Child Abduction and Habitual Residence in the Supreme Court of Canada

The Supreme Court of Canada, in *Office of the Children's Lawyer v Balev* (available here), has evolved the law in Canada on the meaning of a child's habitual residence under Article 3 of the Hague Convention. The Convention deals with the return of children wrongfully removed from the jurisdiction of their habitual residence.

A majority of the court identifies [paras 4 and 39ff] three possible approaches to habitual residence: the parental intention approach, the child-centred approach, and the hybrid approach. The parental intention approach determines the habitual residence of a child by the intention of the parents with the right to determine where the child lives. This approach has been the dominant one in Canada. In contrast, the hybrid approach, instead of focusing primarily on either parental intention or the child's acclimatization, looks to all relevant considerations arising from the facts of the case. A majority of the court, led by the (now retired) Chief Justice, holds that the law in Canada should be the hybrid approach [paras 5 and 48]. One of the main reasons for the change is that the hybrid approach is used in many other Hague Convention countries [paras 49-50].

The dissent (three of the nine judges) would maintain the parental intention approach [para 110]. One of its central concerns is the flexibility and ambiguity of the hybrid approach [para 111], which the judges worry will lead to less clarity and more litigation. Wrongful removal cases will become harder to resolve in a timely manner [paras 151-153].

The majority did not apply the law to the facts of the underlying case, it having become moot during the process of the litigation [para 6]. The court rendered its decision to provide guidance going forward. The dissent would have denied the appeal on the basis that the child's habitual residence was in Germany (as the lower courts had held).

The court briefly addresses the exception to Article 3 in what is commonly known as "Article 13(2)" (since it is not numbered as such) – a child's objection to return

– setting out its understanding of how to apply it [paras 75-81 and 157-160].

The Supreme Court of Canada has recently adopted the practice of preparing summaries of its decisions (available here for this decision) to make them more accessible to the media and the public. These are called "Cases in Brief".

The CJEU settles the issue of characterising the surviving spouse's share of the estate in the context of the Succession Regulation

It has not been yet noted on this blog that the CJEU has recently settled a classic problem of characterisation that has plagued German courts and academics for decades (CJEU, 1 March 2018 – C-558/16, *Mahnkopf*, ECLI:EU:C:2018:138). The German statutory regime of matrimonial property is a community of accrued gains, i.e. that each spouse keeps its own property, but gains that have been made during the marriage are equalised when the marriage ends, i.e. by a divorce or by the death of one spouse. According to § 1371(1) of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*), the equalisation of the accrued gains shall be effected by increasing the surviving spouse's share of the estate on intestacy by one quarter of the estate if the property regime is ended by the death of a spouse; it is irrelevant in this regard whether the spouses have made accrued gains in the individual case. How is this claim to be characterized?

In the course of the German discussion, all solutions had been on the table: some have advocated to classify the issue as a part of succession law only, others have argued for characterising the issue as belonging to the field of matrimonial property law, and a minority opinion has developed a so-called "double

characterisation", i.e accepting the spouse's share in the estate only if both the applicable succession and matrimonial property law would countenance such a solution. In 2015, the German Federal Court of Justice (*Bundesgerichtshof – BGH*), ruling on former autonomous choice of law rules, had settled the issue in favour of applying the German conflicts rules on matrimonial property, mainly arguing that § 1371(1) BGB determines what is left to the estate after the gains accrued during the marriage have been equalised (BGHZ 205, 289). The Court argued that, for practical reasons, the means that the provision deploys to allocate the gains are found in succession law, but its function is to deal with the dissolution of a marriage because of the death of one of the spouses. If frictions arose between the law applicable to matrimonial property and the rules governing succession – e.g. a widow receiving nothing although the succession law and the matrimonial property regime would grant her a share if applied in isolation –, such problems would have to be solved by the technique of adaptation.

In light of the Europeanisation of private international law, however, it had become doubtful whether this approach would remain valid within the context of the Succession Regulation (Regulation (EU) No. 650/2012). A pertinent question was referred to the CJEU by the Kammergericht (Higher Regional Court Berlin). Following the conclusions by AG Szpunar, the CJEU now has decided the case in diametrical opposition to the earlier judgment of the BGH, by adopting a purely succession-oriented characterisation. The CJEU argues that "Paragraph 1371(1) of the BGB concerns not the division of assets between spouses but the issue of the rights of the surviving spouse in relation to assets already counted as part of the estate. Accordingly, that provision does not appear to have as its main purpose the allocation of assets or liquidation of the matrimonial property regime, but rather determination of the size of the share of the estate to be allocated to the surviving spouse as against the other heirs. Such a provision therefore principally concerns succession to the estate of the deceased spouse and not the matrimonial property regime. Consequently, a rule of national law such as that at issue in the main proceedings relates to the matter of succession for the purposes of Regulation No 650/2012" (para. 40). The main reason, however, is to ensure that the European Certificate of Succession remains workable in practice by giving a true and comprehensive picture of the surviving spouse's share in the estate, no matter whether domestic law achieves this result by inheritance law alone or rather by a combination of matrimonial property and succession law (see in particular paras. 42 et seq.). It remains to be seen how much scope this

approach will leave to an application of the European Matrimonial Property Regulation (Regulation (EU) No. 2016/1103), which also covers the liquidation of the matrimonial property regime as a result of the death of one of the spouses. Whereas the law applicable to matrimonial property is, in principle, stabilised at the first common habitual domicile of the spouses, the applicable succession law is changed much more easily – it suffices that the deceased spouse had acquired a new habitual residence before his or her death. Thus, an extension of the Succession Regulation to the detriment of the Matrimonial Property Regulation may disappoint legitimate expectations of the surviving spouse concerning the allocation of accrued gains. The CJEU, however, does not seem to worry too much about this aspect, which was not problematic in the case at hand (para. 41). Future cases may be more enlightening in this regard.

Torture, Universal Civil Jurisdiction and Forum Necessitatis: Naït-Litman v. Switzerland before the ECtHR

On March 15 the ECtHR, sitting as the Grand Chamber,decided on the Naït-Litman v. Switzerland case (application no. 51357/07), against the applicant and his claim of violation of Article 6 ECHR. Independently on whether one agrees or not with the final outcome, for PIL lawyers and amateurs the judgment (for very busy people at least the press release) is certainly worth reading.

The case concerned the refusal by the Swiss courts to examine Mr Naït-Liman's civil claim for compensation for the non-pecuniary damage arising from acts of torture allegedly inflicted on him in Tunisia. According to the applicant, he was arrested in April 1992 by the police in Italy, and after being transferred to the Tunisian consulate in Genoa, he was taken to Tunis by Tunisian agents. Mr Naït-Liman alleges that, from 24 April to 1 June 1992, he was detained and tortured in

Tunis in the premises of the Ministry of the Interior on the orders of A.K., the then Minister of the Interior. Following the alleged torture, Mr Naït-Liman fled Tunisia in 1993 for Switzerland, where he applied for political asylum; this was granted in 1995.

On 14 February 2001, having learnt that A.K. was being treated in a Swiss hospital, the applicant lodged a criminal complaint against him with the Principal Public Prosecutor for the Republic and the Canton of Geneva. He applied to join these proceedings as a civil party. The Prosecutor dropped the proceedings after finding out that A.K. had left the country some days earlier.

Several years later, on 8 July 2004, the applicant lodged a claim for damages with the Court of First Instance of the Republic and the Canton of Geneva against Tunisia and against A.K. The Court of First Instance declared the claim inadmissible on the ground that it lacked territorial jurisdiction and that the Swiss courts did not have jurisdiction under the forum of necessity in the case at hand, owing to the lack of a sufficient link between, on the one hand, the case and the facts, and, on the other, Switzerland. Mr Naït-Liman lodged an appeal with the Court of Justice of the Republic and the Canton of Geneva, which was rejected on the grounds of immunity from jurisdiction of the defendants. The Federal Supreme Court dismissed the second appeal in 2007, considering that the Swiss courts in any event lacked territorial jurisdiction.

The ECtHR considered that international law had not imposed an obligation on the Swiss authorities to open their courts with a view to ruling on the merits of Mr Naït-Liman's compensation claim, on the basis of either universal civil jurisdiction in respect of acts of torture or a forum of necessity.

The case is without doubt of interest for CoL and beyond. To start with, the methodology employed by the Court is remarkable. A wide comparative legal analysis is conducted, which regarding universal civil jurisdiction encompasses the work of the Institute of International Law on the topic in 2015, and the report theretoby A. Bucher, and takes into account 39 member States of the Council of Europe (Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain,

Turkey, Ukraine and the United Kingdom), as well as certain States which are not members of the Council of Europe. The forum necessitatis prong comprises: the works of both the Institute of International Law and the International Law Association -The Sofia Resolution, 2012, of its former Committee on International Civil Litigation and the Interests of the Public-; eleven European States (Austria, Belgium, Estonia, France, Germany, Luxembourg, the Netherlands, Norway, Poland, Portugal and Romania) which explicitly recognise either the forum of necessity, or a principle bearing another name but entailing very similar if not identical consequences (as in the case of France); Switzerland; and Canada (Quebec) as a non-member States of the Council of Europe. Finally, reference is also made to the forum necessitatis provisions in the EU maintenance, succession and matrimonial property regulations.

As to the merits, regarding universal civil jurisdiction the Strasbourg Court examined whether Switzerland was bound to recognise it for acts of torture by virtue of an international custom, or of treaty law. The Court concluded that those States which recognised universal civil jurisdiction beyond the acts of torture are currently the exception, hence evidence indicating the emergence of an international custom which would have obliged the Swiss courts to find that they had jurisdiction to examine Mr Naït-Liman's action does not exist (and even less evidence of the consolidation of such custom). With regard to international treaty law, as it currently stands it also fails to recognise universal civil jurisdiction for acts of torture obliging the States to make available civil remedies in respect of acts of torture perpetrated outside the State territory by the officials of a foreign State.

On the forum necessitatis issue, the Court had to determine whether international law imposed an obligation on the Swiss authorities to make a forum of necessity available to Mr Naït-Liman. In light of the materials alluded to above, the Court could not find an international custom rule enshrining the concept of forum of necessity; it further noted that no international treaty obligation imposes on the States a duty to provide for a forum of necessity.

It followed that the Swiss authorities had enjoyed a wide margin of appreciation in this area. After examining section 3 of the Federal Law on Private International Law and the decisions issued by the Swiss courts, the Court concluded that neither the Swiss legislature nor the Federal Supreme Court had exceeded their margin of appreciation.

It is worth noting that Judge Wojtyczek expressed a partly dissenting opinion; that Judge Dedov and Judge Serghides each expressed a dissenting opinion; and that, being aware of the dynamic nature of this area, the Court expressly refrained from ruling out the possibility of developments in the future. As a consequence the Court (para. 220) "invites the States Parties to the Convention to take account in their legal orders of any developments facilitating effective implementation of the right to compensation for acts of torture, while assessing carefully any claim of this nature so as to identify, where appropriate, the elements which would oblige their courts to assume jurisdiction to examine it."

The Pitfalls of International Insolvency and State Interventionism in Slovenia

Written by Dr. Jorg Sladic, Attorney in Ljubljana and Assistant Professor in Maribor (Slovenia)

The most interesting development in European private international law and European insolvency law seems the Croatian AGROKOR case. Rulings of English courts have been reported (see e.g. Prof. Van Calster's blog, Agrokor DD – Recognition of Croatian proceedings shows the impact of Insolvency Regulation's Annex A.)[1] However, a new and contrary development seems to be an order by the Slovenian Supreme Court in case Cpg 2/2018 of 14 March 2018.[2]

The Slovenian forum refused to grant exequatur to Croatian extraordinary administration as a way of divestiture of insolvent debtor. Large parts of the order do read as a manual of non-contentious proceedings and deal in assessment of interest in bringing an appeal. However, the part dealing with private international law and European civil procedure has to presented. It will have a wider international effect. It is also interesting that the Slovenian forum refused to contemplate any assessment done by the High Court of Justice of England &

Wales in case In the matter of Agrokor dd and in the matter of the Cross-border insolvency regulations 2006 ([2017] Ewhc 2791 (Ch)).

Facts:

AGROKOR is a huge agro-industrial enterprises in South-Eastern Europe (Croatia, Slovenia, Romania, Serbia and also perhaps some other European jurisdictions) employing more than 50 000 employees. It is also the biggest owner of agricultural lands in that part of Europe. The impacts of Agrokor were discussed by Hogan & Lovell on their website.[3] Agrokor was owned and operated by a local oligarch and is apparently implied in not all to transparent business operations. As a consequence it became insolvent.

Due to huge debts that would actually require a collective insolvency proceedings Croatia adopted the Law on Extraordinary Administration Proceeding in Commercial Companies of Systemic Importance for the Republic of Croatia.[4] The essence of that legislation is summarized in English by the High Court of Justice of England & Wales in case In the matter of Agrokor dd and in the matter of the Cross-border insolvency regulations 2006 ([2017] Ewhc 2791 (Ch)). The essence of Croatian legislation is the (temporary) suspension of *par condicio creditorum* in and *pari passu* clauses in insolvency law. AGROKOR was passed under extraordinary administration suspending the rights of owners and of the board of directors.

The Croatian extraordinary administrator requested the recognition of extraordinary administration under Croatian law also for the assets and subsidiaries in Slovenia in 2017. Upon opposition of creditors (banks as creditors *ex iure crediti*) the recognition order was vacated. After remedies the case came before the Supreme Court and ended with an unanimous refusal of recognition.

Reasoning:

In this report only points of private international law will be reported. Questions of standing and of interest in bringing proceedings will not be discussed.

Inapplicability of EU private international law

Even though Slovenia and Croatia are nowadays Member States of the EU, the Regulations 1346/200 and 848/2015 are not to be applied, as the Croatian

proceedings are not mentioned in the Annex A. Slovenian national international collective insolvency law (Art. 445 – 488 Financial Operations, Insolvency Proceedings and Compulsory Winding-up Act) and the Bilateral Legal Assistance Treaty Between Slovenia and Croatia of 1994 are to be applied (par. 6).

The lis pendens plea

Agrokor argued that an arbitration case is pending in London and that some of the parties in the Slovenian case declared their claims in Croatian proceedings for extraordinary administration. The Slovenian Supreme court dismissed such a plea. The effects of lis pendens on the arbitration in the UK are a matter for UK courts (par. 23). As a consequence the recognition of Croatian extraordinary administration in the UK by the judgement of the High Court of Justice Nr. CR-2017-005571 of 9 November 2017 is of no importance for Slovenian proceedings. However, even if UK law incorporated the UNCITRAL guidelines the High court (judge Paul Matthews) based its argumentation on common law and precedents based on that law. The Slovenian forum completely cut the discussion by a laconic statement according to which understanding and application of devices of insolvency law under [*English*] common law is quite different from Slovenian civil law legal order (par. 24).

However, *lis pendens* could be given effect due to parallel pending proceedings in Slovenia and Croatia. The Slovenian Court did not apply the Regulation Brussels Ia (1215/2012) but referred to national Slovenian law. The Slovenian forum explained that the Regulation Brussels Ia is not t be applied by virtue of its exception for bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings (Art. 1(b) Regulation 1215/2012). National Slovenian private international law deals with the exception of *lis pendens* in Art. 88 Private International Law and Proceedings Act of 1999.[5] The essence of Slovenian international *lis pendens* is the request to suspend proceedings before a Slovenian forum. Where Slovenian private international law applies, a Slovenian forum will not suspend the proceedings ox officio. *In concreto*, however, none of the parties in Slovenian set of proceedings requested suspension.

Cross-border effects of substantive consolidation

One of the pleas in appeal was the erroneous application of substantive

consolidation under the UNCITRAL model law. Lower courts considered that the substantive consolidation violated the *par condicio creditorum principle*, i.e. a basic principle of Slovenian insolvency law. Lower courts assessed the Croatian extraordinary administration and concluded that in essence such an administration is to be considered as a substantive consolidation. Substantive consolidation is a treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate.[6] Slovenian insolvency legislation followed the UNCITRAL model law. The Supreme Court did not have any problem incorporating via its own case-law the UNCITRAL Legislative Guide on Insolvency Law. According to the Slovenian forum the Croatian Law on Extraordinary Administration Proceeding in Commercial Companies of Systemic Importance for the Republic of Croatia indeed incorporated the substantive consolidation in Croatian law. Art. 43 of the said Croatian law namely provides for a systemic measure of substantive consolidation (paras. 29 – 40, especially par. 36). Substantive cross-border consolidation is contrary so Slovenian international *ordre public*.

The defence of ordre public (paras 41 – 53)

The essence of Slovenian Supreme Court's reasoning consists of assessment of the compliance with ordre public condition for granting recognition (see on Slovenian legislation in Italian e.g. in Sladi? La Corte suprema slovena si confronta con i danni punitivi, Danno e responsabilità 1/2014, p. 18 et seq.). The national Slovenian law applies the prerequisite of international ordre public, i.e. only foreign decision that could endanger the legal and moral integrity of Slovenian legal order are not recognised. The *ordre public* defence is the ultimate refuge. However, recognition of foreign proceedings for divestiture of over-indebted debtors where the condition of equal treatment of creditors (*par condicio creditorum*) is not complied with would not comply with the requirements of Slovenian international *ordre public*. Slovenia namely protects on the one hand in national insolvency proceedings the equal treatment of creditors. On the other hand it only grants recognition in international insolvency legislation the powers of foreign administrator to conduct the case for the common representation of all creditors (par. 45). The Croatian Law on Extraordinary Administration Proceeding in Commercial Companies of Systemic Importance for the Republic of Croatia is a form of State's economic intervention or economic protectionism having the aim of protection of commercial companies of systemic

importance. The Croatian law interferes in the fundamental principles of collective insolvency law and gives certain creditors privileges to be paid by priority by an administrator's discretionary decision without any consent of the board of creditors (par. 47). The extraordinary administration is conditioned by the State's interest and certainly not by the interest of creditors. Creditors do not get nor the benefit of the *par condicio creditorum* (no equal treatment of creditors in having the same condition vis-a-vis the debtor) and are not paid in equal shares (no *pari passu* clause) (par. 48).

The Slovenian Supreme Court refused to engage in any assessment of compatibility of Croatian law with the Croatian ordre public (par. 49). However, it remarked that Courts in successor States of Yugoslavia refused to recognise the effects of judicial decisions based on the Law on Extraordinary Administration Proceeding in Commercial Companies of Systemic Importance for the Republic of Croatia. Courts in Montenegro (Supreme Court of Montenegro), Serbia (Commercial court of Appeal), Bosnia (Supreme Court of Bosnia) all concluded that the Croatian Law on Extraordinary Administration Proceeding in Commercial Companies of Systemic Importance for the Republic of Croatia does not deal in insolvency, it is aimed at the protection of State's interests. The Croatian law is contrary to ordre public of any of those States. Perhaps the said decisions can also be seen as introducing the government interest analysis in South-Eastern Europe?

In the end the Slovenian Supreme Court stressed the importance of the European *ordre public*. "In the framework of national *ordre public* also the European *ordre public* is to be acknowledged next to regional *ordre public*. [*Comment: The order does not clarify what the difference between the European and regional ordre public is*]. A Slovenian forum is not empowered to refuse the recognition of foreign insolvency proceedings even though they might be contrary to national *ordre public* if such a refusal would not be justified or proportional from a European point of view. Slovenia and Croatia are namely both members of European legal area, i.e. members of the EU. However, each State is empowered to set types and conditions of collective insolvency proceedings on their territories. The effects and closing can then be a subject-matter of recognition (both automatic and according to the rules) in other States and also to set interest to be affected by legal consequences of recognition of foreign insolvency proceedings." Slovenia decided to protect the creditors' interests, for their equal

treatment, as a consequence the refusal of recognition of the extraordinary administration complies with the Slovenian ordre public.

[1]https://gavclaw.com/2018/03/26/agrokor-dd-recognition-of-croatian-proceedings-shows-the-impact-of-insolvency-regulations-annex-a/#comment-69405

[2]Available in Slovenian at http://www.sodisce.si/sodni_postopki/objave/20180319125827 98/

[3]https://www.hlbriworkoutblog.com/2017/12/english-recognition-agrokor-insolvency-not-tick-box-exercise/#page=1

[4]The Croatian version available on the webise of the Croatian Official Journal https://narodne-novine.nn.hr/clanci/sluzbeni/2017_04_32_707.html

[5]The translation in Encyclopedia of Private International Law (Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio), 2017, p. 3784–3804 reads as: »A court of the Republic of Slovenia will stay the proceedings at **the request of a party** if other proceedings on the same matter have been initiated before a foreign court between the same parties:

- if the suit in the proceedings conducted abroad was served on the defendant before the service of the suit in the proceedings conducted in the Republic of Slovenia; or if a non-contentious procedure abroad started earlier than in the Republic of Slovenia;
- if it is probable that the foreign decision will be recognized in the Republic of Slovenia, and;
- if reciprocity exists between the two states.«

[6]http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html.

Krombach: The Final Curtain

Readers of this blog may be interested to learn that the well-known (and, in many ways, quite depressing) *Krombach/Bamberski* saga appears to have finally found its conclusion with a decision by the European Court of Human Rights (*Krombach v France*, App no 67521/14) that was given yesterday.

Krombach – who, after having been convicted for killing his stepdaughter, had successfully resisted the enforcement of the French civil judgment in Germany (Case C-7/98 *Krombach*) and, equally successfully, appealed the criminal sentence (*Krombach v France*, App no 29731/96), before he had famously been kidnapped, brought to France, and convicted a second time – had brought a new complaint with regard to this second judgment. He had argued that his conviction in France violated the principle of *ne bis in idem* (as guaranteed in Art 4 of Protocol No 7) since he had previously been acquitted in Germany with regard to the same event.

Yesterday, the Court declared this application inadmissible as Art 4 of Protocol No 7, according to both its wording and the Court's previous case law, 'only concerned "courts in the same State"' (see the English Press Release).

> *[35.] … [L]a Cour constate que cette thèse [du requérant] se heurte aux termes mêmes de l'article 4 du Protocole no 7, qui renvoient expressément au « même État » partie à la Convention plutôt qu'à tout État partie à la Convention. …*
>
> *[36.] La Cour a ainsi jugé avec constance que l'article 4 du Protocole no 7 ne visait que les « juridictions du même État » et ne faisait donc pas obstacle à ce qu'une personne soit poursuivie ou punie pénalement par les juridictions d'un État partie à la Convention en raison d'une infraction pour laquelle elle avait été acquittée ou condamnée par un jugement définitif dans un autre État partie … .*

It also pointed out that 'the fact that France and Germany were members of the European Union did not affect the applicability of Article 4 of Protocol No. 7' (ibid).

> *[38.] La Cour estime par ailleurs que la circonstance que la France et*

> *l'Allemagne sont membres de l'Union Européenne et que le droit de l'Union européenne donne au principe ne bis in idem une dimension trans-étatique à l'échelle de l'Union européenne … est sans incidence sur la question de l'applicabilité de l'article 4 du Protocole no 7 en l'espèce.*

The Strasbourg Court thus appears to have added the final chapter to a case that has occupied the courts in Germany, France, and Luxembourg for almost 35 years, raising some pertinent questions as to mutual trust and judicial corporation in the process.

Cross-border Human Rights and Environmental Damages Litigation in Europe: Recent Case Law in the UK

Over the last few years, litigation in European courts against gross human rights violations and widespread environmental disasters has intensified. Recent case law shows that victims domiciled in third States often attempt to sue the local subsidiary and/or its parent company in Europe, which corresponds to the place where the latter is seated. In light of this, national courts of the EU have been asked to determine whether the parent company located in a Member State may serve as an anchor defendant for claims against its subsidiary – sometimes with success, sometimes not:

For example, in *Okpabi & Ors v Royal Dutch Shell Plc & Anor*, the English High Court, Queen's Bench Division, by its Technology and Construction Court, decided that it had no international jurisdiction to hear claims in tort against the Nigerian subsidiary (SPDC) of Royal Dutch Shell (RDC) in connection with environmental and health damages due to oil pollution in the context of the group's oil production in Nigeria. To be more specific, Justice Fraser concluded

that the Court lacked jurisdiction over the action, inasmuch as the European parent company did not owe a duty of care towards the claimants following the test established in *Caparo Industries Plc v Dickman*. Under the Caparo-test, a duty of care exists where the damage was foreseeable for the (anchor) defendant; imposing a duty of care on it must be fair, just, and reasonable; and finally, there is a certain proximity between the parent company and its subsidiary, which shows that the first exercises a sufficient control over the latter.

On 14 February 2018, the Court of Appeal validated the first instance Court's reasoning by rejecting the claimants appeal (the judgment is available here). In a majority opinion (Justice Sales dissenting), the second instance Court confirmed that the victims' claims had no prospect of success. Nevertheless, Justice Simon provided a different assessment of the proximity requirement: after analysing the corporate documents of the parent company, he observed that RDS had established standardised policies among the Shell group. According to the Court, however, this did not demonstrate that RDS actually exercised control over the subsidiary. At paragraph 89 of the judgment, Justice Simon states that it is "important to distinguish between a parent company which controls, or shares control of, the material operations on the one hand, and a parent company which issues mandatory policies and standards which are intended to apply throughout a group of companies (…). The issuing of mandatory policies plainly cannot mean that a parent has taken control of the operations of a subsidiary (…) such as to give rise to a duty of care". Therefore, the Court of Appeal set a relatively high jurisdictional threshold that will be difficult for claimants to pass in the future.

Conversely, in *Lungowe v Vedanta*, a case that involved a claim against a parent company (Vedanta) seated in the UK and its foreign subsidiary for the pollution of the Kafue River in Zambia, as well as the adverse consequences of such an occurrence on the local population, the Court of Appeal concluded that there was a real issue to be tried against the parent company. Moreover, the Court considered that the subsidiary was a necessary and proper party to claim and that England and Wales was the proper place in which to bring the claims. Apparently, this case involved greater proximity between the parent company and its subsidiary compared to *Okpabi*. In particular, the fact that Vedanta hold 80% of its subsidiary' shares played an important role. The same can be said as regards the degree of control of Vedanta's board over the activities of the subsidiary (see the analysis of Sir Geoffrey Vos at paragraph 197 of the *Okpabi* appeal).

Unsatisfied with the current landscape, some States adopted –or are in the process of adopting– legislations that establish or reinforce the duty of care or vigilance of parent companies directly towards victims. In particular, France adopted the Duty of Vigilance Law in 2017, according to which parent companies of a certain size have a legal obligation to establish a vigilance plan (*plan de vigilance*) in order to prevent human rights violations. The failure to implement such a plan will incur the liability of parent companies for damages that a well-executed plan could have avoided. In Switzerland, a proposal of amendment of the Constitution was recently launched, the goal of which consists in reinforcing the protection of human rights by imposing a duty of due diligence on companies domiciled in Switzerland. Notably, the text establishes that the obligations designated by the proposed amendment will subsist even where conflict of law rules designate a different law than the Swiss one (overriding mandatory provision). Finally, some other States, such as Germany, propose voluntary measures through the adoption of a National Action Plan, as this was suggested by the EU in its CSR Strategy.

For further thoughts see Matthias Weller / Alexia Pato, "Local Parents as 'Anchor Defendants' in European Courts for Claims against Their Foreign Subsidiaries in Human Rights and Environmental Damages Litigation: Recent Case Law and Legislative Trends" forthcoming in Uniform Law Review 2018, Issue 2, preprint available at SSRN.

Draft Withdrawal Agreement, Continued

It is not quite orthodox to follow on oneself's post, but I decided to make it as a short answer to some emails I got since yesterday. I do not know why Article 63 has not been agreed upon, although if I had to bet I would say: too complicated a provision. There is much too much in there, in a much too synthetic form; *per se* this does not necessarily lead to a bad outcome , but here… it looks like, rather. Just an example: Article 63 refers sometimes to provisions, some other to

Chapters, and some to complete Regulations. Does it mean that "provisions regarding jurisdiction" are just the grounds for jurisdiction, without the *lis pendens* rules (for instance), although they are in the same Chapter of Brussels I bis?

One may also wonder why a separate rule on the assessment of the legal force of agreements of jurisdiction or choice of court agreements concluded before the end of the transition period in civil and commercial matters (Regulation 1215/2912) and maintenance (Regulation 4/2009): does the reference to "provisions regarding jurisdiction" not cover them already? Indeed, it may just be a reminder for the sake of clarity; but taken literally it could lead to some weird conclusions, such as the Brussels I Regulation taken preference over the 2005 Hague Convention "in the United Kingdom, as well as in the Member States in situations involving the United Kingdom", whatever these may be. Of course I do not believe this is correct.

At any rate, for me the most complicated issue lies with the Draft Withdrawal Agreement provisions regarding time. As I already explained yesterday, according to Article 168 "Parts Two and Three, with the exception of Articles 17a, 30(1), 40, and 92(1), as well as Title I of Part Six and Articles 162, 163 and 164, shall apply as from the end of the transition period", fixed for December 31st, 2020 (Article 121). In the meantime, ex Article 122, Union Law applies, in its entirety (for no exception is made affecting Title VI of Part Three). What are the consequences? Following an email exchange with Prof. Heredia, Universidad Autónoma de Madrid, let's imagine the case of independent territorial insolvency proceedings – Article 3.2 Regulation 2015/848: if opened before December 31st, 2020, they shall be subject to the Insolvency Regulation. If main proceedings are opened before that date as well, the territorial independent proceedings shall become secondary insolvency proceedings – Article 3.4 Insolvency Regulation. If the main proceedings happen to be opened on January 2nd, 2021, they shall not – Article 63.4 c) combined with Article 168 Draft Withdrawal Agreement (I am still discussing Articles 122 and 168 with Prof. Heredia).

Another not so easy task is to explain Article 63.1 in the light of Articles 122 and 168. The assessment of jurisdiction for a contractual claim filed before the end of the transition period will be made according to Union Law, if jurisdiction is contested or examined *ex officio* before December 31st, 2020; and according to the provisions regarding jurisdiction of Regulation 1215/2012 (or the applicable

one, depending on the subject matter, see Article 63.1 b, c, d) Draft Withdrawal Agreement, if it -the assessment- happens later. Here my question would be, what situations does the author of the Draft have in mind? Does Article 63.1 set up a kind of *perpetuatio iurisdictionis* rule, so as to ensure that the same rules will apply when jurisdiction is contested at the first instance before the end of the transition period, and on appeal afterwards (or even only afterwards, where it is possible)? Or is it a rule to be applied at the stage of recognition and enforcement where the application therefor is presented after the end of the transition period (but wouldn't this fall under the scope of Article 63.3)?

That is all for now – was not a short answer, after all, and certainly not the end of it.

(Addenda: as for the UK, on 13 July 2017, the Government introduced the Withdrawal Bill to the House of Commons. On 17 January 2018, the Bill was given a Third Reading and passed through the House of Commons. Full text of the Bill as introduced and further versions of the Bill as it is reprinted to incorporate amendments (proposals for change) made during its passage through Parliament are available here. The Bill aims at converting existing direct EU law, including EU regulations and directly effective decisions, as it applies in the UK at the date of exit, into domestic law.)

Draft Withdrawal Agreement 19 March 2018: Still a Way to Go

Today, the European Union and the United Kingdom have reached an agreement on the transition period for Brexit: from March 29 of next year, date of disconnection, until December 31, 2020. The news are of course available in the press, and the Draft Withdrawal Agreement of 19 March 2018 has already been published… coloured: In green, the text is agreed at negotiators' level and will only be subject to technical legal revisions in the coming weeks. In yellow, the text is agreed on the policy objective but drafting changes or clarifications are

still required. In white, the text corresponds to text proposed by the Union on which discussions are ongoing as no agreement has yet been found. For ongoing judicial cooperation in civil and commercial matters (Title VI of Part III, to be applied from December 31, 2020: see Art. 168), this actually means that subject to "technical legal revisions", the following has been accepted:

- Art. 62: The EU and the UK are in accordance as to the application by the latter (no need to mention the MS for obvious reasons) of the Rome I and Rome II regulations to contracts concluded before the end of the transition period, and in respect of events giving rise to damage, and which occurred before the end of the transition period.
- Art. 64: There is also agreement as to the handling of ongoing cooperation procedures, whereby requests for service abroad, the taking of evidence and in the frame of the European Judicial Network are meant.
- Art. 65: There is agreement as well as to the way Council Directive 2003/8/EC (legal aid), Directive 2008/52/EC on certain aspects of mediation in civil and commercial matter, and Council Directive 2004/80/EC (relating to compensation to crime victims) will apply after the transition period.

Conversely, no agreement has been found regarding Art. 63, i.e., how to deal with jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities (but whatever is agreed will also be valid in respect of the provisions of Regulation (EU) No 1215/2012 as applicable by virtue of the agreement between the European Community and the Kingdom of Denmark, see Art. 65.2, in green).

In the light of this it may be not really worth to start the analysis of the Title as a whole: Art. 63 happens to be the less clear provision. Some puzzling expressions such as "as well as in the Member States in situations involving the United Kingdom" are common to approved texts, but may change in the course of the technical legal revision. So, let's wait and see.

NoA: Another relevant provision agreed upon – in green- is Art. 124, Specific arrangements relating to the Union's external action. Title X of Part III, on pending cases and new cases before the CJEU, remains in white.

And: On the Draft of February 28, 2018 see P. Franzina's entry here. The Draft

was transmitted to the Council (Article 50) and the Brexit Steering Group of the European Parliament; the resulting text was sent to the UK and made public on March 15.

Religious Conversion and Custody – Important New Decision by the Malaysian Federal Court

A saga that has kept Malaysians engaged for years has finally founds its conclusion. A woman, named (rather improbably, at least for European observers) Indira Gandhi, was fighting with her ex husband over custody. The ex-husband had converted to Islam and had extended the conversion to their three children, with the consequence that the Syariah courts gave him sole custody. What followed was a whole series of court decisions by civil courts on the one hand and Syariah courts on the other, focusing mainly on the jurisdictional question which set of courts gets to decide matters of religious status and which law—Islamic law or civil law—determines the question. The Malaysian Federal Court now quashed the conversion as regards the children, thereby claiming, at least for children, a priority of the Constitution and the jurisdiction of civil courts.

Although the case is mostly discussed in the context of religious freedom and (civil) judicial review, it also raises core issues of conflict of laws. Malaysia is a country with an interpersonal legal system, which leaves jurisdiction over certain matters of Islamic law to the Syariah courts. Indira Gandhi's ex-husband here used this system, effectively, for a form of forum shopping: converting to Islam enabled him, ostentatiously, to opt into a system more favorable to his own

situation. The background, from the perspective of conflict of laws, is that the decisive connecting factor, namely a person's religion, is open to manipulation in a way in which other connecting factors are not. According to Article 121 of the Federal Constitution, the civil courts have no jurisdiction over matters of the Syariah Courts. On the other hand, Art. 12(4) of the Constitution provides that a minor's religion is determined by his parent or guardian, a provision the Syariah Courts neglected here. Letting the Constitution trump leads to a desirable result in this case, but it does not, by itself, resolve the underlying conflict-of-laws issues. Here, as in comparable situations, the doctrinal problem appears to lie first in the issue of unilateral determination of personal status and second in a conflation of issues of jurisdiction and applicable law.

The case is *Indira Gandhi v. Pengarah Jabatan Agama Islam Perak u.a.,* [2018] 1 LNS 86 (Federal Court of Malaysia); it is available here. A short summary is here, another one, including a useful timeline of events, is here. For a very helpful analysis of the case and its background and implications by Jaclyn L. Neo, focusing especially on questions of jurisdiction and judicial review, see here. A longer discussion by Dian A.H. Shah focuses also on two other cases and more broadly on the issues of religious freedom: Dian A.H. Shah, *Religion, conversions, and custody: battles in the Malaysian appellate courts*, in Law and Society in Malaysia: Pluralism, Religion and Ethnicity (Andrew Harding/Dian A.H. Shah eds., 2018). The affair is also discussed in Yvonne Tew's article '*Stealth Theocracy*,' which is forthcoming with the Virginia Journal of International Law.

Mutual trust and judicial cooperation in the EU's external relations – the blind spot in the

EU's Foreign Trade and Private International Law policy?

Further to the splendid conference How European is European Private International Law? at Berlin on 2 and 3 March 2018, I would like to add some thoughts on an issue that was briefly raised by our fellow editor Pietro Franzina in his truly excellent conference presentation on "The relationship between EU and international Private International Law instruments". Pietro rightly observed an "increased activity on the external side", meaning primarily the EU's PIL activities on the level of the Hague Conference.

At the same time, there seems to be still a blind spot for the EU's Private International Law policy when it comes to the design of the EU's Free Trade Agreements (FTAs). Although there is an increasingly large number of such agreements and although "trade is no longer just about trade" (DG Trade) but additionally about exchange or even export of values such as "sustainability", human rights, labour and environmental standards and the rule of law, there seems to be no policy by DG Trade to include in its many FTAs a Chapter on judicial cooperation with the EU's respective external trade partners.

To my knowledge there are only the following recent exceptions: The Association Agreements with Georgia and Moldova. Both Agreements entered into force on 1 July 2016.

Article 21 (Georgia) and Article 20 (Moldova) provide:

"Legal cooperation: 1. The Parties agree to develop judicial cooperation in civil and commercial matters as regards the negotiation, ratification and implementation of multilateral conventions on civil judicial cooperation and, in particular, the conventions of the Hague Conference on Private International Law in the field of international legal cooperation and litigation as well as the protection of children."

Article 24 of the Association Agreement of 29 May 2014 with the Ukraine reads slightly differently:

"Legal cooperation: 1. The Parties agree to further develop judicial cooperation in

civil and criminal matters, making full use of the relevant international and bilateral instruments and based on the principles of legal certainty and the right to a fair trial.2. The Parties agree to facilitate further EU-Ukraine judicial cooperation in civil matters on the basis of the applicable multilateral legal instruments, especially the Conventions of the Hague Conference on Private International Law in the field of international Legal Cooperation and Litigation as well as the Protection of Children."

All other FTAs, even those currently under (re-) negotiation, do not take into account the need for the management of trust in the judicial cooperation of the trade partners in their deepened and integrated trade relations. Rather, foreign trade law and PIL seem to have remained separate worlds, although the business transactions that are to take place and increase within these trade relations obviously rely heavily on both areas of the law.

Some thoughts on why there is no integrated approach to foreign trade and PIL in the EU, why this is a deficiency that should be taken care of and how this could possibly be done are offered here.