The "Coman" Case (C-673/16): Some reflections from the point of view of private international law

Written by Dr. iur. Baiba Rudevska (Latvia)

On 5 June 2018, the ECJ rendered a judgment in the *Coman* case (C-673/16). For the first time the ECJ had the opportunity to rule, on the concept of '*spouse*' within the meaning of the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38) in the context of a same-sex marriage. Even if the Directive only covers questions related to the entry and residence in the European Union (EU), this judgment could be of interest for Private International lawyers as well.

Main Facts:

Mr Coman (a Romanian and American citizen), and Mr Hamilton (an American citizen) met in the United States and lived there together. Mr Coman later took up residence in Belgium while Mr Hamilton continued to live in the US. In 2010 they got married in Belgium. In 2012 they contacted the competent Romanian authority to request information on the conditions under which Mr Hamilton, a non-EU citizen, could obtain the right to reside in Romania for more than three months. The Romanian authority replied that Mr Hamilton had only a right of residence for three months because, according to the Romanian Civil Code, marriage between two persons of same sex was not recognised. The case went up to the Constitutional Court, which decided to make the request for a preliminary ruling. One of the questions referred to the ECJ was as follows:

Does the term "spouse" in Article 2(2)(a) of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the Charter, include the same-sex spouse, from a State which is not a Member State of the European Union, of a citizen of the European Union to whom that citizen is lawfully married in accordance with the law of a Member State other than the host Member State?

Only this question is of interest for private international law (hereinafter referred to as "PIL"). Let us take a look at the decision and at the reasoning of the ECJ.

Decision of the ECJ:

The ECJ decided that:

1. In a situation in which a Union citizen has made use of his freedom of movement by moving to and taking up genuine residence, in accordance with the conditions laid down in Article 7(1) of Directive 2004/38 in a Member State other than that of which he is a national, and, whilst there, has created and strengthened a family life with a third-country national of the same sex to whom he is joined by a marriage lawfully concluded in the host Member State, Article 21(1) TFEU must be interpreted as precluding the competent authorities of the Member State of which the Union citizen is a national from refusing to grant that third-country national a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise marriage between persons of the same sex.
2. Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38.

As we can see from the operative part, the ECJ does *not* impose the recognition of same-sex marriages in all the Member States.

Main Reasoning of the ECJ:

The first important thing to be noted is that the ECJ only uses the term "recognition of marriage" (paras. 36, 40, 42, 45, 46 of the judgment) whereas the Advocate General only referred to the term "autonomous interpretation" (paras. 33-58 of the opinion). And *vice versa*– the ECJ does not directly mention the term "autonomous interpretation" and the Advocate General does not analyse the "recognition of marriage". This raises an interesting question: what exactly was

the method used by the ECJ in this case? Autonomous interpretation and recognition are two different methods; the former is widely used both in EU law (in general) and in international human rights law, whereas the latter is typical of PIL. Only in the second case (if we recognise that the ECJ has applied the recognition method) will this judgment be important and have a considerable impact in the field of PIL.

Here is my opinion on how this judgment should be construed:

1. The ECJ starts its reasoning by *de facto* using the method of autonomous interpretation:

(a) The term 'spouse' refers to a person joined to another person by the bonds of marriage (para. 34 of the judgment).

(b) The term 'spouse' within the meaning of Directive 2004/38 is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned (para. 35 of the judgment).

(c) Article 2(2)(a) of that directive, applicable by analogy in the present case, does not contain any reference with regard to the concept of 'spouse' within the meaning of the Directive. It follows that a Member State cannot rely on its national law as a justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state (para. 36 of the judgment).

However, after that, the ECJ switches to the term 'recognition of marriage' (paras. 35 et seq.). Does the ECJ switch to recognition or is it still using autonomous interpretation with different words?

2. It seems that the ECJ continues to applyautonomous interpretation of the term 'spouse', as the Advocate General did in his observations. In fact, the use of the words 'recognition of marriage' must be understood within the context of Romanian domestic law (Civil Code) according to which marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners are not recognised in Romania (paras. 8, 36 of the judgment). From the point of view of PIL, it is important to point out that this Romanian legal

provision already contains the Romanian public policy clause; in other words, the public policy exception is already integrated in this legal norm.

Why Autonomous Interpretation?

Both the Advocate General and the ECJ stressed that Article 2(2)(b) of the Directive 2004/38 refers to the conditions laid down in the relevant legislation of the Member State to which that citizen intends to move or in which he intends to reside, but Article 2(2)(a) of that Directive, applicable by analogy in the present case, does not contain any such reference with regard to the concept of 'spouse' within the meaning of the Directive. Consequently, the Member State cannot rely on its national law as a justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state (para. 36 of the judgment; paras. 33, 34 of the opinion).

The Advocate General points out that the terms of a provision of EU law without express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU (para. 34 of the opinion). The method of autonomous interpretation (qualification *lege communae*) is the only alternative to a reference to domestic law (qualification *lege fori*or *lege causae*). There are no other alternatives, even if in practice the ECJ does not clearly emphasise the application of this method [Audit M. L'interpretation autonome du droit international privé communautaire // *Journal du droit international*, 2004, n° 3, p. 799].

The use of the Advocate General's opinion in the reasoning of the ECJ leads to the conclusion that the ECJ has applied the method of autonomous interpretation (rather than recognition) of a precise term to construe, namely 'spouse' (Article 2(2)(a) of the Directive).

Why Not Recognition?

The method of recognition is one of the methods used within the framework of PIL. However, as Professor Lagarde has shown, this method can be applied in primary EU law and not in secondary law (like directives or regulations) [Lagarde P. La reconnaisance. Methode d'emploi. In: Vers de nouveaux équilibres entre

ordres juridiques. *Mélanges en l'honneur de H.Gaudemet-Tallon*. Paris: Dalloz, 2008, p. 483].

Therefore, in cases like *Grunkin Paul*(C-353/06) and *Bogendorff von Wolffersdorff*(C-438/14) we see the application of this method to names, according to provisions of TFEU (see operative parts of both judgments). The application of recognition also implies some changes in the civil registers of the Member States. On the other hand, what had been requested in the *Coman*case was the interpretation of Article 2(2)(a) of the Directive and not a ruling on the recognition of same-sex marriages within the EU. The sole context of the word 'recognition' can be found in the relevant provision of Romanian law, excluding the recognition of foreign same-sex marriages. One can only guess, but it seems that the confusion of two methods – "autonomous interpretation" and "recognition" – has been ultimately inspired by the wording of the Romanian legal provision.

Conclusions:

The interpretation and application of the judgment in the *Coman* case is narrower than it seems at the first glance. In reality, the ECJ has applied the method of autonomous interpretation of the term 'spouse' used in Article 2(2)(a) of the Directive 2004/38. According to the ECJ, this term is gender-neutral and must be understood as encompassing same-sex spouses – but only in the context of the Directive.

Therefore, this judgment does not impose the recognition of foreign same-sex marriages within the EU. It only means that Romania must grant entry and residence permits to same-sex spouses too. In such situations Romania must apply the autonomous interpretation of the term 'spouse' instead of a domestic legal norm prohibiting the recognition of foreign same-sex marriages in Romania. In other words, Article 21(1) TFEU must be seen as precluding a Member State from applying its domestic law on this particular point, and the domestic public policy exception cannot be applied either. However, this interpretation relates only to the Directive. The qualification *lege communae* of the term 'spouse' shall prevail over its qualification *lege fori*. No more and no less.

An additional remark: see the new Regulation (EU) 2016/1191 of the European Parliament and of the Council on promoting the free movement of citizens by

simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 [OJ L 200, 26.7.2016, pp. 1-136]. Article 2(4) of this Regulation states that it does not apply to the recognition, in a Member State, of legal effects relating to the content of public documents (including public documents establishing the fact of marriage, capacity to marry, and marital status; Article 2(1)(e)), issued by the authorities of another Member State.

Petronas Lubricants: ECJ confirms that Art 20(2) Brussels I can be used by employer for assigned counter-claim

Last Thursday, the ECJ rendered a short (and rather unsurprising) decision on the interpretation of Art 20(2) Brussels I (= 22(2) of the Recast Regulation). In *Petronas Lubricants* (Case C 1/17), the Court held that an employer can rely on the provision to bring a counter-claim in the courts chosen by the employee even where said claim has been assigned to the employer after the employee had initiated proceedings.

The question had been referred to the ECJ in the context of a dispute between an employee, Mr Guida, and his two former employers, Petronas Lubricants Italy and Petronas Lubricants Poland. Mr Guida's parallel employment contracts with these two companies had been terminated among allegations of wrongly claimed reimbursements. Mr Guida, who is domiciled in Poland, had sued his Italian employer in Italy for wrongful dismissal and his employer had brought a counter-claim for repayment of the sums Mr Guida had allegedly wrongfully received, which had been assigned by the Polish employer.

Art 20(2) Brussels I contains an exception to the rule in Art 20(1), according to which an employee can only be sued in the courts of their country of domicile, to

allow the employer to bring a counter-claim in the courts chosen by the employee. Similar exceptions can be found in Art 12(2) Brussels I (= Art 14(2) of the Recast; for insurance contracts) and Art 16(3) Brussels I (= Art 18(3) of the Recast; for consumer contracts), all of which incorporate the ground for special jurisdiction provided in Art 6 No 3 Brussels I (= Art 8(3) of the Recast). In the present case, the ECJ had to decide whether this exception would also be available for counter-claims that had been assigned to the employer after the employee had initiated proceedings.

The Court answered this question in the affirmative, pointing out that

> *[28] … provided that the choice by the employee of the court having jurisdiction to examine his application is respected, the objective of favouring that employee is achieved and there is no reason to limit the possibility of examining that claim together with a counter-claim within the meaning of Article 20(2) [Brussels I].*

At the same time, the Court emphasised that a counter-claim can only be brought in the court chosen by the employee if it fulfils the more specific requirements of Art 6 No 3 Brussels I, according to which the counter-claim must have arisen 'from the same contract or facts on which the original claim was based'. This has recently been interpreted by the ECJ (in Case C-185/15 *Kostanjevec*) as requiring that both claims have 'a common origin' (see [29]–[30] of the decision). Where this is the case – as it was here (see [31]–[32]) –, it does not matter that the relevant claims have only been assigned to the employer after the employee had initiated proceedings (see [33]).

Mareva injunctions under Singapore law

Whether the Singapore court has the jurisdiction or power to grant a Mareva injunction in aid of foreign court proceedings was recently considered by the

Singapore High Court in *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] SGHC 64. Both plaintiff and defendant were Indonesian and the claim related to alleged breaches of duties which the defendant owed to the plaintiff. The plaintiff had obtained leave to serve the writ in Indonesia on the defendant. The defendant thereupon applied, inter alia, to set aside service of the writ and for a declaration that the court has no jurisdiction over him. In response, the plaintiff applied for a Mareva injunction against the defendant in respect of the defendant's assets in Singapore. The plaintiff had, after the Singapore action was filed, commenced actions in Malaysia and Indonesia covering much the same allegations against the defendant.

Under Singapore law (excluding actions commenced in the Singapore International Commercial Court where different rules apply), leave to serve the writ on the defendant abroad may be granted at the court's discretion if the plaintiff is able to show: (i) a good arguable case that the claim falls within one of the heads of Order 11 of the Rules of court; (ii) a serious issue to be tried on the merits; and (iii) Singapore is *forum conveniens*. On the facts, the parties were Indonesian and the alleged misconduct occurred in Indonesia. As the plaintiff was unable to satisfy the third requirement, the court discharged the order for service out the writ out of the jurisdiction. Other orders made in pursuant of the order for service out were also set aside.

On the Mareva injunction, the Singapore High Court adopted the majority approach in the Privy Council decision of *Mercedes Benz v Leiduck* [1996] 1 AC 284. Lord Mustill had distinguished between two questions, to be approached sequentially: first, the question of whether the court has *in personam* jurisdiction over the defendant; secondly, the question of whether the court has a power to grant a Mareva injunction to restrain the defendant from disposing of his local assets pending the conclusion of foreign court proceedings. Valid service is required to found *in personam* jurisdiction under Singapore law. In *PT Gunung Madu Plantations*, as in *Mercedes Benz* itself, as the answer to the first question was in the negative, the second question did not arise.

Justice Woo was cognisant of the difficulties caused by hewing to the traditional approach of viewing Mareva relief as strictly ancillary to local proceedings but stated 'that is a matter that has to be left to a higher court or to the legislature' (para 54). His Honour referenced developments in the UK and Australia, where freestanding asset freezing orders in aid of foreign proceedings are permitted.

Further, the Singapore International Arbitration Act was amended in 2010 to give the court the power to grant an interim injunction in aid of a foreign arbitration. It is likely that legislative intervention will be required to develop Singapore law on this issue.

The judgment may be found here: http://www.singaporelaw.sg/sglaw/laws-of-singapore/case-law/free-law/high-court-judgments/23135-pt-gunung-madu-plantations-v-muhammad-jimmy-goh-mashun

---

Nori Holdings: England & Wales High Court confirms 'continuing validity of the decision in West Tankers' under Brussels I Recast

Earlier this month, the English High Court rendered an interesting decision on the (un-)availability of anti-suit injunctions in protection of arbitration agreements under the Brussels I Recast Regulation (No 1215/2012). In *Nori Holdings v Bank Otkritie* [2018] EWHC 1343 (Comm), Males J critically discussed (and openly disagreed with) AG Wathelet's Opinion on Case C-536/13 *Gazprom* and confirmed that such injunctions continue to not be available where they would restrain proceedings in another EU Member State.

The application for an anti-suit injunction was made by three companies that had all entered into a number of transactions with the defendant bank involving shares of companies incorporated in Cyprus. These arrangements were restructured in August 2017. In October 2017, the defendant alleged that the agreements entered into in the course of this restructuring were fraudulent and started proceedings in Russia – based, *inter alia*, on Russian bankruptcy law – to set them aside. In January 2018, the claimants reacted by commencing LCIA arbitrations against the bank – based on an arbitration clause in the original agreements, to which the restructuring agreements referred – seeking a

declaration that the restructuring agreements are valid and an arbitral anti-suit injunction against the Russian proceedings. Meanwhile, each of the parties also commenced proceedings in Cyprus.

The defendant bank advanced several reasons for why the High Court should not grant the injunction, including the availability of injunctive relief from the arbitrators and the non-arbitrability of the insolvency claim. While none of these defences succeeded with regard to the proceedings in Russia, the largest individual part of the decision ([69]–[102]) is dedicated to the question whether the High Court had the power to also grant an anti-suit injunction with regard to the proceedings in Cyprus, an EU member state.

The European Court of Justice famously held in *West Tankers* (Case C-185/07) that 'even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness' (at [24]) and that

> *[30] […] in obstructing the court of another Member State in the exercise of the powers conferred on it by [the Regulation], namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under [the Regulation] is based […].*

Accordingly, it would be 'incompatible with [the Regulation] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement' (at [34]).

Shortly thereafter, the European legislator tried to clarify the relationship between the Brussels-I framework and arbitration in Recital (12) of the recast Regulation. This Recital included, among other things, a clarification that a decision on the validity of an arbitration agreement is not subject to the Regulation's rules on recognition and enforcement. Rather surprisingly, this was understood by Advocate General Wathelet, in his Opinion on Case C-536/13 *Gazprom*, as an attempt to 'correct the boundary which the Court had traced between the application of the Brussels I Regulation and arbitration' (at [132]);

consequently, he argued that 'if the case which gave rise to the judgment in [*West Tankers*] had been brought under the regime of the Brussels I Regulation (recast) […] the anti-suit injunction forming the subject-matter of [this judgment] would not have been held to be incompatible with the Brussels I Regulation' (at [133]). AG Wathelet went even further when he opined that Recital (12) constituted a 'retroactive interpretative law', which explained how the exclusion of arbitration from the Regulation 'must be and always should have been interpreted' (at [91]), very much implying that *West Tankers* had been wrongly decided.

The Court of Justice, of course, did not follow the Advocate General and, instead, reaffirmed its decision in *West Tankers* in Case C-536/13 *Gazprom*. As Males J rightly points out (at [91]), the Court did not only ignore the Advocate General's Opinion, it also very clearly regarded *West Tankers* a correct statement of the law under the old Regulation. While Males J considered this observation alone to be 'sufficient to demonstrate that the opinion of the Advocate General on this issue on [sic] was fundamentally flawed' (at [91]), he went on to point out six (!) further problems with the Advocate General's argument. In particular, he argued (at [93]) that if the Advocate General were right, any proceedings in which the validity of an arbitration were contested would be excluded from the Regulation, which, indeed, would go much further than what the Recital seems to try to achieve.

Consequently, Males J concluded that

> *[99] […] there is nothing in the Recast Regulation to cast doubt on the continuing validity of the decision [in West Tankers] which remains an authoritative statement of EU law. […] Accordingly there can be no injunction to restrain the further pursuit of the Bank's proceedings in Cyprus.*

Of course, this does not mean that claimants will receive no redress from the English courts in a case where an arbitration agreement has been breached through proceedings brought in the courts of another EU member state. As Males J explained (at [101]), the claimants may be entitled to an indemnity 'against (1) any costs incurred by them in connection with the Cypriot proceedings and (2) any liability they are held to owe in those proceedings.' While one might consider such an award to be 'an antisuit injunction in all but name' (Hartley (2014) 63 ICLQ 843, 863), the continued availability of this remedy in the English courts despite *West Tankers* has been confirmed in *The Alexandros T* [2014] EWCA Civ

1010. In the present case, Males J nonetheless deferred a decision on this point as the Cypriot court could still stay the proceedings and because the claimants might still be able to obtain an anti-suit injunction from the arbitral tribunal.

Double Counting the Place of the Tort?

In common law Canada there is a clear separation between the question of a court having jurisdiction (jurisdiction *simpliciter*) and the question of a court choosing whether to exercise or stay its jurisdiction. One issue discussed in the Supreme Court of Canada's recent decision in *Haaretz.com v Goldhar* (available here) is the extent of that separation. Does this separation mean that a particular fact cannot be used in both the analysis of jurisdiction and of *forum non conveniens*? On its face that seems wrong. A fact could play a role in two separate analyses, being relevant to each in different ways.

Justice Cote, with whom Justices Brown and Rowe agreed, held that "applicable law, as determined by the *lex loci delicti* principle, should be accorded little weight in the *forum non conveniens* analysis in cases where jurisdiction is established on the basis of the *situs* of the tort" (para 90). She indicated that this conclusion was mandated by the separation of jurisdiction and staying proceedings, which extends to each being "based on different factors". So if the place of the tort has been used as the basis for assuming jurisdiction, the same factor (the place of the tort) should not play a role in analyzing the most appropriate forum when considering a stay. And since the applicable law is one of the factors considered in that analysis, if the applicable law is to be identified based on the connecting factor of the place of the tort, which is the rule in common law Canada, then the applicable law as a factor "should be accorded little weight".

In separate concurring reasons, Justice Karakatsanis agreed that the applicable law "holds little weight here, where jurisdiction and applicable law are both

established on the basis of where the tort was committed" (para 100). In contrast, the three dissenting judges rejected this reason for reducing the weight of the applicable law (para 208). The two other judges did not address this issue, so the tally was 4-3 for Justice Cote's view.

As Vaughan Black has pointed out in discussions about the decision, the majority approach, taken to its logical conclusion, would mean that if jurisdiction is based on the defendant's residence in the forum then the defendant's residence is not a relevant factor in assessing which forum is more appropriate. That contradicts a great many decisions on *forum non conveniens*. Indeed, the court did not offer any supporting authorities in which the "double counting" of a fact was said to be inappropriate.

The majority approach has taken analytical separation too far. There is no good reason for excluding or under-weighing a fact relevant to the *forum non conveniens* analysis simply because that same fact was relevant at the jurisdiction stage. Admittedly the court in *Club Resorts* narrowed the range of facts that are relevant to jurisdiction in part to reduce overlap between the two questions. But that narrowing was of jurisdiction. *Forum non conveniens* remains a broad doctrine that should be based on a wide, open-end range of factors. The applicable law, however identified, has to be one of them.

The Most Appropriate Forum: Assessing the Applicable Law

Another issue in the recent Supreme Court of Canada decision in *Haaretz.com v Goldhar* (available here) involves the applicable law as a factor in the *forum non conveniens* analysis. It is clear that one of the factors in determining the most appropriate forum is the applicable law. This is because it is quite easy for the forum to apply its own law and rather more difficult for it to apply the law of another jurisdiction.

So if the defendant can show that the forum would apply not its own law but

rather the law of another jurisdiction, that points to a stay of proceedings in favour of that other jurisdiction. In contrast, if the plaintiff can show that the forum would apply its own law, that points against a stay of proceedings. In *Haaretz.com* the plaintiff was able to show that the Ontario court would apply Ontario law, not Israeli law. So the applicable law factor favoured Ontario.

Not so, argued the defendant, because an Israeli court would apply Israeli law (see para 88). So as between the two jurisdictions neither was any more convenient than the other!

In the Supreme Court of Canada, four of the judges rejected the defendant's rejoinder. The dissenting judges held that "[i]t is entirely appropriate, in our view, for courts to only look at the chosen forum in determining the applicable law. Requiring courts to assess the choice of law rules of a foreign jurisdiction may require extensive evidence, needlessly complicating the pre-trial motion stage of the proceedings" (para 207). In separate concurring reasons, Justice Karakatsanis agreed with the dissent on this point (para 100). So because Ontario would apply Ontario law, this factor favours proceedings in Ontario rather than proceedings in Israel.

In contrast, Justice Cote, with whom Justices Brown and Rowe agreed, stated that "I am concerned that disregarding the applicable law in the alternative forum is inconsistent with the comparative nature of the *forum non conveniens* analysis" (para 89). She cited in support an article by Brandon Kain, Elder C. Marques and Byron Shaw (2012). The other two judges did not comment on this issue, so the court split 4-3 against looking at the applicable law in the alternative forum.

There is force to the practical concern raised by the dissent, and even with the assistance of the parties in many cases the court will be unable to form a sufficiently strong view as to what law the foreign forum would apply. But conceptually it does seem that if it is established that the foreign forum will apply its own law, that should go to negate the benefits of the plaintiff's chosen forum applying its own law. Neither is any more convenient where compared against the other.

Perhaps because of the novelty of the approach, Justice Cote's application of it may have missed the mark. She held that "[a]s each forum would apply its own law, the applicable law factor cannot aid Haaretz in showing that it would be

fairer and more efficient to proceed in the alternative forum" (para 88). But the true point flowing from establishing that Israel would apply Israeli law, it would seem, should be that the applicable law factor cannot aid Goldhar (the plaintiff) in showing that it would be fairer and more efficient to proceed in Ontario. If it cannot aid Haaretz.com that Israel would apply its own law, then how is the factor relevant and why is the court indicating a willingness to consider it? It surely could not aid Haaretz.com that Israel would apply some other law.

On a motion for a stay, if the court did know what law would be applied in both the chosen forum and the alternative forum, we would have four possible situations. On Justice Cote's approach, if both forums would apply their own law, this is a neutral factor. Similarly, if both forums would apply law other than forum law, this is also a neutral factor. In the other two situations, the applicable law factor favours the forum that would be applying its own law. With the court splitting 4-3 against looking at the applicable law in the alternative forum, this is not the approach – but should it be?

The Role of Foreign Enforcement Proceedings in Forum Non Conveniens

The doctrine of *forum non conveniens*, in looking to identify the most appropriate forum for the litigation, considers many factors. Two of these are (i) a desire to avoid, if possible, a multiplicity of proceedings and (ii) any potential difficulties in enforcing the decision that results from the litigation. However, it is important to keep these factors analytically separate.

In the Supreme Court of Canada's recent decision in *Haaretz.com v Goldhar* (available here) Justice Abella noted that "enforcement concerns would favour a trial in Israel, in large part because Haaretz's lack of assets in Ontario would mean that any order made against it would have to be enforced by Israeli courts,

thereby raising concerns about a multiplicity of proceedings" (para 142). Similarly, Justice Cote concluded (paras 82-83) that the fact that an Ontario order would have to be enforced in Israel was a factor that "slightly" favoured trial in Israel.

Justice Abella has arguably conflated the two factors rather than keeping them separate. The concerns raised by a multiplicity of proceedings tend to focus on substantive proceedings rather than on subsequent procedural steps to enforce a judgment. Courts rightly try to avoid substantive proceedings in more than one jurisdiction that arise from the same factual matrix, with one of the core concerns being the potential for inconsistent findings of fact. Of course, enforcement proceedings do involve an additional step that is avoided if the judgment can simply be enforced locally. But that, in itself, should not be grouped with the kinds of concerns raised by multiple substantive proceedings. It will be unfortunate if subsequent courts routinely consider contemplated foreign enforcement proceedings as raising a multiplicity of proceedings concern.

Justice Cote (with whom Justices Brown and Rowe agreed) did not conflate enforcement proceedings and the concern about multiplicity. However, it should be noted that *Club Resorts*, which she referenced on this point, stated (para 110 that "problems related to the recognition and enforcement of judgments" is a relevant factor for *forum non conveniens*. The stress there should be on "problems". If it can be anticipated that there may be problems enforcing the judgment where the assets are, that is an important consideration. But if no such problems are anticipated, the mere fact that enforcement elsewhere is contemplated should not point even "slightly" against the forum as the place for the litigation. In *Haaretz.com* the judges who consider the enforcement factor did not identify any reason to believe that enforcement proceedings in Israel would be other than routine.

The dissenting judges (Chief Justice McLachlin and Justices Moldaver and Gascon) properly separated these two factors in their analysis (paras 234-237). They did not treat enforcement proceedings as part of the analysis of a multiplicity of proceedings. On enforcement, their view was that in defamation proceedings it is often sufficient just to obtain the judgment, in vindication of the plaintiff's reputation, and that enforcement can thus be unnecessary or "irrelevant" (para 236). Justice Cote strongly disagreed (para 83). Leaving that dispute to one side, the dissent could have also made the point that this was not a

case where any “problems” had been raised about enforcement in Israel.

Staying Proceedings, Undertakings and “Buying” a Forum

One of the points of interest in the Supreme Court of Canada’s recent decision in *Haaretz.com v Goldhar* (available here) concerns the appropriateness of the plaintiff’s undertaking to pay the travel and accommodation costs of the defendant’s witnesses, located in Israel, to come to the trial in Ontario. The defendant had raised the issue of the residence of its witnesses as a factor pointing to Israel being the more appropriate forum. The plaintiff, one presumes, made a strategic decision to counter this factor by giving the undertaking.

The motions judge and the Court of Appeal for Ontario both considered the undertaking as effective in reducing the difficulties for the defendant in having the litigation in Ontario. However, the undertaking was viewed quite differently by at least some of the judges of the Supreme Court of Canada. Justice Cote, joined by Justices Brown and Rowe, stated that “consideration of such an undertaking would allow a wealthy plaintiff to sway the *forum non conveniens* analysis, which would be inimical to the foundational principles of fairness and efficiency underlying this doctrine” (para 66). Justice Abella, in separate reasons, stated “I think it would be tantamount to permitting parties with greater resources to tip the scales in their favour by ‘buying’ a forum. … it is their actual circumstances, and not artificially created ones, that should be weighed” (para 140). The other five judges (two concurring in the result reached by these four; three dissenting) did not comment on the undertaking.

Undertakings by one party in response to concerns raised by the other party on motions to stay are reasonably common. Many of these do involve some financial commitment. For example, in response to the concern that various documents

will have to be translated into the language of the court, a party could undertake to cover the translation costs. Similarly, a party might undertake to cover the costs of the other party flowing from more extensive pre-trial discovery procedures in the forum. Travel and accommodation expenses are perhaps the most common subject for a financial undertaking. Is the Supreme Court of Canada now holding that these sorts of undertakings are improper?

The more general statement from Justice Abella rejecting artificially created circumstances could have an even broader scope, addressing more than just financial issues. Is it a criticism of even non-financial undertakings, such as an undertaking by the defendant not to raise a limitation period – otherwise available as a defence – in the foreign forum if the stay is granted? Is that an artificially-created circumstance?

Vaughan Black has written the leading analysis of conditional stays of proceedings in Canadian law: "Conditional *Forum Non Conveniens* in Canadian Courts" (2013) 39 Queen's Law Journal 41. Undertakings are closely related to conditions. The latter are imposed by the court as a condition of its order, while the former are offered in order to influence the decision on the motion. But both deal with very similar content, and undertakings are sometimes incorporated into the order as conditions. Black observes that in some cases courts have imposed financial conditions such as paying transportation costs and even living costs during litigation (pages 69-70). Are these conditions now inappropriate, if undertakings about those expenses are? Or it is different if imposed by the court?

My view is that the four judges who made these comments in *Haaretz.com* have put the point too strongly. *Forum non conveniens* is about balancing the interests of the parties. If one party points to a particular financial hardship imposed by proceeding in a forum, it should be generally open for the other party to ameliorate this hardship by means of a financial undertaking. Only in the most extreme cases should a court consider the undertaking inappropriate. And perhaps, though the judges do not say so expressly, *Haaretz.com* is such a case, in that there were potentially 22 witness who would need to travel from Israel to Ontario for a trial.

Supreme Court of Canada: Israel, not Ontario, is Forum Conveniens for Libel Proceedings

The decision to stay proceedings under the doctrine of *forum non conveniens* is discretionary, which in part means that appeal courts should be reluctant to reverse the decisions of motions judges on the issue. It comes as some surprise, therefore, that the Supreme Court of Canada has disagreed with not only the motions judge but also the Court of Appeal for Ontario and overturned two earlier decisions denying a stay. In *Haaretz.com v Goldhar* (available here) the court held (in a 6-3 decision) that the plaintiff's libel proceedings in Ontario should be stayed because Israel is the clearly more appropriate forum.

The decision is complex, in part because the appeal also considered the issue of jurisdiction and in part because the nine judges ended up writing five sets of reasons, four concurring in the result and a fifth in dissent. That is very unusual for Canada's highest court.

The case concerned defamation over the internet. The plaintiff, a resident of Ontario, alleged that an Israeli newspaper defamed him. Most readers of the story were in Israel but there were over 200 readers in Ontario.

On assumed jurisdiction, the court was asked by the defendant to reconsider its approach as set out in *Club Resorts* (available here), at least as concerned cases of internet defamation. Eight of the nine judges refused to do so. They confirmed that a tort committed in Ontario was a presumptive connecting factor to Ontario, such that it had jurisdiction unless that presumption was rebutted (and they held it was not). They also confirmed the orthodoxy that the tort of defamation is committed where the statement is read by a third party, and that in internet cases this is the place where the third party downloads and reads the statement (paras 36-38 and 166-167). Only one judge, Justice Abella, mused that the test for jurisdiction should not focus on that place but instead on "where the plaintiff

suffered the most substantial harm to his or her reputation" (para 129). This borrows heavily (see para 120) from an approach to choice of law (rather than jurisdiction) that uses not the place of the tort (*lex loci delicti*) but rather the place of most substantial harm to reputation to identify the applicable law.

On the stay of proceedings, six judges concluded that Israel was the most appropriate forum. Justice Cote wrote reasons with which Justices Brown and Rowe concurred. Justice Karakatsanis disagreed with two key points made by Justice Cote but agreed with the result. Justices Abella and Wagner also agreed with the result but, unlike the other seven judges (see paras 91 and 198), they adopted a new choice of law rule for internet defamation. This was a live issue on the stay motion because the applicable law is a relevant factor in determining the most appropriate forum. They rejected the *lex loci delicti* rule from *Tolofson* (available here) and instead used as the connecting factor the place of the most substantial harm to reputation (paras 109 and 144). Justice Wagner wrote separately because he rejected (paras 147-148) Justice Abella's further suggestion (explained above) that the law of jurisdiction should also be changed along similar lines.

The core disagreement between Justice Cote (for the majority) and the dissent (written jointly by Chief Justice McLachlin and Justices Moldaver and Gascon) was that Justice Cote concluded that the motions judge made six errors of law (para 50) in applying the test for *forum non conveniens*, so that no deference was required and the court could substitute its own view. In contrast, the dissent held that four of these errors were "merely points where our colleague would have weighed the evidence differently had she been the motions judge" (para 179) which is inappropriate for an appellate court and that the other two errors were quite minor and had no impact on the overall result (para 178). The dissent held strongly to the orthodox idea that decisions on motions to stay are entitled to "considerable deference" (para 177) lest preliminary motions and appeals over where litigation should occur undermine stability and increase costs (para 180).

Another fundamental disagreement between Justice Cote and the dissent was their respective view of the scope of the plaintiff's claim. During the motion and appeals, the plaintiff made it clear that he was only seeking a remedy in respect of damage to his reputation in Ontario (as opposed to anywhere else) and that he was not going to sue elsewhere. The dissent accepted that this undertaking to the court limited the scope of the claim (paras 162-163) and ultimately it pointed

to Ontario as the most appropriate forum. In contrast, Justice Cote held that the plaintiff's undertaking "should not be allowed to narrow the scope of his pleadings" (para 23). It is very hard to accept that this is correct, and indeed on this point Justice Karakatsanis broke with Justice Cote (para 101) and agreed with the dissent. Why should the court not accept such an undertaking as akin to an amendment of the pleadings? Justice Cote claimed that "[n]either Goldhar nor my colleagues … may now redefine Goldhar's action so that it better responds to Haaretz's motion to stay" (para 24). But why should the plaintiff not be able to alter the scope of his claim in the face of objections to that scope from the defendant?

There are many other points of clash in the reasons, too many to engage with fully here. How important, at a preliminary stage, is examination of what particular witnesses who have to travel might say? What role does the applicable law play in the weighing of the more appropriate forum when it appears that each forum might apply its own law? Does a subsequent proceeding to enforce a foreign judgment count toward a multiplicity of proceedings (which is to be avoided) or do only substantive proceedings (on the merits) count? Is it acceptable for a court to rely on an undertaking from the plaintiff to pay the travel and accommodation costs for the defendant's witnesses or is this allowing a plaintiff to "buy" a forum?

It might be tempting to treat the decision as very much a product of its specific facts, so that it does not offer much for future cases. There could, however, be cause for concern. As a theme, the majority lauded "a robust and careful" assessment of *forum non conveniens* motions (para 3). If this robust and careful assessment is to be performed by appellate courts, is this consistent with deference to motions judges in their discretionary, fact-specific analysis? The dissent did not think so (para 177).

Case C-191/18 and Us

Open your eyes, we may be next. Or maybe we are already there? Case C- 191/18, *KN v Minister for Justice and Equality*, is not about PIL. The questions referred to the CJ on March 16, actually relate to the European Arrest warrant (and Brexit). However, PIL decisions are mirroring the same concerns.

It has been reported, for instance, that a Polish district court has refused a Hague child return to England on the basis (*inter alia*) that Brexit makes the mother`s position too uncertain. A recent case before the Court of Appeal of England and Wales shows that English judges are also struggling with this (see "Brexit and Family Law", published on October 2017 by Resolution, the Family Law Bar Association and the International Academy of Family Lawyers, supplemented by mainland IAFL Fellows, Feb 2018).

And even if it was not the case: can we really afford to stay on the sidelines?

Needless to say, Brexit is just one of the ingredients in the current European Union melting pot. Last Friday's presentation at the Comité Français de Droit International Privé, entitled « Le Droit international privé en temps de crise », by Prof. B. Hess, provided a good assessment of the main economic, political and human factors explaining European contemporary mess – by the way, the parliamentary elections in Slovenia on Sunday did nothing but confirm his views. One may not share all that is said on the paper; it's is legitimate not to agree with its conclusions as to the direction PIL should follow in the near future to meet the ongoing challenges; the author's global approach, which comes as a follow up to his 2017 Hague Lecture, is nevertheless the right one. Less now than ever before can European PIL be regarded as a "watertight compartment", an isolated self-contained field of law. Cooperation in criminal and civil matters in the AFSJ follow different patterns and maybe this is how it should be (I am eagerly waiting to read Dr. Agnieszka Frackowiak-Adamska's opinion on the topic, which seem to disagree with the ones I expressed in Rotterdam in 2015, and published later). The fact remains that systemic deficiencies of the judiciary in a given Member State can hardly be kept restricted to the criminal domain and leave untouched the civil one; doubts hanging over one prong necessarily expand to the other. The *Celmer* case, C-216/18 PPU, *Minister for Justice and Equality v LM*, heard last Friday (a commented report of the hearing will soon be released in

Verfassungsblog, to the best of my knowledge), with all its political charge, cannot be deemed to be of no interest to us; precisely because a legal system forms a consistent whole mutual trust cannot be easily, if at all, compartmentalized.

The Paris presentation was of course broader and it is not my intention to address it in all its richness, in the same way that I cannot recall the debate which followed, which will be reproduced in due time at the *Travaux*. Still, I would like to mention the discussion on asylum and PIL, if only to refer to what Prof. S. Courneloup very correctly pointed out to: asylum matters cannot be left to be dealt with by administrative law alone; on the contrary, PIL has a big say and we – private international lawyers- a wide legal scenario to be alert to (for the record, albeit I played to some extent the dissenting opinion on Friday, my actual stance on the need to pair up public and private law for asylum matters is clear in *CDT*, 2017). Last year the JURI Committee of the European Parliament commissioned two studies (here and here; they were also reported in CoL) on the relationship between asylum and PIL, thus suggesting some legislative initiative might be taken. But nothing has happened since.