche had not met the requirements
of Art. 32 no. 1 lit. a of the recast Brussels I Regulation and asked the lower court to determine whether the „letter before claim" sent by the investor had already initiated proceedings in England so that parallel proceedings in Germany were barred. The authors agree that Art. 32 no. 1 must be interpreted strictly, but doubt that a „letter before claim" is sufficient to vest English courts with priority under the Brussels Regulation.

C. Thomale: **Treating apartment-owner associations at Private International Law**

In its recent Brian Andrew Kerr ./. Pavlo Postnov and Natalia Postnova decision, the CJEU has taken a position on how to handle apartment owners' obligations to contribute to their association in terms of international jurisdiction and choice of law. The casenote analyses the decision, notably assessing the relationship of international jurisdiction and choice of law, the concept of "services" as contained in the Brussels I Regulation and the Rome I Regulation respectively, as well as the company law exception according to Art. 1 (2) (f) Rome I Regulation.

H. Roth: **The Probative Value of Certificates as per Art 54 Brussels I and Art 53 Brussels Ia**

According to the European rules on recognition and enforcement of judgments in civil and commercial matters, the probative value of both certificates is determined as mere information provided by the court of origin. At the second step of assessing whether there are grounds to refuse recognition (appeal or refusal of enforcement), the court of the member state in which enforcement is sought will have to verify itself the factual and legal requirements for service of process.

M. Brosch: **Public Policy and Conflict of Laws in the Area of**

International Family and Succession Law

The public policy-clause is rarely applied in private international law cases. Relevant case law often concerns matters of international family and succession law. This also applies to two recent decisions of the Court of Appeal in Berlin and the Austrian Supreme Court relating, respectively, to the recognition of a Lebanese judgement on the validity of a religious marriage and the applicability of Iranian succession law. Although systemically coherent, the courts' findings give rise to several open questions. Furthermore, it is argued that two opposite tendencies can be identified: On the one hand, the synchronisation between forum and ius as well as the prevalence of the habitual residence as connecting factor in EU-PIL leave little room for the application of the public policy-clause. On the other hand, its application may be triggered in areas where the nationality principle still prevails, i.e. in non-harmonised national PIL and PIL rules in bilateral treaties.

E.M. Kieninger: **Vedanta v Lungowe: A milestone for human rights litigation in English courts against domestic parent companies and their foreign subsidiary**

In Vedanta v Lungowe, a case involving serious health and environmental damage due to emissions into local rivers from a copper mine in Sambia, the UK Supreme Court has affirmed the jurisdiction of the English courts, in relation to both the English parent company and the subsidiary in Sambia. In the view of the Supreme Court, the claim against the parent company has a real issue to be tried and denying access to the English courts would equal a denial of substantive justice.
The decision is likely to have consequences not only for the appeal against the Court of Appeal's denial of access to the English courts in Okpabi v Royal Dutch Shell, but also for the development of a more general duty of care of parent companies towards employees and people living in the vicinity of mines or industrial plants run by subsidiaries.

B. Lurger: **How to Determine Foreign Legal Rules in Accelerated Proceedings in Austrian Courts**

In a rather lengthy proceeding initiated in 2014 in the district court Vienna Döbling the wife claimed maintenance from her husband. The Austrian Supreme Court (OGH) examined the special conditions of the application of foreign law in accelerated proceedings (motion for injunctive relief). The Court first clarified the construction of Art. 5 Hague Maintenance Protocol in relation to a pending divorce proceeding in which Austrian law applied, whereas the habitual residence of the claimant was situated in the United Kingdom. The OGH held that in accelerated proceedings, the question of whether foreign law had to be applied (the choice of law question) can regularly be answered without considerable effort. As the next step, the determination of the content of the foreign law must be undertaken by the lower courts with reasonable means and effort. As in ordinary proceedings, the parties do not have any particular duties to assist the court in this determination. Considering the special circumstances of the case, which consisted in the considerable wealth of the parties and the divorce and maintenance proceedings going up and down the instances in Vienna already for years, the Supreme Court arrived at the conclusion
that the application of English law by the Austrian courts was appropriate even in the accelerated proceeding at hand.

China’s innovative Internet Courts and their use of blockchain backed evidence

Written by Sophie Hunter

Since 2017, the Supreme People’s Court of China (SPC) has established three internet courts in Hangzhou, Beijing and Guangzhou which are major hubs for e-commerce, the internet industry and the headquarters of giant internet companies like Alibaba and Baidu. With an internet penetration of 54% and approximately 800 million internet users, the introduction of such courts helps to

reduce the rising number of online disputes between citizens in a time and cost efficient way thanks to the admissibility of blockchain backed online data as evidence. China's leading role in internet litigation comes at no surprise since regular courts favor documentary evidence over live testimony and already so much is done online.

This post sheds light on this new model and how it has potential to influence other jurisdictions.

China's political strategy towards innovation and internet

Like many other countries, China views the Internet as key to its future growth and development opportunities. The Chinese government maintains the world's most sophisticated internet censorship apparatus called the Great Firewall. After the 2017 cybersecurity law, the level of internet freedom in the country declined as a result of strengthened repressive restrictions on online activities and onerous financial burdens on technology companies, independent media, and bloggers. President Xi Jinping announced plans at the 19th Communist Party Congress in October 2017 to transform China into a "cyber superpower". China's Internet Plus strategy, which is part of this initiative, encompasses innovations such as internet courts, in order to actively promote the healthy development of e-commerce, industrial networks, and Internet banking, as well as facilitate the growth of new industries and the expansion of its companies' international Internet footprint. Although China has recently clamped down on cryptocurrencies, it hailed blockchain development in its five-year plan to 2021.

The new model of specialized courts for internet-related disputes or Internet Courts

According to the Provisions published by the SPC (Provisions on Several Issues Concerning the Trial of Cases by the International Courts) the Internet Courts focus on disputes involving: the online sale of goods and services, lending, copyright and neighboring rights ownership and infringement, domains, infringement on personal rights or property rights via the Internet, product liability claims, and Internet public interest litigation brought by prosecutors. The litigation process is conducted solely online, including the service of legal documents, the presentation of evidence, and the actual trial itself which, to comply with principles of trial in person and direct speech principle, rely on the

online video system.

A major advantage of such courts is that it addresses the increasing workload and burden on the judiciary. The average duration of these online trials in Hangzhou in 2017/18 was 28 minutes, and the average processing period from filing to trial and conclusion was 38 days. However, the Hangzhou Internet Court has also been criticized for its lack of impartiality, since it is technically supported by Alibaba and its subsidiaries which are related to most disputes in the region. Other courts have not faced such criticism.

Blockchain mechanisms as a new method to authenticate evidence

Blockchain-related innovations are increasingly becoming relevant to legally authenticate evidence. Since a blockchain generates immutable, time-stamped data which can then be used as an auditable trail, it seems likely that the legal sphere will get heavily influenced in the near future by the security of the blockchain (which is set before any transactions or documentation takes place). China is ahead of the game in this respect. At the 2019 Forum on China Intellectual Property Protection, the president of the Beijing Internet Court (established in September 2018, and has since processed 14,904 cases) reportedly said that the court employs technologies such as artificial intelligence (AI) and blockchain to render judgement.

Since most of the evidence in the cases heard by Internet Courts is electronic data and is stored on the Internet, the SPC outlined in its Provisions that the Internet court can rely on evidence provided by the parties that can be authenticated by electronic signatures, time stamps, hash value verification, blockchain and other tamper-proof verification methods. Before the implementation of the Provisions, the Internet Court in Hangzhou for the first time in China admitted evidence that was authenticated by blockchain technology in an online copyright infringement case, which confirmed that data uploaded to a blockchain platform reflected its source, generation and path of delivery, and were therefore reliable evidence. Since, China’s Supreme Court ruled that evidence authenticated with blockchain technology is binding in legal disputes.

Internet courts rely on blockchain to deal with a range of cases such as disputes over liability for Internet tort and other types of Internet-related disputes in the areas of intellectual property rights and administrative litigation. An Internet

judge in China's Hangzhou province relied on blockchain to defend Intellectual Property rights because such technology is paramount to safeguard authors' ownership over their work. In August 2018, the same court handed down a judgment on China's first case of unfair competitionin big data products. As Wang Jiangqiao, a judge at the Internet Court, sums up "since blockchain guarantees that data can not be tampered, all digital footprints stored in the judicial blockchain system have legal effect."

Can this model be exported to Western jurisdictions?

With the increasing reliance on internet for both private and business matters, the number of disputes is likely to increase in the near future. Internet Courts like the ones in China could provide a model to improve efficiency, significantly reduce costs and address infringements that may have been too cost-effective to pursue otherwise, while removing at the same time human interference as much as possible, which will make the information stored on blockchain more credible as noted by Qin Pengfei, a paralegal with Shanghai Dabang Law firm. Already the US State of Vermont has passed legislation to allow courts to use data on blockchain as evidence. In 2018, the U.K. Law Commission has announced its plans to review legal frameworks involving smart contracts so that it doesn't lag behind as blockchain legal applications develop. However, no other country has yet actively followed suit with China's model of Internet Courts. One reason copyright lawyer Liu Hongze argues is the fact that the acceptance of evidence stored on the blockchain may have little impact now on non-internet-related civil or criminal lawsuits. Indeed, blockchain data being legal evidence is relatively new and courts' acceptance of it will depend on individual courts and situations. Nevertheless, what is certain is that China's Internet Courts have a strong potential to launch the reliance of blockchain in the legal sphere, and western countries should watch such developments carefully not to fall behind. The recent backlash on Facebook with the judgment of the Bundeskartellamt demonstrates the need to respond to an ever increasing backlog of internet related disputes which interwind privacy, competition, data, cybersecurity and technology. Specialized courts such as Internet Courts might well be the answer.