Recognition in the UK of a marriage celebrated in Somaliland

Can a foreign marriage be recognised in the UK if the State where it was celebrated is not recognised as a State? This was the question which the High Court of Justice (Family Division) had to answer in MM v NA: **[2020] EWHC 93 (Fam)**.

The Court distilled two questions: was the marriage validly celebrated and if so, can it be recognised in the UK? If the answers to both questions were affirmative, the court could give a declaratory order; if one of them were negative, the parties could celebrate a new marriage in the UK.

In assessing the **first question**, the court considered issues of formal and essential validity. It took account of the various systems of law in Somaliland: formal law (including the Somali civil code, which is still in force in Somaliland on the basis of its continuation under the Somaliland constitution), customary law and Islamic law. In matters of marriage, divorce and inheritance, the latter applies. On the basis of the facts, the Court came to the conclusion that the parties were validly married according to the law of Somaliland.

Although this would normaly be the end of the matter, the Court had to consider what to do with a valid marriage emanating from a State not recognised by the UK (the **second question**). The Court referred to the one-voice principle, implying that the judiciary cannot recognise acts by a State while the executive branch of the UK refuses to recognise the State. It then considered exceptions and referred to cases concerning the post-civil war US, post-World War II Eastern Germany, the Turkish Republic of Northern Cyprus, Ciskei (one of the 'States' created by Apartheid-era South Africa), and Southern Rhodesia.

It also referred to the ICJ Advisory Opinion of 21 June 1971 on the continued presence of South Africa in Namiba, particularly its §125, which states:

"while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored

only to the detriment of the inhabitants of the Territory."

The Court found that an exception to the one-voice doctrine is acceptable in matters of private rights. The Court also explained that it had conferred with the Foreign and Commonwealth Office of the UK Government, who would not object to the recognition of a Somaliland marriage even though that State is not recognised.

It thus gave the declaration of recognition of the marriage.

(Thanks to Prakash Shah for the tip.)

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 Private International Law and Comparative Law.

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…

C-493/18, UB v. VA and others – Exclusive jurisdiction under the European Insolvency Regulation

By Dr Lukas Schmidt (PhD EBS Law School), law clerk (*Rechtsreferendar)* at the Regional Court of Wiesbaden, Germany

In cross-border insolvencies questions of international jurisdiction might arise either in relation to the opening of an insolvency proceeding as such, or – further down the road – in relation to proceedings deriving from already opened insolvency proceedings. In both cases the European Insolvency Regulation Recast (Regulation 2015/848) provides for answers: According to Article 3 of the Regulation the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. Article 6 of the Regulation provides that the courts in such Member States shall have jurisdiction as well for actions deriving directly from insolvency proceedings and closely linked with them. Both kind of decisions are to be automatically recognized in all other member states, either through Art. 19 (judgments opening insolvency proceedings) or through Art. 32 (other judgments).

Whereas Article 3 is also to be found in the old EIR (Regulation 1346/2000) as is

Article 19 (Article 16) and Article 32 (Article 25), Article 6 is a new provision, however based without any doubt on the ECJ´s settled case law (Seagon, C-339/07 and Schmid, C-382/12) on the old EIR. Still on the old regulation, but with effect also for Art. 6 and 32 EIR, the ECJ has now specified in the case UB v. VA and others (C-493-18) the scope and the exclusive nature of the *vis attractiva concursus* as (now) laid down in Art. 6 of the EIR.

Some facts are necessary to understand the case:

The insolvent debtor UB, a Dutch citizen, owned an apartment and a property complex in France. Although his assets had been frozen by an English court he and his sister VA signed an acknowledgement of debt by which UB acknowledged owing VA the sum of EUR 500 000 in respect of various loans. UB undertook to repay that sum by 22 August 2017 and subsequently mortgaged, in favour of VA, the apartment and the property complex which he owned in France. In March 2010 he had sold the apartment to Tiger, a company founded by VA. On 10 May 2011 insolvency proceedings were opened against UB in the United Kingdom by the Croydon County Court. The Croydon County Court authorised the insolvency administrator, to bring an action before the courts in France in order to obtain a ruling that the sale of the properties and the mortgages granted over those properties were avoidable under the relevant United Kingdom bankruptcy law provisions. The insolvency administrator made use of this authorisation and succeeded before the French Regional Court and the Court of Appeal. However, the Court of Cassation referred the question of international jurisdiction of the French courts (and its recognition) to the ECJ for a preliminary ruling.

By answering the first two referred questions the ECJ has made clear – rather not surprising – that an action brought by the trustee in bankruptcy appointed by a court of the Member State within the territory of which the insolvency proceedings were opened seeking a declaration that the sale of immovable property situated in another Member State and the mortgage granted over it are ineffective as against the general body of creditors falls within the exclusive

jurisdiction of the courts of the first Member State.

The ECJ has pointed out that for determining whether actions derive directly from insolvency proceedings not the procedural context of the action is decisive, but its legal basis (the trustee asked the French courts to rule on a declaration of ineffectiveness rather than on an action to set the transactions aside).

Equally insignificant for international jurisdiction to hear an action for the restitution of immovable property to the bankruptcy estate is where those assets are located. The court underlines that the objective of improving the efficiency and speed of cross-border insolvency proceedings is only consistent with concentrating all the actions directly related to the insolvency proceedings before the courts of the Member State within the territory of which those proceedings were opened.

More intriguing and not yet subject to the ECJ's case law is the question whether a court can confer its international jurisdiction according to Art. 6 EIR. Eventually, this is what the Croydon Country Court did by authorizing the administrator to bring an action before the French courts in order to obtain a ruling that UB´s deals regarding the French properties were avoidable transactions under the relevant United Kingdom bankruptcy law provisions. The referring Court of Cassation therefore asked in his third question if the UK court's decision authorizing the insolvency administrator to bring an action before the French courts could be classified as a judgment concerning the course of insolvency proceedings within the meaning of Article 25 (now Article 32), which may, on that basis, be recognised with no further formalities, pursuant to that article.

The court's answer to this question is in line with its decision in Wiemer & Trachte v. Tadzher (C-296/17) in which it already confirmed the exclusive jurisdiction of the courts of the Member State within the territory of which insolvency proceedings have been opened for set aside actions. Hence, the ECJ refused the UK court's approach quite quickly stating that Article 25 (now 32)

EIR cannot be interpreted in such a way as to call into question the said exclusive nature of the international jurisdiction of the courts of the Member State within the territory of which the insolvency proceedings were opened to hear actions which derive directly from those proceedings and which are closely connected with them. According to the ECJ Article 25 EIR merely allows for the possibility that the courts of a Member State within the territory of which insolvency proceedings have been opened may also hear and determine an action which derives directly from those proceedings and is closely connected with them, whether that be the court which opened the insolvency proceedings under Article 3(1), or another court of that same Member State having territorial and substantive jurisdiction.

White Paper on Smart Derivatives Contract

by Matthias Lehmann

Smart contracts and the conflict of laws is a widely discussed topic today (see for instance the post by Giesela Rühl). A new contribution to this debate comes from ISDA, the International Swaps and Derivatives, in collaboration with the Singapore Academy of Law and leading law firms. Also involved is the provider of an existing smart contract platform (Corda), which guarantees the paper's practical relevance. The analysis focuses on a potential smart derivative contract to be implemented on Corda.

The authors of the paper take the view that a court in Singapore and the UK would have little difficulties in determining the law governing such a contract – it would simply be the one chosen in the derivatives master agreement. The same goes for the choice of the competent court. In this context, it is important to note that only B2B transactions are considered, with no consumer contracts being

involved. The authors also see little risk for the intervention of public policy rules.

Collateralised derivative transactions, which are of utmost practical importance, are more problematic to the extent that the collateral is governed by the *lex rei sitae*. But the paper also sees a way out here: The collateral could be represented by a token (through so-called tokenisation). Given that tokens have no real geographic location, the law applicable to the token could be determined again by a choice of the parties.

The paper even suggests an innovative way to avoid the need for enforcement: The parties could agree that the “notary” of the platform must implement any judgment rendered by the chosen court. In this way, the need to apply for cross-border recognition and enforcement in the country in which the platform is established would fall away.

Whether this proposal works in practice remains to be seen. One may reasonably fret that the platform will not enjoy complete immunity from the country in which it is established. As long as the courts of this country are liberal, there is however little reason for fear. The Singapore High Court has already shown its readiness to extending property protection to the holders of cryptocurrencies. The country could thus provide a safe haven for the operation of a smart derivatives platform, but that does not exclude the continuing power of its courts to intervene and the possible application of national law, e.g. in case of an insolvency of the platform provider.

Conference Report: Conflict of Laws 4.0 (Münster, Germany)

Written by Prof. Dr. Stefan Arnold, Thorben Eick and Cedric Hornung, University of Münster

Digitization, Artificial Intelligence and the blockchain technology are core elements of a historic transformation of modern society. Such transformations necessarily challenge traditional legal concepts. Hitherto, the academic discourse is much more intense in the area of substantial private law than it is in the area of Private International Law. Thus, a conference on the specific challenges of Artificial Intelligence and Digitization for Private International Law was long overdue. Stefan Arnold and Gerald Mäsch of the Institute of International Business Law (WWU Münster) organized a conference with that specific focus on November 8th at Münster University. The title of the conference was »*Conflict of laws 4.0: Artificial Intelligence, smart contracts and bitcoins as challenges for Private International Law*«. Around a hundred legal scholars, practitioners, doctoral candidates and students attended the conference.

The first speaker, Wolfgang Prinz of Fraunhofer Institute and Aachen University, provided insight into the necessary technical background. His presentation made clear that blockchain technology is already a key factor in international contracting, as e.g. in agricultural crop insurance policies. This introduction into complex digital processes to a largely non-tech-expert audience helped kick off the first round of vivid discussion.

Michael Stürner of Konstanz University devoted his presentation to smart contracts and their role in applying the Rome I Regulation. After raising the question of a specific *lex digitalis*, he focused on the scope of the Regulation with regard to qualification, choice of law and the objective connecting factors. While he concluded that the respective contracts can mainly be treated on the basis of the Rome I Regulation, he also took a quick glance on subsequent questions in terms of virtual securities and the statute of form.

In the third presentation, Stefan Arnold of Münster University explored the issues Artificial Intelligence raises concerning party autonomy and choice of law. At the

beginning of his presentation, he emphasized that these questions are closely related to the different levels of AI and their (lack of) legal capacity: As long as machines act as simple executors of human will, one should establish a normative attribution to the human being in question. For the cases in which the AI exceeds this dependency, Arnold claimed there was no answer in the Rome I Regulation, leaving the way open for the national rules, primarily Art. 5 II EGBGB. Finally, he discussed possibilities *de lege ferenda* such as applying the law of the country of effect and future gateways for the *ordre public*.

Jan Lüttringhaus of Hannover University presented about questions of insurance and liability in the context of Private International Law. In order to underline the importance of this topic, he referred to a provision in the usual insurance conditions presupposing the application of German national law. In a first step, he examined the international civil procedure law of the Brussels I bis Regulation as well as potential difficulties with state immunity. The second part of his lecture was dedicated to the problem of determining the applicable law in situations that feature a decentralization of injury and damage.

In the following presentation, Gerald Mäsch of Münster University proposed a solution for finding the applicable law to Decentralized Autonomous Organizations (DAOs). When legal practitioners try to determine which law applies, they usually resort to the traditional rules of domicile and establishment. Since DAOs have neither of the two, it cannot be subjected to the law of a specific nation by these two approaches. Leaving the international corporate law behind, Mäsch called for a return to the basics: If there is no primary choice of law, one should plainly refer back to the most significant relationship as stated by Savigny. Acknowledging the regular lack of publicity, he nonetheless insisted that this solution answered the parties' needs at the best possible rate.

Bettina Heiderhoff of Münster University presented on how questions of liability can be solved in the context of autonomous systems. She started her presentation by raising the question whether autonomous systems could simply fall into the scope of the Product Liability Directive. Following up, the speaker focused on new fund and insurance systems and the deriving problems with regard to conflict of laws. She expanded upon Art. 5 of the Rome II Regulation and its applicability on autonomous systems, emphasizing the legislator's intention behind the respective rules.

In the following presentation, Matthias Lehmann of Bonn University examined the interaction between blockchain, bitcoin and international financial market law. After a short introduction into the basics of Distributed Ledger Technology (DLT), he shed light onto problems in international banking supervision and how they could be solved by implementing DLT-based solutions. He closed with a plea for common international regulations regarding cryptocurrencies.

Concluding remarks from a practitioners' point of view were made by Ruth-Maria Bousonville and Marc Salevic from Pinsent Masons LLP. The speakers shared their perspective on the topics that had been raised by their predecessors and how practitioners deal with these questions in creating solutions for their clients.

The SHAPE v Supreme Litigation: The Interaction of Public and Private International Law Jurisdictional Rules

Written by Dr Rishi Gulati, Barrister, Victorian Bar, Australia; LSE Fellow in Law, London School of Economics

The interaction between public and private international law is becoming more and more manifest. There is no better example of this interaction than the Shape v Supreme litigation ongoing before Dutch courts, with the most recent decision in this dispute rendered in December 2019 in *Supreme Headquarters Allied Powers Europe ("SHAPE") et al v Supreme Site Service GmbH et al (Supreme)*, COURT OF APPEAL OF 's-HERTOGENBOSCH, Case No. 200/216/570/01, Ruling of 10 December 2019 (the 'CoA Decision'). I first provide a summary of the relevant facts. Second, a brief outline of the current status of the litigation is provided. Third, I make some observations on how public and private international law interact in this dispute.

1 Background to the litigation

In 2015, the Supreme group of entities (a private actor) brought proceedings (the 'Main Proceedings') against two entities belonging to the North Atlantic Treaty Organisation ('NATO') (a public international organisation) before a Dutch district court for alleged non-payments under certain contracts entered into between the parties for the supply of fuel (CoA Decision, para 6.1.12). The NATO entities against whom the claims were brought in question were Shape (headquartered in Belgium) and Allied Joint Force Command Headquarters Brunssum (JFCB) (having its registered office in the Netherlands). JFCB was acting on behalf of Shape and concluded certain contracts (called BOAs) with Supreme regarding the supply of fuel to SHAPE for NATO's mission in Afghanistan carried out for the International Security Assistance Force (ISAF) created pursuant to a Chapter VII Security Council Resolution following the September 11 terrorist attacks in the United States (CoA Decision, para 6.1.8). While the payment for the fuels supplied by Supreme on the basis of the BOAs was made subsequently by the individual states involved in the operations in Afghanistan, 'JFCB itself also purchased from Supreme. JFCB paid Supreme from a joint NATO budget. The prices of fuel were variable. Monitoring by JFCB took place…' (CoA Decision, para 6.1.9. The applicable law of the BOAs was Dutch law but no choice of forum clause was included (CoA Decision, para 6.1.9). There was no provision for arbitration made in the BoAs (CoA Decision, para 6.1.14.1). However, pursuant to a later Escrow Agreement concluded between the parties, upon the expiry of the BoAs, Supreme could submit any residual claim it had on the basis of the BOAs to a mechanism known as the Release of Funds Working Group ('RFWG'). Pursuant to that agreement, an escro account was also created in Belgium. The RFWG comprises of persons affiliated with JFCB and SHAPE, in other words, NATO's representatives (CoA Decision, para 6.1.10). Supreme invoked the jurisdiction of Dutch courts for alleged non-payment under the BOAs. The NATO entities asserted immunities based on their status as international organisations ('IOs') and succeeded before the CoA meaning that the merits of Supreme's claims has not been tested before an independent arbiter yet (more on this at 2).

In a second procedure, presumably to protect its interests, Supreme also levied an interim garnishee order targeting Shape's escrow account in Belgium (the 'Attachment Proceedings') against which Shape appealed (see here for a comment on this issue). The Attachment Proceedings are presently before the Dutch

Supreme Court where Shape argued amongst other things, that Dutch courts did not possess the jurisdiction to determine the Attachment Proceedings asserting immunities from execution as an IO (see an automated translation of the Supreme Court's decision here (of course, no guarantees of accuracy of translation can be made)). The Dutch Supreme Court made a reference for a preliminary ruling to the European Court of Justice ('CJEU') (case C-186/19). It is this case where questions of European private international law have become immediately relevant. Amongst other issues referred, the threshold question before the CJEU is:

> *Must Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ 2012 L 351, p. 1 [Brussels Recast] be interpreted as meaning that a matter such as that at issue in the present case, in which an international organisation brings an action to (i) lift an interim garnishee order levied in another Member State by the opposing party, and (ii) prohibit the opposing party from levying, on the same grounds, an interim garnishee order in the future and from basing those actions on immunity of execution, must be wholly or partially considered to be a civil or commercial matter as referred to in Article 1(1) of the Brussels I Regulation (recast)?*

Whether the claims pertinent to the Attachment Proceedings constitute civil and commercial matters within the meaning of Article 1 of the Brussels Recast is a question of much importance. If it cannot be characterised as civil and commercial, then the Brussels regime cannot be applied and civil jurisdiction will not exist. If jurisdiction under the Brussels Recast does not exist, then questions of IO immunities from enforcement become irrelevant at least in an EU member state. The CJEU has not yet ruled on this reference.

2 The outcome so far

Thus far, the dispute has focused on questions of jurisdiction and IO immunities. These issues arise in somewhat different senses in both sets of proceedings.

The Main Proceedings

Shape and JFCB argue that Dutch courts lack the jurisdiction in public

international law to determine the claims brought by Supreme as NATO possesses immunities given its status as an IO (CoA Decision, para 6.1.13). The rules and problems with the law on IO immunities have been much discussed, including by this author in this very forum. Two things need noting. First, in theory at least, the immunities of IOs such as NATO are delimited by the concept of 'functionalism' – IOs can only possess those immunities that are necessary to protect its functional independence. And second, if an IO does not provide for a 'reasonable alternative means' of dispute resolution, then national courts can breach IO immunities to ensure access to justice. According to the district court, as the NATO entities had not provided a reasonable alternative means of dispute resolution to Supreme, the former's immunities could be breached. The CoA summarised the district court's decision on this point as follows (CoA Decision, para 6.1.14):

> *[T]he lack of a dispute settlement mechanism in the BOAs, while a petition to the International Chamber of Commerce was agreed in a similar BOA agreed with another supplier, makes the claim of an impermissible violation of the right to a fair trial justified. The above applies unless it must be ruled that the alternatives available to Supreme comply with the standard in the Waite and Kennedy judgments: there must be "reasonable means to protest effectively rights". The District Court concludes that on the basis of the arguments put forward by the parties and on the basis of the documents submitted, it cannot be ruled that a reasonable alternative judicial process is available.*

The CoA disagreed with the district court. It said that this was not the type of case where Shape and JFCB's immunities could be breached even if there was a complete lack of a 'reasonable alternative means' available to Supreme (CoA Decision, para 6.7.8 and 6.7.9.1). This aspect of the CoA's Decision was made possible because of the convoluted jurisprudence of the European Court of Human rights where that court has failed to provide precise guidance as to when exactly IO immunities can be breached for the lack of a 'reasonable alternative means', thereby giving national courts considerable leeway. The CoA went on to further find that in any event, Supreme had alternative remedies: it could bring suit against the individual states part of the ISAF action to recover its alleged outstanding payments (CoA Decision, para 6.8.1); and could have recourse to the RFWG (CoA Decision, para 6.8.4). This can hardly be said to constitute a 'reasonable alternative means' for Supreme would have to raise claims before the

courts of multiple states in question creating a risk of parallel and inconsistent judgments; the claims against a key defendant (the NATO entities) remain unaddressed; and the RFWG comprises representatives of the defendant completely lacking in objective independence. Perhaps the CoA's decision was driven by the fact that Supreme is a sophisticated commercial party who had voluntarily entered into the BOAs where the standards of a fair trial in the circumstances can be arguably less exacting (CoA Decision, para 6.8.3).

On the scope of Shape's and JFCB's functional immunities, the CoA said that 'if immunity is claimed by SHAPE and JFCB in respect of (their) official activities, that immunity must be granted to them in absolute terms' (CoA Decision, para 6.7.9.1). It went on to find:

> *The purchase of fuels in relation to the ISAF activities, to be supplied in the relevant area of operations in Afghanistan and elsewhere, is directly related to the fulfilment of the task of SHAPE and JFCB within the framework of ISAF, so full functional immunity exists. The fact that Supreme had and has a commercial contract does not change the context of the supplies. The same applies to the position that individual countries could not invoke immunity from jurisdiction in the context of purchasing fuel. What's more, even if individual countries – as the Court of Appeal understands for the time being before their own national courts – could not invoke immunity, this does not prevent the adoption of immunity from jurisdiction by SHAPE and JFCB as international organisations that, in concrete terms, are carrying out an operation on the basis of a resolution of the United Nations Security Council CoA Decision, para 6.7.9.2).*

Acknowledging that determining the scope of an IO's functional immunity is no easy task, the CoA's reasoning is somewhat surprising. The dispute at hand is a contractual dispute pertaining to alleged non-payment under the BOAs. One may ask the question as to why a classical commercial transaction should attract functional immunity? Indeed, other IOs (international financial institutions) have included express waiver provisions in their treaty arrangements where no immunities exist in respect of business relationships between an IO and third parties (see comments on the Jam v IFC litigation ongoing in United States courts by this author here). While NATO is not a financial institution, it should nevertheless be closely inquired as to why NATO should possess immunities in

respect of purely commercial contracts it enters into. This is especially the case as the CoA found that the NATO entities in question did not possess any treaty based immunities (CoA Decision, para 6.6.7), and upheld its functional immunities based on customary international law only (CoA Decision, para 6.7.1), a highly contested issue (see M Wood, 'Do International Organizations Enjoy Immunity Under Customary International Law?' (2013) 10 IOLR 2). It is likely that the CoA Decision would be appealed to the Dutch Supreme Court and any further analysis must await a final outcome.

The Attachment Proceedings

The threshold question in the Attachment Proceedings is whether Dutch courts possess civil jurisdiction under the Brussels Recast to determine the issues in that particular case. If the claim is not considered civil and commercial within the meaning of Article 1 of the Brussels Recast, then no jurisdiction exists under the rules of private international law and the claim comes to an end, with the issue of immunities against enforcement raised by the NATO entities becoming superfluous. This is because if a power to adjudicate does not exist, then the question on the limitations to its exercise due to any immunities obviously becomes irrelevant. Perhaps more crucially, after the CoA Decision, the ongoing relevance of the Attachment Proceedings has been questioned. As has been noted here:

> *At the public hearing in C-186/19 held in Luxembourg on 12 December, the CJEU could not hide its surprise when told by the parties that the Dutch Appellate Court had granted immunity of jurisdiction to Shape and JCFB. The judges and AG wondered whether a reply to the preliminary reference would still be of any use. One should take into account that the main point at the hearing was whether the "civil or commercial" nature of the proceedings for interim measures should be assessed in the light of the proceedings on the merits (to which interim measures are ancillary, or whether the analysis should solely address the interim relief measures themselves.*

Given that a Supreme Court appeal may still be filed in the Main Proceeding potentially reversing the CoA Decision, the CJEU's preliminary ruling could still be of practical relevance. In any event, in light of the conceptual importance of the central question regarding the scope of the Brussels Recast being considered

in the Attachment Proceeding, any future preliminary ruling by the CJEU is of much significance for European private international law. Summarising the CJEU's approach to the question at hand, the Dutch Supreme Court said:

> *The concept of civil and commercial matters is an autonomous concept of European Union law, which must be interpreted in the light of the purpose and system of the Brussels I-bis Regulation and the general principles arising from the national legal systems of the Member States. In order to determine whether a case is a civil or commercial matter, the nature of the legal relationship between the parties to the dispute or the subject of the dispute must be examined. Disputes between a public authority and a person governed by private law may also fall under the concept of civil and commercial matters, but this is not the case when the public authority acts in the exercise of public authority. In order to determine whether the latter is the case, the basis of the claim brought and the rules for enforcing that claim must be examined. For the above, see, inter alia, ECJ 12 September 2013, Case C-49/12, ECLI: EU: C: 2013: 545 (Sunico), points 33-35, ECJ 23 October 2014, Case C ? 302/13, ECLI: EU: C: 2014: 2319 (flyLal), points 26 and 30, and CJEU 9 March 2017, case C-551/15, ECLI: EU: C: 2017: 193 (Pula Parking), points 33-34 (see the automated translation of the Supreme Court's decision cited earlier, para 4.2.1).*

There is not the space here to explore the case law mentioned above in any detail. Briefly, if the litigation was taken as a whole with the analysis taking into account the nature of the Main Proceedings as informing the characterisation of the Attachment Proceedings , there would be a close interaction between the scope of functional immunity and the concept of civil and commercial. If an excessively broad view of functional immunity is taken (as the CoA has done), then it becomes more likely that the matter will not be considered civil and commercial for the purposes of the Brussels system as the relevant claim/s can said to arise from the exercise of public authority by the defendants. However, as I said earlier, it is somewhat puzzling as to why the CoA decided to uphold the immunity of the defendants in respect of a purely commercial claim.

However, it is worth noting that in some earlier cases, while the CJEU seem to take a relatively narrow approach to the scope of the Brussels system (CJEU Case C-29/76, *Eurocontrol*). More recent case law has taken a broader view. For

example, in *Pula Parking*, para. 39, the CJEU said 'Article 1(1) of Regulation No 1215/2012 must be interpreted as meaning that enforcement proceedings brought by a company owned by a local authority…for the purposes of recovering an unpaid debt for parking in a public car park the operation of which has been delegated to that company by that authority, which are not in any way punitive but merely constitute consideration for a service provided, fall within the scope of that regulation'. If the true nature and subject of Supreme's claims are considered, it is difficult to see how they can constitute anything but civil and commercial within the meaning of the Brussels system in light of recent case law, with the issue of IO immunities a distraction from the real issues. It will be interesting to see if the CJEU consolidates its recent jurisprudence or prefers to take a narrower approach.

3 The interaction between public and private international law?

In the Main Proceedings, in so far as civil jurisdiction is concerned, already, the applicable law to the BOAs is Dutch law and Dutch national courts are perfectly suited to take jurisdiction over the underlying substantive dispute given the prevailing connecting factors. As the CoA determined that the NATO entities tacitly accepted the jurisdiction of the Dutch courts the existence of civil jurisdiction does not seem to be at issue (CoA Decision, para 6.5.3.4). Clearly, in a private international law sense, Dutch courts are manifestly the suitable forum to determine this claim.

However, on its face, the norms on IO immunities and access to justice require balancing (being issues relevant to both public and private international law). As the district court found, if an independent mechanism to resolve a purely commercial dispute (such as an arbitration) is not offered to the claimant, IO immunities can give way to ensure access to justice. Indeed, developments in general international law require the adoption of a reinvigorated notion of jurisdiction where access to justice concerns should militate towards the exercise of jurisdiction where not doing so would result in a denial of justice. Mills has said:

> *The effect of the development of principles of access to justice in international law also has implications when it comes to prohibitive rules on jurisdiction in the form of the immunities recognised in international law…Traditionally these immunities have been understood as 'minimal' standards for when a state may*

> *not assert jurisdiction — because the exercise of jurisdiction was understood to be a discretionary matter of state right, there was no reason why a state might not give more immunity than required under the rules of international law. The development of principles of access to justice, however, requires a state to exercise its jurisdictional powers, and perhaps to expand those jurisdictional powers as a matter of domestic law to encompass internationally permitted grounds for jurisdiction, or even to go beyond traditional territorial or nationality-based jurisdiction (A Mills, 'Rethinking Jurisdiction in International Law' (2014) British Yearbook of International Law, p. 219).*

The Main Proceedings provide an ideal case where civil jurisdiction under private international law should latch on to public international law developments that encourage the exercise of national jurisdiction to ensure access to justice. Not only private international law should be informed by public international law developments, the latter can benefit from private international law as well. I have argued elsewhere that private international law techniques are perfectly capable of slicing regulatory authority with precision so that different values (IO independence v access to justice) can both be protected and maintained at the same time (see here). Similarly, in the Attachment Proceedings, a reinvigorated notion of adjudicative jurisdiction also demands that the private and public properly inform each other. Here, it is of importance that the mere identity of the defendant as an international public authority or the mere invocation of the pursuit of public goals (such as military action) does not detract from properly characterising the nature of a claim as civil and commercial. More specifically, any ancillary proceeding to protect a party's rights where the underlying dispute is purely of a commercial nature ought to constitute a civil and commercial matter within the meaning of the Brussels system. Once civil jurisdiction in a private international law sense exists, then any immunities from enforcement asserted under public international law ought to give way to ensure that the judicial process cannot be frustrated by lack of enforcement at the end. It remains to be seen what approach the CJEU takes to these significant and difficult questions where the public and private converge.

To conclude, only a decision on the merits after a full consideration of the evidence can help determine whether Supreme's (which itself is accused of fraud) claims against Shape et al can be in fact substantiated. In the absence of an alternative remedy offered by the NATO entities, if the Dutch courts do not

exercise jurisdiction, we may never know whether its claims are in fact meritorious.

Venezuela and the Conventions of the Specialized Conferences on Private International Law (CIDIP)

written by Claudia Madrid Martínez

On 28 April 2017, the government of Nicolás Maduro deposited with the General Secretariat of the Organization of American States (OAS), a document whereby he expressed his "irrevocable decision to denounce the Charter of the Organization of American States (OAS) pursuant to Article 143 thereof, thereby initiating Venezuela's permanent withdrawal from the Organization."

Before the two years of the transition regime that the OAS Charter provides for cases of retirement from the Organization (art. 143), on 8 February 2019, Juan Guaidó, president of the National Assembly and interim president of the Republic, wrote to the OAS to "reiterate and formally express the decision of the Venezuelan State to annul the supposed denunciation of the OAS Charter, for Venezuela to be able to remain a member state of the Organization."

In its session of 9 April 2019, the OAS Permanent Council accepted the representation appointed by the National Assembly of Venezuela. However, on 27 April of the same year, the Foreign Ministry, representing Nicolás Maduro, issued a statement informing that "With the denunciation of the OAS Charter made by the government of the Bolivarian Republic of Venezuela on 27 April 2017, within the framework of what is contemplated in article 143; as of this date, no instrument signed and / or issued by the OAS will have a political or legal effect on the Venezuelan State and its institutions".

This political situation has impacted the practical application of the Inter-

American Conventions issued by the Specialized Conferences on Private International Law (CIDIP, by its acronym in Spanish). Remember that within the framework of CIDIP, Venezuela has ratified fourteen instruments on bills of exchange, promissory notes and bills, international commercial arbitration, letters rogatory, taking of evidence abroad, powers of attorney to be used abroad, checks, commercial companies, extraterritorial enforcement of foreign judgments and arbitral awards, information on foreign law, general rules, international child abduction, and international contracts.

For Venezuela these conventions entered into force once the requirements for their validity established in the Constitution and the Vienna Convention on the Law of Treaties had been met. The rules of this convention are considered customary, since Venezuela has not ratified this instrument.

We must consider that the Inter-American Conventions are open conventions, which allow the accession of States not party to the OAS. Spain, for example, has accessed to conventions on letters rogatory and on information on foreign law.

Besides that, none of the Conventions has been denounced or incurred in causes of nullity or suspension, nor has there been an impossibility for performance, nor has therebeen a fundamental change in the circumstances, in the terms of articles 53, 57, 58, 60, 61, 62 of the Vienna Convention.

Although Venezuela has broken diplomatic relations with some States parties of the OAS, such relations are not indispensable for the application of Inter-American Conventions, even though in some cases cooperation is regulated through central authorities.

Another important issue is the independence of the Inter-American Conventions. Since the OAS is not an integration system, its treaties must pass the approval and ratification or accession process, because they are not covered by the characteristics of supranationality or its equivalent, such as occurs in the Andean Community or the European Union.

In any case, the situation is not clear. Article 143 of the OAS Charter provides that when “the General Secretariat receives a notice of denunciation, the present Charter shall cease to be in force with respect to the denouncing State, which shall cease to belong to the Organization after it has fulfilled the obligations arising from the present Charter”. There is no reference to the treaties approved

within it.

Unfortunately, this situation has been reflected in the decisions of our courts. So far there have been two decisions of the highest court in which the Inter-American codification is set aside. In both, exequatur decisions, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards was not applied.

"Although, our Republic has signed the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards with the Republic of Ecuador, it is no less true that, the Bolivarian Republic of Venezuela formalized its final retirement from the OAS, by letter of 27 April 2019, as a result, the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, approved in Montevideo, Uruguay in 1979, endorsed by the Department of International Law of the Organization of American States, ceased to have its effects in our country.

The Civil Chamber of the Supreme Court of Justice issued the first one, under number 0187 on 30 May 2019 (see also here). This decided the exequatur of an Ecuadorian divorce judgment and stated:

Therefore, this exequatur will be reviewed in the light of the Private International Law Act, according to the requirements set forth in article 53 as this is the rule of Private International Law applicable in the specific case".

In this case, the Chamber bases its decision on the fact that in the preamble of the Inter-American Convention, the States parties to the OAS are indicated as participants and that the deposit of the instrument of ratification was made before the OAS. It should be noted that neither this nor any other Inter-American Convention has been denounced by Venezuela.

In the second decision, issued by the Social Chamber of the Supreme Court under number 0416, on 5 December 2019 (see also here) on the occasion of the exequatur of a Mexican divorce judgment, there is not even an argument as to why not apply the Inter-American Convention. In it, the Social Chamber only asserted:

"In this case, it is requested that a judgment issued by a court in the United Mexican States, a country with which the Bolivarian Republic of Venezuela has

not signed international treaties on the recognition and enforcement of judgments, be declared enforceable in the Bolivarian Republic of Venezuela through the exequatur procedure; for this reason, and following the priority order of the sources in the matter, the rules of Venezuelan Private International Law must be applied".

The fundamental role of Venezuela in Inter-American codification through the work of Gonzalo Parra-Aranguren and Tatiana B. de Maekelt is not a secret to anyone. It is unfortunate that a political decision attempts to weaken the Venezuelan system of Private International Law. We insist that ignoring the Inter-American Conventions not only constitutes a breach of the obligation of the State to comply with existing treaties, but also of the internal rules that, like article 1 of the Venezuelan Private International Law Act, require the preferential application of the Public International Law rules, in particular those established in international treaties.

"Promoting Foreign Judgments: Lessons in Legal Convergence from South Africa and Nigeria" (Kluwer Law International B.V. 2019)

Pontian N. Okoli has provided the following extensive summary of the findings of his book, which is a revised version of his PhD thesis,

completed at the University of Dundee.

In 2019, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial matters came into being. It is a clear reflection of determined efforts to produce **a global legal framework** that can support the free movement of foreign judgments. One index of success concerning the 2019 Convention would be whether it promotes the free movement of foreign judgments in **different parts of the world including Africa**. Time will tell. For now, it is necessary to reduce the impediments to the free movement of foreign judgments on at least two levels: first, between African and non-African jurisdictions; and second, between African jurisdictions. The legal frameworks that concern both levels are essentially the same in most African jurisdictions. There is no African legal framework that is equivalent to the Brussels legal regime on the recognition and enforcement of foreign judgments in the European Union. Thus, litigants need to consider relevant legal frameworks in each country. Foreign judgment creditors must be conversant with appropriate laws to ensure recognition and enforcement of foreign judgments. Nigeria and South Africa are two major examples of African jurisdictions where such awareness is required.

Nigeria and South Africa are important for several reasons including their big economies and the fact that they are major political players in their respective regions and have significant influence on the African continent. They also make for interesting comparative study –Nigerian jurisprudence is based on the English common law while South African jurisprudence is mixed – based on Roman Dutch law with a significant influence of English law. Also, Nigeria is not a member of the Hague Conference on Private International Law, but South Africa has been a member since 2002. Understanding why these two jurisdictions adopt their individual approaches to the recognition and enforcement of foreign judgments is critical to unlocking the potential to have rewarding relations with Africa in this regard. It is important to understand what brings both jurisdictions together and what separates both, with a view to determining how common perspectives to foreign judgments enforcement may be attained.

There are several bases for legal convergence. Both jurisdictions have two major legal frameworks on foreign judgments – statutory law and the common law. This two-track system is common in Africa and many parts of the Commonwealth

including the United Kingdom which has more than one statute (and the common law) on foreign judgments. In Nigeria, there is still significant uncertainty as to which legal framework should apply to relevant cases. Nigerian case law clearly shows that statutory law remains the most important guide for litigants. Essentially, Nigeria relies on a statute of nearly a century old (the Reciprocal Enforcement of Judgments Act 1922 — Chapter 175, Laws of the Federation and Lagos 158). Conversely, statutory law is of less practical importance in South Africa where the Enforcement of Foreign Judgments Act 32 of 1988 has been extended to Namibia only.

The comparative study finds that it is generally easier for judgment creditors to enforce foreign judgments in South Africa than in Nigeria. Although there is much to discuss concerning legal uncertainties considering the confusing legal framework in Nigeria, case law demonstrates that the South African attitude to recognition and enforcement foreign judgments is instructive. A liberal legal framework that promotes the recognition and enforcement of foreign judgments should be founded in judicial and legislative attitudes that promote the free movement of foreign judgments. In this context, the theories that underpin the recognition and enforcement of foreign judgments are critical. The theories form the common foundation to which jurisdictions around the world can relate.

The statutory frameworks on foreign judgments are relatively recent. For example, the main Nigerian statute on the subject was patterned on the 1920 UK on the Administration of Justice Act. However, foreign judgments were already being enforced in other jurisdictions as long ago as the nineteenth century through case law (such as *Schibsby v Westenholz* [1870] LR QB 155 and *Hilton v Guyot* 159 US 118 [1895]) which reflected the theories that underpin the recognition and enforcement of foreign judgments. The theories of reciprocity, obligation and comity have been applied with varying degrees of success in different jurisdictions. These theories either clearly apply to Nigerian and South African contexts (for example, through specific legislative provisions in Nigeria) or they have been discussed by the courts in both jurisdictions. The first step should be an agreement on what should drive the recognition and enforcement of foreign judgments. Each of these theories has been criticised rather substantially, and it may be difficult to build on any 'pure theory'. It would be helpful to adopt an approach that encourages the free movement of foreign judgments subject to a consideration of State interests. Such an approach would attach some degree of

obligation in the recognition and enforcement of foreign judgments subject to narrow gaps for defence. This can be illustrated through the application of public policy to frustrate the recognition and enforcement of foreign judgments. Such an obligation should be qualified. Apart from drawing on an analysis of the major theories on the subject, adopting this qualified obligation approach has the benefit of a universal standpoint that is shaped by practical and political realities. This is more pragmatic than strictly applying any traditional theory that is entirely constructed within a legal culture or legal system.

Litigants should expect the enforcement of foreign judgments to be the rule rather than an exception. Fairness requires a consideration of litigant and State interests. Any approach that considers only one (or one at the expense of the other) is unlikely to be fair or acceptable to many jurisdictions including those in Africa. Already, the jurisprudence in both countries suggests that it would be fair to recover debts and there is scope to presume that foreign judgments should be enforced. This perspective of fairness has greatly influenced South African jurisprudence, and this may also partly account for why there is greater success in attempts to enforce foreign judgments even when the law is contested or may at first seem unclear. An example is *Richman v Ben-Tovim* 2007 (2) SA 203 where the respondent did not dispute the debt but argued that his mere presence in England was an insufficient basis for the English court to exercise jurisdiction. The South African Court of Appeal, however, considered that a 'realistic approach' was necessary and enforced the foreign judgment. Although some scholars may criticise this judgment for endorsing 'mere presence' jurisdiction as it divides common law and civil law systems, the rationale behind the decision is instructive. If a 'realistic approach' is to be found, then there is a need to reflect on how to reduce the technicalities that impede the free movement of foreign judgments. Efforts to attain an effective global legal framework that African countries will find useful requires a realistic approach that factors in contextual realities. This realistic approach permeates other aspects of the process that leads to the recognition and enforcement of foreign judgments in Nigeria and South Africa.

An important contextual reality is the characterisation process. How the Nigerian or South African courts characterise a foreign judgment can make a great difference in terms of recognition and enforcement. The way forward is not to create more categories, but to focus on how the foreign judgment may be

enforced subject to considerations of fairness to both the litigants and the State. This perspective of 'cosmopolitan fairness' also facilitates the attainment of practical solutions in issues that concern jurisdictional grounds. To ensure a realistic approach, and in considering a fair approach for litigants and the State, it is critical to reflect on what ultimate end should be attained. If that end is promoting the free movement of foreign judgments, then it is reasonable to put the onus on the judgment debtor. This does not mean that foreign judgments would be enforced regardless of potential injustice or unfairness to the judgment debtor. However, placing the onus on the judgment debtor implies that the application of jurisdictional grounds should be based on promoting the free movement of foreign judgments. At least four traditional bases of jurisdiction are common to Nigeria and South Africa: mere presence, residence, domicile and submission. A new perspective to this subject may consider what purpose each jurisdictional ground should serve and the aims that should be achieved. The Nigerian legal framework, in principle, reflects this approach of considering jurisdictional grounds in a progressive and purposive manner. In Nigeria, doing business or carrying on business is a common thread that runs through all the jurisdictional grounds. There is also a patchwork of jurisprudence concerning individual grounds of jurisdiction. In South Africa, residence needs to be ascertained on a case-by-case basis as neither Nigerian nor South African statutory laws define residence.

In the context of jurisdictional grounds, the lack of interpretational certainty in both countries suggests that there is considerable scope to adopt any approach or combination of approaches that helps to solve problems in a practical way. In dealing with impediments to enforcing foreign judgments in a manner that ensures sustainable progress, there should be a clear consideration of systematic flexibility. In other words, fine demarcations in the context of traditional jurisdictional grounds may not be of practical help in efforts to facilitate the recognition and enforcement of foreign judgments. Any bias against a jurisdictional ground should be re-evaluated in a manner that factors in contextual realities. There should be a consideration of international commercial realities and in a fast-evolving global order that is driven by increasingly complex international commercial transactions. Any approach that focuses on territorial considerations vis-à-vis jurisdictional grounds does not reflect this global order in which increased movement, complex international commercial transactions and the borderless nature of the Internet are important features. This global order

requires a result-oriented approach rather than a recourse to any traditional approach that is driven by technicalities. For example, the question should not be whether a judgment debtor was 'present' in the foreign country but what would amount to presence that is effective for the purposes of enforcing foreign judgments. This reasoning may be replicated for residence or domicile as well.

The need for a 'realistic approach' also extends to public policy. There are clear foundations in Nigerian and South African law that support a narrow application of public policy during legal proceedings to recognise and enforce foreign judgments. This is so although there have been significant interpretational difficulties in both jurisdictions and judgment debtors try to frustrate the enforcement of foreign judgments by relying on defences that are anchored to public policy. For example, characterising damages awarded by the foreign court as compensatory rather than punitive could help to ensure judgment creditors do not go away empty-handed. This is especially so where such judgment creditors are entitled to realising their foreign judgments.

Legal certainty and predictability cannot be driven by a purely circumstantial application of legal principles or consideration of legal issues. But it is also true that the law should not stand still. In this regard, it is instructive that Nigeria and South Africa have areas of possible legal convergence even though they operate considerably different legal cultures. However, the domestic jurisprudence of their different legal cultures does not undermine their common perceptions of fairness and the need to enforce foreign judgments. What is lacking considerably is the right attitude to ensure that the laws already in existence are interpreted progressively and purposively. This requires a robust institutional approach that is driven by the courts. Of course, clear and certain statutory laws should be in place to promote the free movement of foreign judgments. However, legal comparative analysis concerning Nigeria and South Africa demonstrates that the use of statutory laws does not necessarily guarantee legal certainty. The relative success of South Africa in enforcing foreign judgments has been driven by the courts considering the common law. Statutory law has been extended to only one African country. Any foreign legal instrument or convention (at the global or regional level) cannot function effectively without courts that are inclined to recognise and enforce foreign judgments. For example, article 10 of the 2019 Judgments Convention provides that the court addressed may refuse the recognition or enforcement of a foreign judgment if the damages do not actually

compensate a judgment debtor for actual loss suffered. The role of the courts is critical to the success of such legal provisions.

The possibility of African countries such as Nigeria (that are not members of the Hague Conference) ratifying the 2019 Convention cannot be discounted. There is a growing trend of countries signing up to Hague Conventions even though they are not members of the Conference. However, both African and non-African countries require robust legal and institutional frameworks that will support the free movement of foreign judgments. Such legal frameworks should be anchored to an appropriate paradigm shift where necessary.

A strange case of recognition of foreign ecclesiastical decisions in property matters

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A first instance court in
Barbastro (Aragón) has ruled
that a great number of valuable works of art presently on display at the museum of the Catholic diocese of Lleida (Catalonia) are the property of parishes of the diocese of Barbastro-Monzón and must be immediately returned. In its reasoning, the court has given a lot of weight to the fact that, in the decades long dispute between the two Spanish ecclesiastical entities, the diocese of Lleida had agreed to comply with a 2007 ruling of the Vatican's Supreme Tribunal of the Apostolic Signatura, the highest administrative court in the Catholic Church, whose decisions may only be overturned by the Pope himself. This case does not only rise the issue of the recognition of "foreign" ecclesiastical decisions or, alternatively, their relevance for state courts but also how indistinguishable is the science of private international law from the study of legal pluralism, i.e. the interaction of various legal systems over

the same territory, subjects and subject-matters.

Since the middle ages, a small stripe of land in the Spanish region of Aragón (*La Franja de Aragón*) was under the religious jurisdiction of the bishop of Lleida. Article IX of the 1953 concordat between Spain and the Holy See already manifested the intention of both parties to the treaty to revise the existing territorial ecclesiastical constituencies to avoid dioceses which did not correspond to existing state provinces. In 1995, following a decision of the Spanish bishops' conference, the Holy See decided to transfer all the parishes in *La Franja* to the diocese of Barbastro. Further to this reassignment, the diocese of Barbastro requested that all the works of art which were on display at the diocesan museum of Lleida be returned to the parishes of *La Franja*, to which they allegedly belonged.

At the beginning of the 20th century, those works of art had been taken to Lleida from the abovementioned parishes, partly due to their state of decay. The basic legal question here was whether the long deceased bishop of Lleida, who had brokered the deal, had *bought* those works of art a century ago or whether they were only *on deposit* at the Catalan diocesan museum.

The return of those pieces of art has been a matter of regional – or national – pride for more than twenty five years. For many, this basically ecclesiastical dispute over religious property must be put in the context of recent nationalist aspirations of the Catalan government because many inhabitants of *La Franja* speak Catalan and this territory is sometimes perceived to be part of Catalonia in much the same way as nationalists refer to other territories in Spain, France or Italy as *països catalans*. What began as a bitter dispute among bishops has ended as a much bitter dispute between neighbouring regions after their autonomous governments espoused the respective claims, including street demonstrations and endless litigation before Church tribunals and state courts, both civil and administrative. The court records by now have more than 30.000

pages.

The dispute should have ended in 2007 when the Supreme Tribunal of the Apostolic Signatura heard the last possible ecclesiastical appeal against previous rulings of lower canon law courts. The text of this decisions is, of course, in Latin. Thus, the Vatican court ordered the immediate return of the art pieces. Further to this decision and probably compelled by it, the two dioceses signed an agreement in 2008, where the Catalan diocese acknowledged that the legitimate owners of the works of art were the abovementioned parishes of Aragón. Soon afterwards, however, the Lleida bishop went back on his word, apparently when more than 300 letters from the beginning of the 20th century resurfaced, allegedly showing that amounts of money had been paid by the former bishop of Lleida to the parishes of *La Franja*, following the removal of the art pieces to the diocesan museum of Lleida. This money was allegedly the price paid for them, so the Catalan diocese owned them.

The diocese of Barbastro nevertheless sought to have the 2007 Vatican decision recognised but, in 2010, a Spanish court ruled that the only ecclesiastical decisions which could be recognised and enforced in Spain under the new 1979 concordat were those concerning the nullity of marriages (pp. 6-8). The diocese of Barbastro and the Spanish prosecutor present at the proceedings understood that, nevertheless, the 2007 decision may be recognised under those Spanish domestic law provisions for the recognition of foreign court decisions in the absence of a treaty. The "country" of origin of the 2007 decision was, of course, the Holy See.

The Spanish court did refer to the Holy See as a subject of international law at the level of states. Furthermore, the Catholic Church's jurisdiction and autonomy within the Spanish territory and over Spanish Catholics was recognised by the Spanish state by means of an international treaty (i.e. the concordat). Part of this autonomy was – in the eyes of the court – the jurisdiction of ecclesiastical tribunals in religious property matters. Ecclesiastical tribunals had therefore jurisdiction to adjudicate in property disputes and to enforce the ensuing decisions

internally. Such jurisdiction was acknowledged and respected by the Spanish state, which should not interfere with it and, therefore, an ecclesiastical entity could not request state courts to enforce ecclesiastical decisions because this would represent such an act of interference. Ecclesiastical entities may alternatively bring their property claims before Spanish state courts in the first place, which have in the past decided similar cases applying canon law but, if the dispute had been heard and decided by a Church tribunal, state courts had to remain aloof.

However, last week, the same court which in 2010 had refused to recognise the 2007 Vatican decision has now ruled in favour of the return of the works of art to the parishes of Aragón. The Barbastro court explains (p. 17) that the ecclesiastical rulings were not enough in themselves, as evidence of the property rights of the Aragonese parishes. However, such rulings may in fact be evidence of the testimony provided by the parties to the dispute. Additionally, the settlement agreement made by the two dioceses, further to the Vatican ruling of 2007, should indeed be taken as an admission by the diocese of Lleida that the works of art belong in Aragón. Thus, indirectly, the Vatican decision was being respected.

This use made of a "foreign" ecclesiastical court ruling presents some similarities to the theory of vested rights and estoppel *per res iudicattam* in a common law context, whereby foreign court decisions may not be recognised as such but their content may be evidence of a new cause of action in new proceedings commenced in the country where recognition is sought. Even though the Spanish court in 2010 and 2019 was equally unwilling to recognise the effects of the ecclesiastical decision because it had been issued by an ecclesiastical tribunal whose autonomy and jurisdiction would be jeopardised if the Spanish court enforced its contents, the first instance court of Barbastro was now in a position to give a lot of weight at least to the declarations that the parties had made during the proceedings at the Vatican, as well as to the settlement agreement that the Vatican decision had brought about.

The Spanish court also made direct use of canon law as evidence of property rights when it found that, for the transfer of ecclesiastical property to have been valid, a special permit

from the Holy See would have been needed, which was never sought nor obtained. That

Spanish state courts apply canon law is relatively common in, for instance, employment cases – as a way of demonstrating that the relationship between a priest and a bishop is not of an employment nature – or in clergy sex abuse litigation – in order to demonstrate the degree of organizational or supervisory authority of bishops over priests and parishes.