DONE! An important day for global justice and the Hague Conference on Private International Law

Posted for the Permanent Bureau of the Hague Conference on Private International Law (HCCH)

Today, the delegates of the 22nd Diplomatic Session of the HCCH signed the Final Act of the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters – the birth of new treaty and an important day for global justice as well as for the HCCH.

The signing of the Final Act took place during a ceremony in the Great Hall of Justice in the Peace Palace in the presence of the Minister of Foreign Affairs of the Kingdom of the Netherlands, Mr Stef Blok.

The Minister emphasised that the new Convention: "enhances the legal certainty and predictability that is so important in international legal matters…".

This new Convention will be essential to reducing transactional and litigation costs in cross-border dealings and to promoting international access to justice. It will increase certainty and predictability, promote the better management of transaction and litigation risks, and shorten timeframes for the recognition and enforcement of a judgement in other jurisdictions, providing better, more effective, and cheaper justice for individuals and businesses alike. A true gamechanger in international dispute resolution.

The Secretary General of the HCCH, Dr Christophe Bernasconi, stressed that the 2019 Judgments Convention fills an important gap in private international law. He also reminded delegates that with the signing of the Final Act, the work of promoting the 2019 Judgments Convention has only just begun. Professor Paul Vlas, President of the 22nd Diplomatic Session, echoed this sentiment and reiterated that the fast, wide and effective uptake of the Convention by the international community is its next milestone.

After the signing of the Final Act, Uruguay signed as first State the new 2019 Judgments Convention.

The text of the 2019 Judgments Convention, the HCCH's 40th global instrument, will be available shortly on www.hcch.net.

A new HCCH Convention … almost here.

Posted for the Permanent Bureau of the Hague Conference on Private International Law:

Today, the HCCH finalised the text for a new multilateral treaty: the 2019 HCCH Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

The 2019 HCCH Judgments Convention will be a single global framework, enabling the free circulation of judgments in civil or commercial matters across borders. It will be essential to reducing the transactional and litigation costs in cross-border dealings and to promoting international access to justice. It will provide a legal regime that further increases certainty and predictability in cross-border dealings, promotes the better management of transaction and litigation risks, and which shortens timeframes for the recognition and enforcement of a judgement in other jurisdictions.

The 2019 HCCH Judgments Convention will provide better, more effective, and cheaper justice for individuals and businesses alike – a gamechanger in international dispute resolution.

The Final Act will be signed during a ceremony which will take place tomorrow, 2 July 2019, in the Great Hall of Justice in the Peace Palace.

Follow the HCCH on this journey with #2019HCCHDS and #2019HCCHJudgments

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The thing that should not be: European Enforcement Order bypassing acta jure imperii

In a dispute between two Cypriot citizens and the Republic of Turkey concerning the enforcement of a European Enforcement Order issued by a Cypriot court, the Thessaloniki CoA was confronted with the question, whether the refusal of the Thessaloniki Land Registry to register a writ of control against property of the Turkish State located in Thessaloniki was in line with the EEO Regulation.

I. THE FACTS

The dispute began in 2013, when two Cypriot citizens filed a claim for damages against the Republic of Turkey before the Nicosia Disctrict Court. The request concerned compensation for deprivation of enjoyment of their property since July 1974 in Kyrenia, a city occupied by the Turkish military forces during the 1974 invasion on the island. The Kyrenia District Court **(***Eparchiakó Dikastírio Kerýneias*), which operates since July 1974 in Nicosia, issued in May 2014 its ruling, granting damages to the claimants in the altitude of 9 million €. Almost a year later, the latter requested the same court to issue a certificate of European Enforcement Order. The application was granted. Within the same year, the

claimants filed an application before the Athens Court of first Instance for the recognition and enforcement of the Cypriot judgment. Prima facie it seems to be a useless step, however there was a rationale behind it; I will come back to the matter later on. The Athens court granted exequatur (Athens CFI 2407/2015, unreported).

Following almost a year of inactivity, the claimants decided to proceed to the execution of their title by attaching property of the Turkish State in Thessaloniki. Pursuant to domestic rules, the enforcement agent serves the distraint order to the debtor; afterwards, (s)he requests the order to be registered at the territorially competent land registry. Both actions are imperative by law. At this point, the chief officer of the land registry refused to proceed to registration, invoking Article 923 Greek Code of Civil Procedure (CCP) which reads as follows: *Compulsory enforcement against a foreign State may not take place without a prior leave of the Minister of Justice*. The claimants challenged the registrar's refusal by filing an application pursuant to Article 791 CCP, which aims at the obligation of the registrar to proceed to registration by virtue of a court order. The Thessaloniki 1. Instance court dismissed the application (Thessaloniki CFI 8363/2017, unreported). The claimants appealed.

II. THE RULING

The Thessaloniki CoA dismissed the appeal, confirming the first instance ruling in its entirety. It began from the right of the land registrar to a review of legality, thus the right to examine the request beyond possible formality gaps. It then referred to Articles 6.1 ECHR, 1 of the 1. Additional Protocol to the ECHR, and Articles 2.3 (c) and 14 of the 1966 International Covenant on Civil and Political Rights, in order to support the right to enforcement against a foreign State. The appellate court continued by analyzing Article 923 CCP and its importance in the domestic legal order. It emphasized the objective of the provision, i.e. to estimate potential repercussions and to avoid possible tensions with the foreign State in case of execution. The court founded its analysis on two ECHR rulings, i.e. the judgments in the *Kalogeropoulou and* Others *v. Greece and* Germany (59021/00), and *Vlastos v. Greece* (28803/07) cases, adding two rulings of the Full Bench of the Greek Supreme Court from 2002. Finally, the court concluded that there has not been a violation of the EEO Regulation, stating that the process under Article

923 CCP is not to be considered as part of *intermediate proceedings needed to be brought in the Member State of enforcement prior ro recognition and enforcement*; hence, the rule in Article 1 of the EEO Regulation is not violated.

III. COMMENTS

In general terms, one has to agree with the outcome of the case. Nevertheless, there are a number of issues to be underlined, so that the reader gets the full picture of the dispute.

- The claim before the Kyrenia District Court bears some similarities with the ruling of the ECJ in the *Apostolidis/Orams* case: The Court decided then that: *The suspension of the application of the acquis communautaire in those areas of the Republic of Cyprus in which the Government of that Member State does not exercise effective control, provided for by Article 1(1) of Protocol No 10 on Cyprus to the Act concerning the conditions of accession [to the European Union] … does not preclude the application of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to a judgment which is given by a Cypriot court sitting in the area of the island effectively controlled by the Cypriot Government, but concerns land situated in areas not so controlled.* In both cases, the property under dispute was located in the Kyrenia district. The difference lies in the defendants: Unlike the *Orams* case, the respondent here was a foreign State. Article 4 Brussels I Regulation grants the right to claimants to avail themselves of domestic rules of jurisdiction, which is presumably what the claimants did in the case at hand.
- The issue of the EEO certificate seems to run contrary to Article 2.1 EEO Regulation. The matter was not examined by the Thessaloniki courts, which focused on the subject matter, i.e. the refusal of the land registrar on the grounds of Article 923 CCP.
- The exequatur proceedings in Greece seem to be superfluous, given that a EEO may be enforced without the need for a declaration of enforceability (Article 5 EEO Regulation). One reason which possibly triggered additional exequatur proceedings might have been the fact that, unlike the EEO Regulation, the acta iure imperii clause was not included in the

Brussels I Regulation (see Article 1.1). Still, the matter was examined in the *Lechouritou* case even before the entry into force of the Brussels I bis Regulation. Hence, it would not have made a difference in the first place.
- The appellate court focused on the compatibility of Article 923 CCP with the EEO Regulation. However, the claimants carried out the execution in Greece on the grounds of the Cypriot judgment, not the EEO certificate.

Finally, two more points which should not be left without a comment.

- Throughout the proceedings, the Turkish State demonstrated buddhistic apathy. There was not a single remedy brought forward, neither in Cyprus nor in Greece. It was a victory in absentia. A reason for this stance was surely the following: The property of the Turkish state in Thessaloniki hosts one of its General Consulates in Greece. This is not just another Turkish Consulate around the globe: It is built upon the place where the father of the Turkish Republic (Mustafa Kemal Atatürk) was born. It also includes the house where he was raised.
- The Thessaloniki CoA emphasized that a potential refusal of the Greek Minister of Justice to grant leave for execution would not harm the essence of the Cypriot judgment: Enforceability and res iudicata remain untouched; hence, the claimants may seek enforcement of the judgment in the foreign country, i.e. Turkey… The argument was 'borrowed' by the ruling of the ECJ in the *Krombach* case (which is cited in the text of the decision); therefore, it is totally alien to the case at hand. Even if the claimants were to find any assets of the Turkish Republic in the EU, like the Villa Vigoni in Italy, the ruling of the ICJ in the case *Germany v. Italy: Greece intervening)* would serve as a tool to grant jurisdictional immunity to the Turkish state.

IV. CONCLUSION

Article 923 CCP is the first line of defence for foreign states in Greece. In the unlikely event that the Greek Minister of Justice grants leave for execution, a judgment creditor will be confronted with a second hurdle, if (s)he's aiming at the seizure of property similar to the case discussed here: the maxim ne impediatur

legatio (ad hoc see Greek Supreme Court, 29 November 2017, decision no. 1937/2017, reported in English here). Hence, the chances to capitalize on the enforceable title are close to zero.

Rethinking COMI in the Age of Multinational, Digital and Glocal Enterprises

Written by Renato Mangano, Professor of Commercial Law at the University of Palermo (Italy).

Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings failed to provide a definition of COMI (centre of main interests), either in Article 2, which was specifically devoted to definitions, or in Article 3, which regulated international jurisdiction.

For its part, Article 3(1) merely provided that "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 3(1) further stipulated that "in the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

Recital 13 specified that "the 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties", but different views have been expressed as regards, in particular, the relation between the concept of 'administration' and the concept of 'ascertainability by third parties'.

As a result, Article 3 of Regulation No 1346/2000 gave rise a number of disputes and was the object of several requests to the European Court of Justice (ECJ) for preliminary rulings, with *Eurofood* being the first case in point.

Eventually, Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings (Recast) laid down new rules on COMI — a definition of COMI was introduced; the presumption aiming at better ascertaining COMI was extended to individuals as well; the judicial rule of thumb that evaluated negatively a debtor who had moved his/her/its COMI shortly before the request to open insolvency proceedings was incorporated into a mandatory rule; and eleven recitals, aiming at making this framework clearer and more easily applicable, were introduced (Recitals 25 to 34, and 53).

However, one may doubt whether these efforts have succeeded. The many disputes involving NIKI Luftfahrt GmbH are illuminating. NIKI was an insolvent company under Austrian law incorporated in Austria. However, NIKI was also a subsidiary of the Air Berlin PLC & Co. Luftverkehrs KG, better known as Air Berlin. This is a company under German law incorporated in Germany.

Therefore, the crucial question was: which Member State had jurisdiction to open main insolvency proceedings against NIKI? Did Austria or Germany have jurisdiction? The question was clear-cut but the answers to this question were various and contradictory. The NIKI dispute has at long last been settled, but the dynamic of the NIKI case is intriguing because it demonstrates that the new COMI rules still give rise to doubts as regards both the relation between the two elements constituting the COMI definition (*i.e.*between "the place where the debtor conducts the administration of its interests on a regular basis" and the place "which is ascertainable by third parties"), and the relation between the definition of COMI and the presumptions that are provided to make it easier to apply this definition.

Moreover, some legal counsels maintain that the new COMI rules could facilitate fraudulent COMI relocations. A company could move its registered office to another Member State which is less favourable towards its creditors; make the transfer public,*e.g.*by using the new address in correspondence; await the expiration of the three-month period laid down by the time limit to the presumption; and apply for a fraudulent, but a 'legally authorized' opening of insolvency proceedings in the new jurisdiction.

Mutatis mutandis, a similar idea is proposed as regards individuals. To our knowledge there is no evidence of cases where these proposals have facilitated fraudulent COMI relocations. However, the proposal to circumvent the new COMI

rules deserves attention because it leverages some prescriptions which were conceived precisely to prevent a debtor from circumventing the COMI rules.

The problems with the new COMI rules do not end here, as I have demonstrated in a recent paper titled *The Puzzle of the New European COMI Rules: Rethinking COMI in the Age of Multinational, Digital and Glocal Enterprises*.

In fact, sometimes the investigation about 'ascertainability by third parties' could prove problematic. The more complex a business organization is, the more often this situation arises. This is because the more complex a business organization is, the easier it becomes for a firm to be split into many 'units' (the term is intentionally non-technical) which, on the one hand, are located in different countries and, on the other hand, are in contact with different groups of creditors: case by case, these groups of creditors may have differing perceptions as to where the firm is located.

Undoubtedly, problems of this nature may arise when insolvency occurs within a group of companies – Recital 53 of Regulation 2015/848 allows one single court to open one single set of insolvency proceedings concerning several companies belonging to the same group. But the investigation about 'ascertainability by third parties' could prove equally challenging when a firm conducts its relationships with suppliers and customers through digital networks, and even more so if this firm runs a business which is glocal, in the sense that it is characterized by both global and local considerations. The domain name ".com" gives no indication as to where a business is located and, even where the domain name uses a country code such as ".de" or ".fr", there is no guarantee that the firm is established in that country, since it is relatively common practice to keep web servers geographically separated from the actual location of the enterprise.

It is highly probable that these shortcomings will result again in requests for preliminary rulings; it is also highly desirable that the ECJ provide an interpretation of the COMI rules which would prove crucial in resolving those specific issues that gave rise to such requests.

Arguably, this situation is less serious as regards the flaw affecting the rules which lay down the time limits to the applicability of the COMI presumptions – this flaw could probably be fixed by means of interpretation. However – as regards the flaw concerning the prerequisite of 'ascertainability by third parties'–

it is highly improbable that the ECJ will be able to solve this problem at the roots and, consequently, prevent subsequent litigation.

Even the most enthusiastic supporters of ECJ activism must admit that the European Court is not allowed to interpret the new COMI rules in a way that proves to be against both the letter and the spirit of the legal framework, for this power belongs to the regulator alone. To be more precise, this statement implies that the ECJ will be unable either to rule that the prerequisite 'ascertainability by third parties' would be unnecessary whenever this presence was de facto incompatible with that of 'administration on a regular basis', or to rule that the application of the COMI presumptions might disregard the COMI definition. Both rulings would infringe not only the letter of the new COMI rules but also the clearly traceable intention of the regulator.

Further, the ECJ might certainly rule that the COMI of a company X is located in a country Y by putting the COMI of that company into a system of relations with some elements which are considered as relevant to the case. However, since ascertainment of the COMI is case-sensitive and since the one-to-one relation between these factors and the debtor's exact location cannot be established in a universal way, this ruling will not provide the interpreter with a general criterion that would hold good for any future cases.

US Supreme Court has granted certiorari in a case concerning the determination of habitual residence under the Child Abduction Convention: Monasky v.

Taglieri

On 10 June 2019, the US Supreme Court granted certiorari in the case of Monasky v. Taglieri. By doing so, the US Supreme Court will finally resolve the split in the US Circuits regarding the standard of review and the best approach to follow in determining the habitual residence of a child under the *HCCH Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Child Abduction Convention).

The questions presented are:

1. Whether a district court's determination of habitual residence under the Hague Convention should be reviewed de novo, as seven circuits have held, under a deferential version of de novo review, as the First Circuit has held, or under clear-error review, as the Fourth and Sixth Circuits have held.
2. Where an infant is too young to acclimate to her surroundings, whether a subjective agreement between the infant's parents is necessary to establish her habitual residence under the Hague Convention.

Regarding the first question, it is important to note that findings of facts are reviewed for clear error and issues of law are reviewed de novo. This is of crucial importance as this would determine the extent to which the decision of the US district court can be reviewed by the US court of appeals, as these standards confer greater deference for findings of fact. The question then arises as to whether the determination of habitual residence is a mixed question of law and fact or only a question of fact.

The second question deals with the case of newborn or young infants and whether a subjective agreement between the parents is necessary to establish a habitual residence under the Child Abduction Convention. Despite its simplicity, the Court may also take the opportunity to address the current split in the US circuits regarding the extent to which courts can rely on the parents' last shared intent or the child's acclimatization or both in determining the habitual residence of a child.

This is well summed up by the Seventh Circuit Court of Appeals in *Redmond v. Redmond* (2013): "In substance, all circuits – ours included – consider *both*

parental intent *and* the child's acclimatization, differing only in their emphasis. The crux of disagreement is how much weight to give one or the other, especially where the evidence conflicts."

In my personal opinion, the hybrid approach, that is relying on *both* shared parental intent and the child's acclimatization (without placing more emphasis on one or the other, except perhaps for the case of newborns or very young infants), as well as looking to all other relevant considerations arising from the facts of the particular case, is the right approach to follow. This would avoid that parents create artificial jurisdictional links in a State and thus engage in forum shopping. The flip side of this argument is that this would necessarily mean less party autonomy in these matters. By following this approach, the United States would align itself to case law in Canada (*Balev* case – Canadian Supreme Court, see our previous post here), the European Union (*Mercredi v. Chaffe*, confirmed in *O.L.v. P.Q.*) and the United Kingdom (*A. v. A. (Children: Habitual Residence)*).

To conclude with the words of the *Balev* case: "[…] the hybrid approach to habitual residence best conforms to the text, structure, and purpose of the *Hague Convention*. There is no reason to decline to follow the dominant trend in *Hague Convention* jurisprudence. The hybrid approach should be adopted in Canada".

Singapore Court of Appeal Affirms Party Autonomy in Choice of Court Agreements

Professor Yeo Tiong Min, SC (honoris causa), Yong Pung How Professor of Law at Singapore Management University, has kindly provided the following report:

"The Singapore Court of Appeal has recently affirmed the significance of giving effect to party autonomy in the enforcement of choice of court agreements under the common law in three important decisions handed down in quick succession, on different aspects of the matter: the legal effect of exclusive choice of court

agreements, the interpretation and effect of non-exclusive choice of court agreements, and the effect of exclusive choice of court agreements on anti-suit injunctions.

In *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65, proceedings were commenced in Singapore in respect of an alleged breach of a commercial sale contract containing an exclusive choice of English court agreement. The agreement was dated before the Hague Convention on Choice of Court Agreements took effect in English law, so the Convention was not engaged. Like many other common law countries, the Singapore courts would give effect to the agreement unless strong cause can be demonstrated by the party seeking to breach the agreement. A complication arose because there had been four previous decisions of the Court of Appeal in the shipping context where proceedings had been allowed to continue in Singapore in the face of an exclusive choice of foreign court agreement because the court had found that the defence was devoid of merits. The claimant's argument that based on these decisions the Singapore court should hear the case because there was no valid defence to its claim succeeded before the High Court.

Sitting as a coram of five on the basis of the significance of the issue, the Court of Appeal unanimously reversed the decision. It decided that the merits of the case were not a relevant consideration at the stage where the court was determining whether to exercise its jurisdiction, and departed from its previous decisions to the extent that they stood to the contrary. While affirming the continuing validity of the strong cause test, the court placed considerable emphasis on the element of contractual enforcement. Thus, factors that were reasonably foreseeable at the time of contracting would generally carry little or no weight. In particular, the court recast one of the traditional factors in the strong cause test, "whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages", as an inquiry into whether the party seeking to enforce the choice of court agreement was acting abusively in the context of cross-border litigation. In the view of the court, the genuine desire for trial in the contractual forum has been adequately expressed in the choice of court agreement itself, and it is legitimate to seek the procedural advantages in the contractual forum. The court considered that strong cause would generally need to be established by either proof that the party seeking trial in the contractual forum was acting in an abusive manner (which is said to be a very high threshold), or that the party

evading the contractual forum will be denied justice in that forum (ignoring the foreseeable factors), for example if war had broken out in that jurisdiction.

The court left open the question whether the same approach would be taken if the choice of court agreement had not been freely negotiated, taking cognisance of situations, especially in the shipping context, where contracting parties may find themselves bound by clauses the contents of which they have had no prior notice. The court expressed the tentative view that as a matter of consistency, the same approach should be adopted.

In *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] SGCA 11, the Court of Appeal was faced with an unusual clause: "This Agreement shall be governed by the laws of Singapore/or People's Republic of China and each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People's Republic of China." The High Court found the choice of law agreement to be meaningless as a purported floating choice of law, and that the choice of court agreement was invalid as it could not be severed from the choice of law agreement. The court then applied the natural forum test and declined to exercise jurisdiction on the basis that China was the clearly more appropriate forum for the dispute. On appeal, the Court of Appeal agreed with the finding that the choice of law agreement was invalid, but held that the choice of court agreement could be severed from the choice of law agreement.

In a prior decision, the Court of Appeal in *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] SGCA 16, had considered a non-exclusive choice of court clause to be relevant at the very least as a factor in the natural forum test, and that the weight to be accorded to the factor depended on the circumstances of each case. It also considered that there was another possible approach to such clauses based on contractual enforcement principles, which it did not fully endorse as the parties had not raised arguments based on contractual intentions.

In *Shanghai Turbo*, the Court of Appeal had to face this issue squarely, and affirmed that if there is a contractual promise in the non-exclusive choice of court clause, the party seeking to breach the agreement had to demonstrate strong cause why it should be allowed to do so. The court went on to hold that, generally, where Singapore contract law is applicable, the "most commercially sensible and reasonable" construction of an agreement to submit, albeit non-exclusively, to a court is that the parties have agreed not to object to the exercise of jurisdiction by

the chosen court. This inference does not depend on there being an independent basis for the chosen court to assume jurisdiction (eg, by way of choice of law agreement), or on the number of courts named in the clause. Conversely, there is generally no inference that the parties have agreed that the chosen court is the most appropriate forum to hear the case.

Thus, practically, where there is a non-exclusive choice of Singapore court clause, in general the Singapore will hear the case unless strong cause (the same test elucidated in *Vinmar*) is demonstrated by the party objecting to the exercise of jurisdiction by the Singapore court, but where there is a non-exclusive choice of foreign court clause, this is merely a factor in the natural forum test, as the party seeking trial in Singapore is not in breach of any agreement. On the facts, the court held that jurisdiction should be exercised because the defendant could not demonstrate strong cause.

It is to be noted these are canons of construction under Singapore law. Under Singapore private international law, the choice of court agreement is governed by the law that governs the main contract unless the parties have indicated otherwise. However, Singapore law will apply in default of proof of foreign law. Moreover, canons of construction may be displaced by evidence of contrary intention. The court left open the question – expressing no tentative view – whether the same approach would be taken for contracts which are not freely negotiated. However, as this is a question of interpretation, the context of negotiation could be a relevant indication of the true meaning of contractual terms.

The third case is on arbitration, but the Court of Appeal also made comments relevant to choice of court agreements. In *Sun Travels & Tours Pvt Ltd v Hilton International (Maldives) Pvt Ltd* [2019] SGCA 10, an injunction was sought to prevent reliance on a foreign judgment obtained in proceedings commenced in breach of an arbitration agreement. The court correctly identified the remedy sought as an anti-enforcement injunction, but nevertheless also discussed the anti-suit injunction because the case was argued on the basis that the injunction sought followed from an entitlement to an anti-suit injunction. The court clarified that an anti-suit injunction would generally be granted to enforce a choice of court agreement unless strong cause is demonstrated why it should be denied, and that there is no need to demonstrate vexatious or oppressive conduct independently. Thus, the law in this area is the mirror image of *Vinmar*. This case

is particularly significant for Singapore because statements in the previous Court of Appeal decision in *John Reginald Stott Kirkham v Trane US Inc* [2009] SGCA 32 could be read as suggesting that the breach of contract is merely one factor to consider in determining whether the conduct of foreign proceedings abroad was vexatious.

These common law developments are highly significant in bringing greater consistency with developments elsewhere where party autonomy has come to assume tremendous significance. One is the Hague Convention on Choice of Court Agreements which took effect in Singapore law on 1 October 2016. Two critical aspects of this Convention are that a choice of the court of a Contracting State is deemed to be exclusive unless there are express provisions to the contrary, and that the chosen court should assume jurisdiction unless the choice of court clause is invalid. The second is the Singapore International Commercial Court (SICC) established in 2015. Where there is a choice (whether exclusive or not) of SICC clause, the SICC will assume jurisdiction unless the case is not an appropriate one having regard to the court's character as an international commercial court. In addition, under the Rules of Court, a choice of the Singapore High Court made on or after 1 October 2016 is presumed to include the SICC unless expressly indicated otherwise. In both situations, the common law is not relevant, and to that extent, the practical effects of *Vinmar* and *Shanghai Turbo* will be limited. However, the extent to which anti-suit injunctions will be consistent with the Hague Convention on Choice of Court Agreements remains an open question, and it is certainly an area for watch for further developments."

A more detailed discussion of the cases mentioned above can be found at: https://cebcla.smu.edu.sg/sites/cebcla.smu.edu.sg/files/Paper2019.pdf

Hotel contracts and jurisdiction clauses before Greek courts

Dr Haris P. Meidanis – FCIArb, Meidanis, Seremetakis & Associates Law Firm, Athens, Greece

A recent judgment of the Mytilene Court of First Instance raised a very topical issue, related to the acceptance of international jurisdiction by Greek Courts in the case of hotel contracts, nothwistanding the prorogation clause in favour of the court of some other member state (in this case the courts of the Netherlands).

The guarantee contracts

The position of the court was that such a contract (a so-called guarantee) that essentially guarantees the payment of a certain number of hotel rooms by the tour operator, irrespective of the actual use of the reserved rooms, can be characterised as a lease contract for immovable property under the meaning of art. 24 of the Brussels Ia Regulation. The underlying idea is that such a contract is predominantly a lease contract regarding immovable property and the services aspect that coexists with the lease character of the same contract is diluted into the latter. Under this line of arguments, the court found that, nothwistanding the prorogation clause in favour of the courts of the Netherlands, the court of the place of the immovable property (Greece and in particular Mytilene) should be the only competent to hear the case (art. 24 of Brussels Ia Regulation).

The allotment contracts

Interestingly, similar judgments of other courts of touristic destinations in Greece (Dodecanese islands, like Kos and Rhodes or of the Ionian island of Corfu) have issued similar judgments in the past, also in relation to the so-called allotment hotel contracts. Under them, the tour operator reserves rooms spanning from a minimum to a maximum pre-agreed number and agrees to use as many of them as it can and at the same time to lift by an agreed d-day, the reservation for the ones

that are not to be used. Therefore, under the allotment contract, the reservation is not "guaranteed" for the totality of the rooms in question, as is the case with the "guarantee" contract. This point is generally downplayed by Greek courts who seem to be in favour of the application of art. 24 par. 1 of the Brussels I Regulation in every hotel contract, by emphasising on the fact that the primary character of such contracts is the lease.

Critique

This approach, although it does generally make sense, it also merits some qualification. To start with, the prorogation clause is a clause to be preserved by the parties. As is well known, one of the two ways to depart from such a clause in the context of Brussels Ia Regulation (the other is the tacit prorogation), is the case of the so-called exclusive jurisdiction of art. 24, the case of immovable property being one of them: This is the case among others "in proceedings which have as their object …tenancies of immovable property". As explained, under Greek case law, it is admitted that this is the case and such contracts are predominantly lease of property contracts. Essentially, the question of pinpointing the legal nature of the guarantee and the allotment hotel contracts, is one of characterisation of private international law. It is generally submitted that characterisation should not be made *lege fori* and it should take into account the meaning of the relevant juridical categories in a wider/ international environment. This been said, it looks that Greek courts tend to do the characterisation *lege fori* in relation to hotel contracts, presumably in order to feel more comfortable with an argumentation made in the context of Greek law only. To be noted that this approach in relation to art. 24 of the Brussels Ia Regulation has a strong support also by the doctrine, which at least partly, supports the *lege situs* interpretation,[1] which in our case coincides with the *lex fori*. Nevertheless, the suggestion of approaching the matter without a strict *lege situs* or *lege fori* approach, that is under the so-called autonomous interpretation, widely used under the various EU PIL Regulations, should not be underplayed. The Hacker case (C-280/90) is also relevant, to the extent that it excludes the application of art. 24 par. 1 in the case of package holidays. Therefore, the predominantly lease dimension of the hotel contracts under Greek law, should not always be taken for granted. The main question is whether the above described hotel contracts are contracts for lease of property under the above points. As a matter of fact, in

hotel contracts, the counter signatory of the hotel owner is not the actual user of the property, but a tour operator who then “sells” a package to the end user. On the other hand, from the hotel owner point of view, the contract is predominantly a lease contract. Another critical point is that in real life, the imbalance of powers between a north European tour operator and a local 25 rooms family hotel can be enormous. Especially In the case that the tour operator simply reserves the totality of the hotel rooms and cancels the reservation without good cause, it puts the hotel owner in the extremely burdensome situation to have to file an action somewhere in Europe, usually in “unknown territory” and under generally uncomfortable conditions. If, therefore the totality of the hotel rooms (or almost the totality) is involved, it can be said that the lease dimension of the agreement should indeed always prevail, and this should generally be the case in guarantee hotel contracts. This should be so no matter if the autonomous or the *lege situs* characterisation is followed. This is not necessarily the case if a small number of the rooms of hotels are reserved or in the case of allotment. In the latter case, perhaps the reservation of the totality of the rooms should again direct us towards the application of art. 24 par. 1, but following a closer examination of the terms of the hotel agreement in order for us to be able to examine if *in casu* the lease dimension again prevails and if the cancellation of the agreement should end up to a damage to the owner, similar to the one it would suffer in the case of cancellation of a guarantee contract. In this context, the rest of the facts of the case, i.e percentage of the rooms in relation to overall number of rooms of the hotel in question, the degree of power imbalance of the parties, the rest of the services involved (see for example Pammer case C-585/08) cannot be ignored.

[1] De Lima Pinheiro, in Magnus/ Mankowski Brussels I Regulation 2nd ed. Seller 2012, art. 22 par. 25.

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.

Just published: "Towards a global Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters" by Hans van Loon, former Secretary General of the HCCH

Hans van Loon, former Secretary General of the Hague Conference on Private International Law (HCCH), has just published an article entitled "Towards a global Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters" in the *Collection of Papers of the Faculty of Law,* Niš*,* No 82, Year LVIII, 2019 (see pp. 15-36). The paper develops a lecture held at the Law Faculty.

The author has provided the following summary of his article (emphasis has been added):

The article traces the history of the "Judgments Project", and provides background on the current negotiations at the Hague Conference on Private International Law, which have resulted in the May 2018 draft Convention, and, it

is hoped, will very soon culminate in the adoption of a Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. To that end, a Diplomatic Session has been convoked at the Peace Palace in The Hague (the Netherlands) from 18 June to 2 July 2019.

The article starts by recalling the interaction between, on the one hand, the *1971 Hague Convention on the Recognition and Enforcement of Judgments in Civil and Commercial Matters* and *its Supplementary Protocol*, and, on the other, the *1968 Brussels Jurisdiction and Enforcement Convention* (now: Brussels I recast). The 1968 Brussels Convention drew inspiration both from the 1971 Hague Convention and its Protocol (excluding exorbitant grounds of jurisdiction) and the 1965 Hague Choice of Court Convention. Yet, it went beyond those instruments by (1) providing uniform rules on original jurisdiction; (2) enabling recognition and enforcement generally without review of the original grounds of jurisdiction; and (3) benefitting from a mechanism of uniform interpretation by the Court of Justice of the European Union (CJEU). The success of the Brussels Convention, however, contributed to a lack of interest in the 1971 Convention, which never came off the ground. Other reasons were the 1971 Convention's alleged discriminatory effect vis-à-vis companies and persons not domiciled in Europe and the issue of bilateralisation – the 1971 Convention required for its operation a supplementary agreement between any two Contracting States, an issue that has come up again in the current negotiations.

In 1992, having considered the possibility of bilateral negotiations with EEC Member States, the USA made a proposal to the Hague Conference for a "mixed" Convention. The idea was that this instrument would provide a list of permitted grounds of jurisdiction and a list of prohibited grounds of jurisdiction, while leaving a "grey area" that would allow Contracting States to establish additional grounds of original jurisdiction and provisions on recognition and enforcement under national law. With the "mixed" Convention idea as a start, negotiations took place between 1996-2001.They ultimately led, via a preliminary draft Convention, to an "Interim text" adopted at a diplomatic conference in 2001. The dynamics of those negotiations were very much determined by the transatlantic dimension, with different, and as it turned out, incompatible strategic objectives (the US being interested in securing recognition and enforcement of its judgments in Europe, and non-discrimination regarding direct grounds of jurisdiction for US-based companies and persons, and Europe, in urging the US to reduce the reach

of jurisdiction of its courts regarding Europe-based companies and persons). The resulting text left many issues unresolved, including: (1) (commercial) activity as a ground of jurisdiction (2) the use of the internet, including e-commerce, (3) the protection of weaker parties, in particular consumers and employees, (4) intellectual property (IP), (5) the issue of bilateralisation and (6) the relationship with the Brussels/Lugano texts. It was therefore decided to take a step back, and focus first, separately as with the 1965 Convention, on choice of court agreements.

The article then discusses how the 2005 Choice of Court Convention was able to avoid some of these six major issues, and how it dealt with the remaining ones. Importantly, the Choice of Court Convention found a solution for its relationship to the Brussels/Lugano texts (it also had a substantial impact on the Brussels I recast). In fact, the 2005 Convention provides an important source of inspiration for the 2018 draft, which can be seen, for example, in the definition of its substantive scope, and its provisions on recognition and enforcement, including of judgments awarding punitive damages. However, the coming negotiations are still faced with several of the aforementioned major issues, and some new ones.

Meanwhile, however, the dynamics of the negotiations have changed. Whereas in the past the transatlantic dimension was predominant, the current negotiations have taken on a much more global character, China and other (formerly) "emerging" States having become more actively involved. In some respects, this adds to the difficulty of reaching agreement (for instance regarding IP). On the other hand, the current negotiations are limited to recognition and enforcement only. Yet, indirectly, the difference in approach to judicial jurisdiction between the US – where this is a constitutional matter, with a focus on the relationship between the *defendant and the forum* (the article discusses recent developments in the case law of the US Supreme Court on international jurisdiction) – and most other States – where the focus is on the relationship between the *subject matter of the litigation and the forum* – has reappeared in the current negotiations.

The article discusses how this is reflected in the draft, in particular in art. 5, in its provisions on contracts, torts, the internet, intellectual property and consumers and employees.

It is noted, with some regret, that as a result, the torts jurisdiction provision is very limited, indeed even narrower than its predecessor in the 2001 Interim text.

It is hoped that the final text will make room for recognition and enforcement of judgments emanating from the court of the place where the injury arose, at least if the defendant could reasonably foresee that its conduct would give rise to the harm in that State. This would be important, for example, concerning civil judgments resulting from cross-border environmental litigation. Regarding IP, the May 2018 draft does not take a firm position, and it even leaves open the possibility of a complete exclusion. That would be a step back in comparison with the Choice of Court Convention, so hopefully it will be possible to avoid such a far-reaching result.

Finally, a number of other, including novel, features of the draft are highlighted. Some concern is expressed about the addition of "situations involving infringements of security or sovereignty of [the requested] State" as a ground of refusal of recognition and enforcement (art. 7 (1) (c)), because that may invite a review of the merits of the judgment, which is in principle, rightly, prohibited (art. 4(2)). Interesting novelties include a provision which gives the requested court a certain flexibility in dealing with judgments that are subject to review in the State of origin (art. 4 (4)); the exclusion of *forum non conveniens* at the stage of recognition and enforcement (art. 14 (2)), and a tentative provision dealing with "common courts", such as the future Unified Patent Court art. 4 (5).

The article concludes by expressing the hope that the Convention will avoid the complexity of its 1971 predecessor, notably by avoiding its bilateralisation system, or at least by drafting it in such a manner that it does not make the ratification unattractive or its application unduly difficult. In any event, the Convention will fulfill a long-felt need for a global multilateral framework for the recognition and enforcement of civil and commercial judgments, and thereby contribute to the global transnational legal order.

First Meeting of the Young Private

International Law Research Network

Maximilian Schulze, an assistant of Dr. Susanne Gössl, LL.M. (Tulane), University of Bonn, has kindly provided us with the following report.

On 5 April 2019, the first meeting of the newly established research network "Young Private International Law in Europe" took place at the University of Würzburg, Germany. The network intends to create a Europe-wide exchange at 'junior faculty' level (predoc/postdoc) in the context of various comparative Private International Law (PIL) projects. The first research project and meeting in Würzburg deal with the "Recognition/Acceptance of Legal Situations". This topic was selected in view of the recent series of decisions by the CJEU regarding international name law (see, e.g. CJEU C-148/02 – *Garcia Avello*) and, most recently, same-sex marriage (CJEU C-673/16 – *Coman*)) and a parallel discussion which evolved in the context of the case law of the ECtHR, in particular regarding the recognition of adoptions, same-sex marriages and surrogacy. In order to contribute to a pan-European understanding of 'acceptance' of legal situations related to a person's status in a cross-border context to enhance the free movement of EU citizens and protect their fundamental rights regarding private and family life, the aforementioned first project of the research network compares the reception and implementation of the CJEU and ECtHR case law in 16 EU Member States (Austria, Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Spain, and Sweden).

The meeting, organised by *Susanne Lilian Gössl*, Bonn, and *Martina Melcher*, Graz, comprised a public and a workshop session. The meeting was kindly supported by the German Research Foundation (Deutsche Forschungsgemeinschaft – DFG) as well as by the prior meeting of the German "Conference for Young PIL scholars" at the University of Würzburg.

The public session

Martina Melcher and *Susanne Lilian Gössl* opened the public session with an overview of the project and outlined the results of the comparative study. Martina

Melcher highlighted the aim of the project as an "academic offspring" for young scholars to facilitate their comparative law and PIL research interests by setting up a network for young scholars. Methodologically, the network selects a specific topic – in this project/meeting the "Recognition/Acceptance of Legal Situations" – on which participants first submitted national reports, which then led to a comprehensive comparative report and analysis, which will be finalized and published in 2020. Susanne Gössl further specified the network's approach on how the individual reports are to be composed. This is to take CJEU and ECtHR case law in all fields of the law where member states' awareness is high (e.g. name law, surrogacy and same-sex marriage) as a starting point and then look at the individual states' implementations, including in particular the recognition by judgments and by rules of PIL. As the network is not limited to international family law, future meetings and comparative reports will also deal with commercial law topics.

Marion Ho-Dac, Valenciennes, then set out the methodological approaches to recognition. She highlighted the increasing importance of cross-border continuity of status in view of the circulation of people and recent refugee movements. When looking at the Member States' approaches, she stressed two considerations one has to bear in mind: the legal technique of recognition and the underlying legal policy thereof. She then set of the three different approaches: traditional PIL methods, procedural recognition and alternative methods (e.g. uniform law on supranational level or a mutual recognition system at EU level). However, she concluded that none of these were perfect methods. In his responsio, *Tamás Szabados*, Budapest, doubted that legislators always have a clear methodology in mind. He exemplified this by the Hungarian PIL Act, in effect since 2018, in which no general theory of recognition is followed, although the responsible committee was aware of the recognition questions discussed.

Sarah den Haese, Gent, then referred to a 2014 academic proposal on the recognition of names that was not acted upon by the Commission and analysed its weaknesses which need addressing for a future proposal to be successful. Firstly, any proposal would require a harmonisation of conflict of laws rules. Secondly, she proposed recognition without a conflict of laws test and no control of the substantive law subject to a very narrow public policy exception only. *Tena Hoško*, Zagreb, responded by setting out the conflict rules implemented in Croatia. Although academic proposals had been submitted, the Croatian legislator

did not follow them but rather opted to copy the German conflicts rule (Art. 10 EGBGB). Although she exemplified certain weaknesses in this newly implemented approach (i.e. the issues of dual citizenship and renvoi), she concluded that the new rules are a huge step forward.

The workshop session

The public session was followed by a workshop session in which the preliminary results of the draft comparative report on "Recognition/Acceptance of Legal Situations" were discussed among the project participants and a few other interested parties. The workshop contained four parts, each initiated by a short introduction summarising the major findings and followed by an in-depth discussion among the participants.

In the first part, the general awareness was addressed. In her introduction, *Giulia Vallar*, Milan, pointed out an academic awareness in many Member States that a comprehensive overhaul of the rules of PIL is required. This awareness is also registered by the legislator, however mostly by countries that were involved in CJEU cases. She went on to set out the areas of law in which awareness for recognition is high (e.g. name law and same-sex marriages or partnerships). She concluded that based on their awareness of the issue, the analysed Member States can be subdivided into those involved in CJEU cases, those indirectly influenced by CJEU case law and those influenced by the ECtHR.

The second part, focusing to the legal methodology employed for recognition, was introduced by *Katarzyna Miksza*, Vilnius. She pointed out and illustrated the huge variety of methods of recognition detected by the draft comparative report by reference to national laws. In the subsequent discussion it was pointed out that it would be rather difficult to reconcile the different kinds of approaches to recognition.

Thirdly, the substantive requirements for recognition were discussed. In their presentation, *María Asunción Cebrián Salvat* and *Isabel Lorente Martínez*, Murcia, highlighted the (general) prohibition of a *revision au fond* as a starting point before outlining three hotspots of the public policy exception (surrogacy, same sex marriages or civil partnerships, and name law) and further challenges for recognition, in particular *fraus legis* and the legitimate expectations of the parties, in the various countries. In the subsequent discussion it was pointed out

that the comparative report also shows that the public policy exception does not only function as a bar to recognition, but can, as well as human rights, require and facilitate recognition.

Finally, the formal requirements for recognition were discussed. *Florian Heindler*, Vienna, initially drew attention to the difficulty of distinguishing between formal and substantive requirements and stated the definition of the comparative report of the former as requirements relating to form (i.e. of documents) as well as procedural requirements (regarding certain additional procedural steps). Also in the subsequent discussion the challenging identification and categorisation of requirements was brought up.

In the final discussion, it was immediately agreed that the project was until now only able to scratch the surface of the issues and further work and discussions were required and promising. Therefore, a continuation of the project was agreed on and a further meeting is already being planned.