Conference on Human Rights and Tort Law

The Institute for European Tort Law (Vienna) organises a **Conference on Human Rights and Tort Law** which will take place on **1 December 2009** in **Vienna**.

The conference programme and detailed information on booking etc. as well as a registration form can be found here.

Asserting Personal Jurisdiction in Human Rights Cases

My colleague Roger Alford has a fascinating post over at the blog Opinio Juris (available here) detailing a recent decision of the United States Court of Appeals for the Ninth Circuit in the case of Bauman v. DaimlerChrysler AG. In that case, a panel of the Ninth Circuit held that a United States federal district court did not have personal jurisdiction over DaimlerChrysler because the corporation did not have continuous and systematic contacts with the forum. The case arose out of the alleged kidnapping, detention, and torture of Argentinian citizens in Argentina by Argentinian state security forces acting at the direction of Mercedes Benz Argentina. The plaintiffs sued the parent company, DaimlerChrysler AG, and the Ninth Circuit concluded that it lacked personal jurisdiction.

As Roger notes, this conclusion is not surprising under current US caselaw. What is perhaps surprising is Judge Stephen Reinhardt's dissent, in which he argues that promoting international human rights is a state interest that should factor into a finding of personal jurisdiction. Reinhardt first concluded that DaimlerChrysler AG had minimum contacts in the forum through its American subsidiary. He then examined whether it was reasonable to assert jurisdiction based on seven factors, including "the state's interest in adjudicating the suit."

As Roger explains, this looks very much like a *forum non conveniens* argument "dressed up as an assertion of personal jurisdiction." On the one hand, such an argument is clearly incorrect in that personal jurisdiction and *forum non conveniens* are different analytical frameworks. In the context of personal jurisdiction, the question is whether the assertion of jurisdiction by a United States court is appropriate under due process. In the context of *forum non conveniens*, the question is whether the forum is a convenient place for resolving the suit in light of various public and private factors. On the other hand, there is a close relationship between the two doctrines. The historical development of the *forum non conveniens* doctrine in the US was closely related to evolving concepts of judicial jurisdiction in the early 1900s. As *Pennoyer's* strict territoriality rules were transformed into a minimum contacts analysis under *International Shoe*, it is arguable that *forum non conveniens* in the US was employed to moderate expansive jurisdiction by US courts. In that the two are connected historically, it was perhaps appropriate for Reinhardt to conflate the two analyses under a reasonableness approach. Although, there was perhaps no reason to reach the question of reasonableness given the state of the law as to subsidiaries.

Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (II): The proposed Art. 6a; Art. 7 is dead, long live Article 7?

Eduardo Álvarez-Armas is Lecturer in Law at Brunel University London and Affiliated Researcher at the Université Catholique de Louvain. He has kindly provided us with his thoughts on recent proposals for amending the Rome II Regulation. This is the second part of his contribution; a first one on the law applicable to strategic lawsuits against public participation can be found here.

Over the last few months, the European Parliament´s draft report on corporate due diligence and corporate accountability (2020/2129(INL)) and the proposal for an EU Directive contained therein have gathered a substantial amount of attention (see, amongst others, blog entries by Geert Van Calster, Giesela Rühl, Jan von Hein, Bastian Brunk and Chris Thomale). As the debate is far from being exhausted, I would like to contribute my two cents thereto with some further (non-exhaustive and brief) considerations which will be limited to three selected aspects of the proposal´s choice-of-law dimension.

1. **A welcome but not unique initiative (Comparison with the UN draft Treaty)**

Neither Article 6a of Rome II nor the proposal for an EU Directive are isolated initiatives. A so-called draft Treaty on Business and Human Rights ("*Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*") is currently being prepared by an *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, established in 2014 by the United Nation´s Human Rights Council. Just like it is the case with the EP´s proposal, the 2nd revised UN draft Treaty (dated 6th August 2020) (for comments on the applicable law aspects of the 1st revised draft, see Claire Bright´s note for the BIICL here) contains provisions on international jurisdiction (Article 9, "*Adjudicative Jurisdiction*") and choice of law (Article 11, "*Applicable law*").

Paragraph 1 of the latter establishes the *lex fori* as applicable for "*all matters of substance* […] *not specifically regulated*" by the instrument (as well as, quite naturally, for procedural issues). Then paragraph 2 establishes that "*all matters of substance regarding human rights law relevant to claims before the competent court may, upon the request of the victim of a business-related human rights abuse or its representatives, be governed by the law of another State where: a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or b) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled*".

In turn, the proposed Article 6a of Rome II establishes that: "[…] *the law*

applicable to a non-contractual obligation arising out of the damage sustained shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred or on the law of the country in which the parent company has its domicile or, where it does not have a domicile in a Member State, the law of the country where it operates." (The proposed text follows the suggestions made in pp. 112 ff of the 2019 Study requested by the DROI committee (European Parliament) on Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries.)

Putting aside the fact that the material scopes of the EP's and the UN's draft instruments bear differences, the EP´s proposal features a more ambitious choice-of-law approach, which likely reflects the EU´s condition as a "Regional integration organization", and the (likely) bigger degree of private-international-law convergence possible within such framework. Whichever the reasons, the EP´s approach is to be welcomed in at least two senses.

The first sense regards the clarity of victim choice-of-law empowerment. While in the UN proposal the victim is allowed to "*request*" that a given law governs "*all matters of substance regarding human rights law relevant to claims before the competent court*", in the EP´s proposal the choice of the applicable law unequivocally and explicitly belongs to the victim (the "*person seeking compensation for damage*"). A cynical reading of the UN proposal could lead to considering that the prerogative of establishing the applicable law remains with the relevant court, as the fact that the victim may request something does not necessarily mean that the request ought to be granted (Note that paragraph 1 uses "*shall*" while paragraph 2 uses "*may*"). Furthermore, the UN proposal contains a dangerous opening to *renvoi*, which would undermine the victim´s empowerment (and, to a certain degree, foreseeability). Therefore, if the goal of the UN´s provision is to provide for *favor laesi*, a much more explicit language in the sense of conferring the choice-of-law prerogative to the victim would be welcomed.

2. **A more ambitious initiative (The "domicile of the parent" connection, and larger victim choice)**

A second sense in which the EP´s choice-of-law approach is to be welcomed is its bold stance in trying to overcome some classic "business & human rights"

conundrums by including an ambitious connecting factor, the domicile of the parent company, amongst the possibilities the victim can choose from. Indeed, I personally find this insertion in suggested Art. 6a Rome II very satisfying from a substantive justice (*favor laesi*) point of view: inserting that very connecting factor in Art. 7 Rome II (environmental torts) is one of the main *de lege ferenda* suggestions I considered in my PhD dissertation (*Private International Environmental Litigation before EU Courts: Choice of Law as a Tool of Environmental Global Governance*, Université Catholique de Louvain & Universidad de Granada, 2017. An edited and updated version will be published in 2021 in Hart´s "Studies in Private International Law"), in order to correct some of the shortcomings of the latter. While not being the ultimate solution for all the various hurdles victims may face in transnational human-rights or environmental litigation, in terms of content-orientedness this connecting factor is a great addition that addresses the core of the policy debate on "business & human rights". Consequently, I politely dissent with Chris Thomale´s assertion that this connecting factor "*has no convincing rationale*". Moreover, I equally dissent from the contention that a choice between the *lex loci damni* and the *lex loci delicti commissi* is already possible via "*a purposive reading of Art. 4 para 1 and 3 Rome II*". For reasons I have explained elsewhere, I do not share this optimistic reading of Art. 4 as being capable of filling the transnational human-rights gap in Rome II. And even supposing that such interpretation was correct, as draft Art. 6a would make explicit what is contended that can be read into Art. 4, it would significantly increase legal certainty for victims and tortfeasors alike (as otherwise some courts could potentially interpret the latter Article as suggested, while others would not).

Precisely, avoiding a decrease in applicable-law foreseeability seems to be (amongst other concerns) one of the reasons behind Jan von Hein´s suggestion in this very blog that Art. 6a´s opening of victim´s choice to four different legal systems is excessive, and that not only it should be reduced to two, but that the domicile of the parent should be replaced by its "habitual residence". Possibly the latter is contended not only to respond to systemic coherence with the remainder of Rome II, but also to narrow down options: in Rome II the "habitual residence" of a legal person corresponds only with its "*place of central administration*"; in Brussels I bis its "domicile" corresponds with either "*statutory seat*", "*central administration*" or "*principal place of business*" at the claimant´s choice. Notwithstanding the merits in system-alignment terms of this proposal, arguably,

substantive policy rationales (*favor laesi*) ought to take precedence over pure systemic private-international-law considerations. This makes all the more sense if one transposes, *mutatis mutandis*, a classic opinion by P.A. Nielsen on the three domiciles of a corporation under the "Brussels" regime to the choice-of-law realm: "*shopping possibilities are only available because the defendant has decided to organise its business in this way. It therefore seems reasonable to let that organisational structure have* […] *consequences*" (P. A. NIELSEN, "Behind and beyond Brussels I – An Insider´s View", *in* P. DEMARET, I. GOVAERE & D. HANF [eds.], *30 years of European Legal Studies at the College of Europe [Liber Professorum 1973-74 – 2003-04]*, Cahiers du Collège d´Europe Nº2, Brussels, P.I.E.-Peter Lang, 2005, pp. 241-243).

And even beyond this, at the risk of being overly simplistic, in many instances, complying with four different potentially applicable laws is, actually, in alleged overregulation terms, a "false conflict": it simply entails complying only with the most stringent/restrictive one amongst the four of them (compliance with X+30 entails compliance with X+20, X+10 and X). Without entering into further details, suffice it to say that, while ascertaining these questions *ex post facto* may be difficult for victim´s counsel, it should be less difficult *ex ante* for corporate counsel, leading to prevention.

3. **<u>A perfectible initiative (tension with Article 7 Rome II)</u>**

Personally, the first point that immediately got my attention as soon as I heard about the content of the EP report´s (even before reading it) was the Article 6a *versus* Article 7 Rome II scope-delimitation problem already sketched by Geert Van Calster: when is an environmental tort a human-rights violation too, and when is it not? Should the insertion of Art. 6a crystallize, and Art. 7 remain unchanged, this question is likely to become very contentious, if anything due to the wider range of choices given by the draft Art. 6a, and could potentially end before the CJEU.

What distinguishes say *Mines de Potasse* (which would generally be thought of as "common" environmental-tort situation) from say *Milieudefensie v. Shell* 2008 (which would typically fall within the "Business & Human Rights" realm and not to be confused with the 2019 *Milieudefensie v. Shell* climate-change litigation) or *Lluiya v. RWE* (as climate-change litigation finds itself increasingly connected to human-rights considerations)? Is it the geographical location of tortious result

either inside or outside the EU? (When environmental torts arise outside the EU from the actions of EU corporations there tends to be little hesitation to assert that we are facing a human-rights tort). Or should we split apart situations involving environmental damage *stricto sensu* (pure ecological damage) from those involving environmental damage *lato sensu* (damage to human life, health and property), considering only the former as coming within Art. 7 and only the latter as coming within Art. 6a? Should we, alternatively, introduce a *ratione personae* distinction, considering that environmental torts caused by corporations of a certain size or operating over a certain geographical scope come within Art. 6a, while environmental torts caused by legal persons falling below the said threshold (or, rarely, by individuals) come within Art. 7?

Overall, how should we draw the boundaries between an environmental occurrence that qualifies as a human-rights violation and one that does not in order to distinguish Art. 6a situations from Art. 7 situations? The answer is simple: we should not. We should consider every single instance of environmental tort a human-rights-relevant scenario and amend Rome II accordingly.

While the discussion is too broad and complex to be treated in depth here, and certainly overflows the realm of private international law, suffice it to say that (putting aside the limited environmental relevance of the Charter of Fundamental Rights of the EU) outside the system of the European Convention of Human Rights (ECHR) there are clear developments towards the recognition of a human right to a healthy or "satisfactory" environment. This is already the case within the systems of the American Convention on Human Rights (Art. 11 of the Additional Protocol to the Convention in the area of Economic, Social and Cultural Rights) and the African Charter on Human and People´s Rights (Art. 24). It is equally the case as well in certain countries, where the recognition of a fundamental/constitutional right at a domestic level along the same lines is also present. And, moreover, even within the ECHR system, while no human right to a healthy environment exists as such, the case-law of the European Court of Human Rights has recognized environmental dimensions to other rights (Arts. 2 and 8 ECHR, notably). It may therefore be argued that, even under the current legal context, all environmental torts are, to a bigger or lesser extent, human-rights relevant and (save those rare instances where they may be caused by an individual) "business-related".

Ultimately, if any objection could exist nowadays, if/when the ECHR system does

evolve towards a broader recognition of a right to a healthy environment, there would be absolutely no reason to maintain an Art. 6a *versus* Art. 7 distinction. Thus, in order to avoid opening a characterization can of worms, it would be appropriate to get "ahead of the curve" in legislative terms and, accordingly, use the proposed Art. 6a text as an all-encompassing new Art. 7.

There may be ways to try to (artificially) delineate the scopes of Articles 7 and 6a in order to preserve a certain *effet utile* to the current Art. 7, such as those suggested above (geographical location of the tortious result, size or nature of the tortfeasor, type of environmental damage involved), or even on the basis of whether situations at stake "trigger" any of the environmental dimensions of ECHR-enshrined rights. But, all in all, I would argue towards using the proposed text as a new Art. 7 which would comprise both non-environmentally-related human-rights torts and, comprehensively, all environmental torts.

Art. 7 is dead, long live Article 7.

Álvarez-Armas on potential human-rights-related amendments to the Rome II Regulation (I): The law applicable to SLAPPs

Eduardo Álvarez-Armas is Lecturer in Law at Brunel University London and Affiliated Researcher at the Université Catholique de Louvain. He has kindly provided us with his thoughts on recent proposals for amending the Rome II Regulation. This is the first part of his contribution; a second one on corporate social responsibility will follow in the next days.

On December the 3rd, 2020, the EU commission published a call for applications, with a view to putting forward, by late 2021, a (legislative or non-legislative) initiative to curtail *"abusive litigation targeting journalists and civil society"*. As defined in the call, strategic lawsuits against public participation (commonly abbreviated as SLAPPs) *"are groundless or exaggerated lawsuits, initiated by state organs, business corporations or powerful individuals against weaker parties who express, on a matter of public interest, criticism or communicate messages which are uncomfortable to the litigants"*. As their core objective is to silence critical voices, SLAPPs are frequently grounded on defamation claims, but they may be articulated through other legal bases (as *"data protection, blasphemy, tax laws, copyright, trade secret breaches"*, etc) (p. 1).

The stakes at play are major: beyond an immediate limitation or suppression of open debate and public awareness over matters that are of significant societal interest, the economic pressure arising from SLAPPs can "drown" defendants, whose financial resources are oftentimes very limited. Just to name but a few recent SLAPP examples (For further review of cases throughout the EU see: Greenpeace European Unit [O. Reyes, rapporteur], "Sued into silence – How the rich and powerful use legal tactics to shut critics up", Brussels, July 2020, p. 18ff): at the time of her murder in 2017, Maltese journalist Daphne Caruana Galizia was facing over 40 civil and criminal defamation lawsuits, including a 40-million US dollar lawsuit in Arizona filed by Pilatus Bank (Greenpeace European Unit [O. Reyes, rapporteur], pp. 9-12); in 2020, a one million euros lawsuit was introduced against Spanish activist Manuel García for stating in a TV program that the poor livestock waste management of meat-producing company "Coren" was the cause for the pollution of the As Conchas reservoir in the Galicia region.

In light of the situation, several European civil-society entities have put forward a model "*EU anti-SLAPP Directive*", identifying substantive protections they would expect from the European-level response announced in point 3.2 of the EU Commission´s "*European democracy action plan*". If it crystallized, an EU anti-SLAPP directive would follow anti-SLAPP legislation already enacted, for instance, in Ontario, and certain parts of the US.

Despite being frequently conducted within national contexts, it is acknowledged that SLAPPs may be *"deliberately brought in another jurisdiction and enforced*

across borders", or may "*exploit other aspects of national procedural and private international law*" in order to increase complexities which will render them "*more costly to defend*" (Call for applications, note 1, p. 1) Therefore, in addition to a substantive-law intervention, the involvement of private international law in SLAPPs is required. Amongst core private-international-law issues to be considered is the law applicable to SLAPPs.

De lege lata, due to the referred frequent resort to defamation, and the fact that this subject-matter was excluded from the material scope of application of the Rome II Regulation, domestic choice-of-law provisions on the former, as available, will become relevant. This entails a significant incentive for forum shopping (which may only be partially counteracted, at the jurisdictional level, by the "*Mosaic theory*").

De lege ferenda, while the risk of forum shopping would justify by itself the insertion of a choice-of-law rule on SLAPPs in Rome II, the EU Commission´s explicit objective of shielding journalists and NGOs against these practices moreover pleads for providing a content-oriented character to the rule. Specifically, the above-mentioned "gagging" purpose of SLAPPs and their interference with fundamental values as freedom of expression sufficiently justify departing from the neutral choice-of-law paradigm. Furthermore, as equally mentioned, SLAPP targets will generally have (relatively) modest financial means. This will frequently make them "weak parties" in asymmetric relationships with (allegedly) libeled claimants.

In the light of all of this, beyond conventional suggestions explored over the last 15 years in respect of a potential rule on defamation in Rome II (see, amongst other sources: Rome II and Defamation: Online Symposium), several thought-provoking options could be explored, amongst which the following two:

1st Option: Reverse mirroring Article 7 Rome II

A first creative approach to the law applicable to SLAPPs would be to introduce an Article 7-resembling rule, with an inverted structure. Article 7 Rome II on the law applicable to non-contractual obligations arising from environmental damage embodies the so-called "theory of ubiquity" and confers the prerogative of the election of the applicable law to the "weaker" party (the environmental victim). In the suggested rule on SLAPPs, the choice should be "reversed", and be given to

the defendant, provided they correspond with a carefully drafted set of criteria identifying appropriate recipients for anti-SLAPP protection.

However, this relatively straightforward adaptation of a choice-of-law configuration already present in the Rome II Regulation could be problematic in certain respects. Amongst others, for example, as regards the procedural moment for performing the choice-of-law operation in those domestic systems where procedural law establishes (somewhat) "succinct" proceedings (i.e. with limited amounts of submissions from the parties, and/or limited possibilities to amend them): where a claimant needs to fully argue their case on the merits from the very first written submission made, which starts the proceedings, how are they meant to do so before the defendant has chosen the applicable law? While, arguably, procedural adaptations could be enacted at EU-level to avoid a "catch-22" situation, other options may entail less legislative burden.

2nd option: a post-Brexit conceptual loan from English private international law = double actionability

A more extravagant (yet potentially very effective) approach for private-international-law protection would be to "borrow" the English choice-of-law rule on the law applicable to defamation: the so-called double actionability rule. As it is well-known, one of the core reasons why "*non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation*" were excluded from the material scope of the Rome II Regulation was the lobbying of publishing groups and press and media associations during the Rome II legislative process (see A. Warshaw, "Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims"). With that exclusion, specifically, the English media sector succeeded in retaining the application by English courts of the referred rule, which despite being "*an oddity*" in the history of English law (*Vid*. D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws,* 9th ed., Swett & Maxwell, 2016, p. 479), is highly protective for defendants of alleged libels and slanders. The double actionability rule, roughly century and a half old, (as it originated from *Philips v. Eyre* [*Philips v. Eyre* (1870) L.R. 6 Q.B. 1.] despite being tempered by subsequent case law) is complex to interpret and does not resemble (structurally or linguistically) modern choice-of-law rules. It states that:

"*As a general rule, in order to found a suit in England for a wrong alleged to have*

been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England ... Secondly, the act must not have been justifiable by the law of the place where it was done" (*Philips v. Eyre*, p. 28-29).

The first of the cumulative conditions contained in the excerpt is usually understood as the need to verify that the claim is viable under English law (*Lex fori*). The second condition is usually understood as the need to verify that the facts would give rise to liability also under foreign law. Various interpretations of the rule can be found in academia, ranging from considering that once the two cumulative requirements have been met English law applies (*Vid*. Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-111), to considering that only those rules that exist simultaneously in both laws (English and foreign) apply, or that exemptions from liability from either legal system free the alleged tortfeasor (*Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885. Similarly, Dicey, Morris & Collins, *The Conflict of Laws,* vol. II, 15th ed., Swett & Maxwell, 2012, pp. 2252-2270, para. 35-128). Insofar as it is restrictive, and protective of the defendant, double actionability is usually understood as a "*double hurdle*" (*Vid*. Cheshire, North & Fawcett, *Private International Law*, 15th ed., OUP, 2017, p. 885; D. McLean & V. Ruiz Abou-Nigm, *The Conflict of Laws*, 9th ed., Swett & Maxwell, 2016, p. 479) to obtaining reparation by the victim, or, in other words, as having to win the case "*twice in order to win* [only] *once*" (*Vid*. A. Briggs, *The Conflict of Laws*, 4th ed., Clarendon Law Series, OUP, 2019, p. 274). Thus, the practical outcome is that the freedom of speech of the defendant is preserved.

A plethora of reasons make this choice-of-law approach controversial, complex to implement, and difficult to adopt at an EU level: from a continental perspective, it would be perceived as very difficult to grasp by private parties, as well as going against the fundamental dogma of EU private international law: foreseeability. This does not, nevertheless, undermine the fact that it would be the most effective protection that could be provided from a private-international-law perspective. Even more so than the protection potentially provided by rules based on various "classic" connecting factors pointing towards the defendant´s "native" legal system/where they are established (as their domicile, habitual residence, etc).

Truth be told, whichever approach is chosen, a core element which will certainly become problematic will be the definition of the personal scope of application of the rule, i.e. how to precisely identify subjects deserving access to the protection provided by a content-oriented choice-of-law provision of the sort suggested (and/or by substantive anti-SLAPP legislation, for that matter). This is a very delicate issue in an era of "fake news".

Call for papers: AEPDIRI Seminar in Madrid "A Private International Law centred on the rights of individuals"

VII Seminario sobre temas de actualidad de Derecho Internacional Privado

UN DERECHO INTERNACIONAL PRIVADO CENTRADO EN LOS DERECHOS DE LAS PERSONAS

14 de marzo de 2024
Universidad Pontificia Comillas-ICADE (Madrid)

COMILLAS UNIVERSIDAD PONTIFICIA

AEPDIRI

The Spanish Association of Professors of International Law and International Relations (AEPDIRI) is organising its VII Seminar on current issues in Private International Law on the topic "A Private International Law centred on the rights of individuals". The seminar will take place at the Faculty of Law of the

Universidad Pontificia Comillas (ICADE) in Madrid on 14 March 2024. The working language of the Seminar will be Spanish, but papers may also be presented in English or French.

The Seminar is intended to discuss topics related to the challenges posed by the rights of individuals from a broad perspective and from a Private International Law dimension, related to the following thematic lines: Current issues raised by the regulation of the capacity of persons in Private International Law; Current issues raised by the regulation of parentage in international situations; The rights of vulnerable persons from a Private International Law dimension; Challenges posed by digitisation to the rights of the individual in private cross-border situations; Due diligence obligations in value chains and Private International Law; Civil liability of multinationals for human rights violations; New challenges in Immigration Law; Migrants' rights from a Private International Law perspective.

Researchers are welcome to submit presentations, which should cover one of the above-mentioned issues. Proposals should fit into the objectives of the Seminar and will be selected –for their oral presentation and/or publication- according to their relevance, quality and originality in respect to their contribution to the development of Private International Law studies.

Proposals should be submitted following the requirements of the Call (for more information, click here), no later than **15 January 2024**, by email to: seminarioactualidad.dipr2024@aepdiri.org.

The submission of paper abstracts and participation in the Seminar is free of charge.

International child abduction:

navigating between private international law and children's rights law

In the summer of 2023 **Tine Van Hof** defended her PhD on this topic at the University of Antwerp. The thesis will be published by Hart Publishing in the Studies in Private International Law series (expected in 2025). She has provided this short summary of her research.

When a child is abducted by one of their parents, the courts dealing with a return application must consider several legal instruments. First, they must take into account private international law instruments, specifically, the Hague Child Abduction Convention (1980) and the Brussels IIb Regulation (2019/1111). Second, they have to take into account children's rights law instruments, including mainly the UN Convention on the Rights of the Child.

Because these instruments have different approaches regarding the concept of the best interests of the child, they can lead to conflicting outcomes. Strict adherence to private international law instruments by the return court could mean sending a child back to the country where they lived before the abduction. Indeed, the Hague Child Abduction Convention and Brussels IIb presume that it is generally best for children to return to the State of habitual residence and therefore require ¾ in principle ¾ a speedy return. The children's rights law instruments, on the other hand, require that the best interests of the individual child be taken into account as a primary consideration. If the court follows these instruments strictly, it could for example rule in a particular case that it is better for a child with medical problems to stay in country of refuge because of better health care.

The question thus arises how to address these conflicts between private international law and children's rights law in international child abduction cases. To answer this question, public international law can give some inspiration, as it offers a number of techniques for addressing conflicts between fields of law. In particular, the techniques of formal dialogue and systemic treaty interpretation can provide relief.

Formal dialogue, in which the actors of one field of law visibly engage with the instruments or case law of the other field of law, can be used by the Hague Conference, the EU and the Court of Justice of the European Union (CJEU) as private international law actors, and the Committee on the Rights of the Child and the European Court of Human Rights (ECtHR) as children's rights law actors. By paying attention to the substantive, institutional and methodological characteristics of the other field of law, these actors can promote reconciliation between the two fields and prevent the emergence of actual conflict. However, a prerequisite for this is that the actors are aware of the relevance of the other field of law and are willing to engage in such a dialogue. This awareness and willingness can be generated through informal dialogue. The CJEU and the ECtHR, for example, conduct such informal dialogue in the form of their biennial bilateral meeting.

In addition, supranational, international and domestic courts can apply the technique of systemic treaty interpretation by interpreting a particular instrument (e.g., the Hague Child Abduction Convention) in light of other relevant rules applicable in the relationship between the parties (e.g., the UN Convention on the Rights of the Child). This allows actual conflicts between the two fields of law to be avoided. This technique was used, for example, by the ECtHR in *X v. Latvia*. To apply this technique, it is also important that courts are aware of the applicability of the other field of law and are willing to take into account its relevant rules. Again, courts have established initiatives that promote this awareness and willingness, such as the International Hague Network of Judges.

The expectation is that by applying these techniques, the potential conflict between private international law and children's rights law in the context of international child abduction will no longer manifest itself as an actual conflict. Further, applying these techniques will make it possible for national courts to adequately apply all instruments and make a balanced decision on the return of children. In addition to these two techniques, other techniques, such as coordination *ex ante*, are considered appropriate to better align private international law and children's rights law when dealing with other issues, such as for example international surrogacy.

The CJEU on Procedural Rules in Child Abduction Cases: private international law and children's rights law

Comment on CJEU case *Rzecznik Praw Dziecka e.a., C-638/22 PPU*, 16 February 2023)

Written by Tine Van Hof, post-doc researcher in Private International Law and Children's Rights Law at the University of Antwerp, previously published on EU live

The Court of Justice of the EU has been criticised after some previous cases concerning international child abduction such as *Povse* and *Aguirre Zarraga* for prioritising the effectiveness of the EU private international law framework (i.e. the Brussels IIa Regulation, since replaced by Brussels IIb, and the principle of mutual trust) and using the children's rights law framework (i.e. Article 24 of the EU Charter of Fundamental Rights and the principle of the child's best interests) in a functional manner (see e.g. Silvia Bartolini and Ruth Lamont). In *Rzecznik Praw Dziecka* the Court takes both frameworks into account but does not prioritise one or the other, since the frameworks concur.

Rzecznik Praw Dziecka e.a. concerns Article $388^1(1)$ of the Polish Code of Civil Procedure, which introduced the possibility for three public entities (Public Prosecutor General, Commissioner for Children's Rights and Ombudsman) to request the suspension of the enforcement of a final return decision in an international child abduction case. Such a request automatically results in the suspension of the enforcement of the return decision for at least two months. If the public entity concerned does not lodge an appeal on a point of law within those two months, the suspension ceases. Otherwise, the suspension is extended

until the proceedings before the Supreme Court are concluded. The Court of Justice was asked to rule on the compatibility of this Article of the Polish CCP with Article 11(3) of the Brussels IIa Regulation and with Article 47 of the EU Charter.

Private international law and children's rights law

As Advocate General Emilou emphasised in the Opinion on *Rzecznik Praw Dziecka*, (see also the comment by Weller) child abduction cases are very sensitive cases in which several interests are intertwined, but which should eventually revolve around the best interests of the child or children. In that regard, the Hague Child Abduction Convention, as complemented by Brussels IIa for intra-EU child abduction situations, sets up a system in which the prompt return of the child to the State of habitual residence is the principle. It is presumed that such a prompt return is in the children's best interests in general (*in abstracto*). This presumption can be rebutted if one of the Child Abduction Convention's exceptions applies. Next to these instruments, which form the private international law framework, the children's rights law framework also imposes certain requirements. In particular, Article 24(2) of the EU Charter, which is based on Article 3 of the UN Convention on the Rights of the Child, requires the child's best interests (*in abstracto* and *in concreto*) to be a primary consideration in all actions relating to children. The Court of Justice analyses Article 388[1](1) of the Polish CCP in light of both frameworks. The Court's attentiveness towards private international law and children's rights law is not new but should definitely be encouraged.

The private international law framework

The Court of Justice recalls that, for interpreting a provision of EU law, one should take into account that provision's terms, its context and the objectives pursued by the legislation of which it forms part. To decide on the compatibility of the Polish legislation with Article 11(3) Brussels IIa, the Court of Justice thus analyses the terms of this provision, its context (which was said to consist of the Child Abduction Convention) and the objectives of Brussels IIa in general. Based on this analysis, the Court of Justice concludes that the courts of Member States are obliged to decide on the child's return within a particularly short and strict timeframe (in principle, within six weeks of the date on which the matter was brought before it), using the most expeditious procedures provided for under

national law and that the return of the child may only be refused in specific and exceptional cases (i.e. only when an exception provided for in the Child Abduction Convention applies).

The Court of Justice further clarifies that the requirement of speed in Article 11(3) of Brussels IIa does not only relate to the procedure for the issuing of a return order, but also to the enforcement of such an order. Otherwise, this provision would be deprived of its effectiveness.

In light of this analysis, the Court of Justice decides that Article 388^{1}(1) of the Polish CCP is not compatible with Article 11(3) Brussels IIa. First, the minimum suspension period of two months already exceeds the period within which a return decision must be adopted according to Article 11(3) Brussels IIa. Second, under Article 388^{1}(1) of the Polish CCP, the enforcement of a return order is suspended simply at the request of the authorities. These authorities are not required to give reasons for their request and the Court of Appeal is required to grant it without being able to exercise any judicial review. This is not compatible with the interpretation that Article 11(3) Brussels IIa should be given, namely that suspending the return of a child should only be possible in 'specific and exceptional cases'.

The children's rights law framework

After analysing the private international law framework, the Court of Justice addresses the children's rights law framework. It mentions that Brussels IIa, by aiming at the prompt adoption and enforcement of a return decision, ensures respect for the rights of the child as set out in the EU Charter. The Court of Justice refers in particular to Article 24, which includes the obligation to take into account, respectively, the child's best interests (para 2) and the need of the child to maintain personal relations and direct contact with both parents (para 3). To interpret these rights of the child enshrined in the EU Charter, the Court of Justice refers to the European Court of Human Rights, as required by Article 52(3) of the EU Charter. Particularly, the Court of Justice refers to *Ferrari v. Romania* (para 49), which reads as follows:

'In matters pertaining to the reunification of children with their parents, the adequacy of a measure is also to be judged by the swiftness of its implementation. Such cases require urgent handling, as the passage of time can have irremediable

consequences for the relations between the children and the parent who does not live with them.'

Unfortunately, the Court of Justice does not explicitly draw a conclusion from its analysis of the children's rights law framework. Nevertheless, it can be concluded that the Polish legislation is also incompatible with the requirements thereof. In particular, it is incompatible with both the collective and the individual interpretation of the child's best interests.

On a collective level, Article 388^{1}(1) of the Polish CCP is contrary to the children's best interests since it does not take into account that international child abduction cases require 'urgent handling, as the passage of time can have irremediable consequences for the relations between the children and the parent who does not live with them' (as has also been acknowledged by the ECtHR as being in the best interests of children that have been abducted in general).

On an individual level, it is possible that an enforcement of the return decision is contrary to the child's best interests and that a suspension thereof is desirable. However, Article 388^{1}(1) of the Polish CPP is invaluable in that regard (see also Advocate General Emilou's Opinion on *Rzecznik Praw Dziecka*, points 77-92). First, the Article exceeds what would be necessary to protect a child's individual best interests. Indeed, under that Article, the authorities can request the suspension without any motivation and without any possibility for the courts to review whether the suspension would effectively be in the child's best interests. More still, the provision is unnecessary to protect a child's individual best interests. Indeed, a procedure already existed to suspend a return decision if the enforcement would be liable to cause harm to the child (Article 388 of the Polish CCP).

Conclusion

In this case, the private international law and the children's rights law framework concurred, and both preclude the procedural rule foreseen in Article 388^{1}(1) of the Polish CCP. The Court of Justice can thus not be criticised for prioritising the EU private international law framework in this case. Nevertheless, the Court of Justice could have been more explicit that the conclusion was reached not only based on the private international law framework but also on the children's rights

law framework.

Finally, the Brussels IIb Regulation, which replaced Brussels IIa as from 1 August 2022, made some amendments that better embed and protect the child's best interests. It provides *inter alia* that Member States should consider limiting the number of appeals against a return decision (Recital 42) and that a return decision 'may be declared provisionally enforceable, notwithstanding any appeal, where the return of the child before the decision on the appeal is required by the best interests of the child' (Article 27(6)). While the Polish provision was thus already incompatible with the old Regulation, it would certainly not be compatible with the new one. To prevent future infringements, legislative reform of the Polish CCP seems inevitable.

Today is the 30th anniversary of the UN Convention on the Rights of the Child!

Today (20/11/2019) UNICEF is celebrating the 30th anniversary of the *UN Convention of 20 November 1989 on the Rights of the Child* (UN Convention) with many events worldwide. While it is not a private international law instrument *per se*, many of the modern family law Conventions of the Hague Conference on Private International Law (HCCH) give effect to several human rights contained therein. For example, the HCCH Child Abduction Convention gives effect to Articles 10(2) and 11 of the UN Convention and the HCCH Intercountry Adoption Convention does the same with regard to Article 21 of the UN Convention. Other Hague Conventions that contribute to this undertaking are the HCCH Protection of Children Convention and the HCCH Child Support Convention.

Others are also joining in the celebrations, such as the European Parliament.

La responsabilidad de las multinacionales por violaciones de derechos humanos (book)

One of the most significant trends in the evolution of human rights protection is the increasing role of NGO´s, such as International Amnesty or Human Rights Watch, that have undertaken monitoring and evaluation tasks. Unfortunately, another trend has to do with private actors, specially multinational corporations, acting as agents or accomplices of violations of human rights and the environment. As a result, there is a remarkable extension of the already wide list of potential violators of human rights across the world. The fact that corporations are capable, as private individuals, of perpetrating serious violations of human rights, has attracted the attention of scholars, national and international public instances. Furthermore, many civil actors and individuals as global citizens feel the need to know more about the challenges of globalization and its threats, aiming to a better understanding of the world in where we live. Having this in mind and in order to contribute with some light on this new challenge in the history of human rights, the recently released volume of the collection "Human Rights and Democracy" (University of Alcala – Ombudsman, Spain) gathers essays of various specialists in Human Rights and International Law.

The initial chapter invites the reader to reflect on whether judicial actions lodged against corporations for human rights violations are an isolated phenomenon, or rather they constitute an expression of a broader, more general trend pointing towards a social, juridical and political shift. The remaining chapters address several issues of interest in the effort to provide a better knowledge of the subject: the well- known Ruggie Principles, the access to remedy in the European setting, the fight against supply chains as new forms of slavery, the extraterritoriality question in Kiobel Case, the financial complicity and

transitional justice in Brasil, the due diligence of enterprises in the field of human rights, the human right to a healthy environment, the right to water and the procedural ways to claim liability for environmental harm.

La responsabilidad de las multinacionales por violaciones de derechos humanos has been edited by Francisco J. Zamora and Jesus Garcia Civico (Professors of the Universitat Jaume I, researchers of the Human Rights Effectiveness Research Center, HURIERC), and Dr. Lorena Sales, from the University of Castilla-La Mancha .

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Privacy and Personality Rights in the Rome II Regime – Not Again?

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Art. 1(2)(g) of the Rome II Regulation (Reg. (EC) No. 864/2007) excludes from its scope "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation". In its statement on the Regulation's review clause (Article 30), the Commission undertook as follows:

> *The Commission, following the invitation by the European Parliament and the Council in the frame of Article 30 of the 'Rome II' Regulation, will submit, not later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and*

rights relating to personality. The Commission will take into consideration all aspects of the situation and take appropriate measures if necessary.

The comparative study, prepared for the Commission by its contractors Mainstrat and supporting cast, was published in February 2009. We should not quibble about the two month delay – these review clause deadlines are not, after all, to be taken too seriously. No doubt, the Commission needed a little extra time to take into consideration "all aspects of the situation" and to identify any measures which it thought "necessary". Should its silence on the matter in the following 18 months be taken, therefore, as a tacit acknowledgement that nothing needs be done at this point in time? Or just that the Commission has more "important" fish to fry (such as 200-years of European legal tradition in the area of contract law – a discussion for another day)?

The European Parliament, for one, seems unhappy with the present state of affairs, and this should not come as a surprise. This aspect of the review clause was all that the Parliament had to show for the considerable efforts of its rapporteur, Diana Wallis MEP, and her colleagues on the JURI Committee during the discussions leading to the Rome II Regulation to broker a compromise provision acceptable to the Member States, the media sector and other interested groups. Those efforts proved futile, doing little more than opening what the former Vice-President of the European Commission, Franco Frattini, described with a classical nod as *la boîte de Pandore* (an expression that appears more earthily in the English translation of the Parliamentary debate as "a can of worms").

In her Working Document, Diana Wallis acknowledges that "[t]he history of failed attempts to include violations of privacy and personality rights within the scope of the Rome II Regulation shows how difficult it is to find a consensus in this area". To illustrate those difficulties, it may be noted that at a meeting of the Council's Rome II committee in January 2006, no less than 13 different options for a rule prescribing the law applicable to non-contractual obligations arising from violations of privacy and personality rights were apparently on the table. The topic, with its close link to the fundamental human rights concerning the respect for private life and freedom of expression, inevitably attracts strong and disparate reactions from the media, from civil liberties groups, from those representing celebrities and other targets of "media intrusion" and from politicians of all

colours. Inevitably, any proposal to create uniform European rules in this area, however narrow their scope or limited their effect, will cause a stir, with those involved using the considerable means of influence at their disposal to secure a result (both in the rule adopted and the policy direction) which is perceived to accommodate and further their interests. If the EU does act, one or more groups will claim that a victory has been secured for their own wider objectives (whether they be "freedom of the press", or "protection from media intrusion", or some other totemic principle). Against this background, the most likely outcome (as the Rome II Regulation demonstrates) is a stalemate, with the players pushing their pieces around the board without attempting to make a decisive move.

Why should the outcome be any different on this occasion, especially given the limited time that has elapsed since Rome II was adopted? Wouldn't we all be better off focussing our efforts on more pressing business, or just getting on with our holiday packing?

Mrs Wallis' Working Paper, although admirable in the breadth of its coverage, provides little cause for optimism. If anything, the debate appears to have regressed in the three years since the Regulation was adopted. Instead of the debate being centred upon a clearly focussed proposal, such as that contained in Art. 7 of the European Parliament's Second Reading Proposal, we are left with a tentative preference for introducing a degree of flexibility (either judicial or party oriented) coupled with some form of foreseeability clause. Other options, such as reform of the related rules of jurisdiction, minimum standards of protection for privacy and personality rights and (gulp) "a unified code of non-contractual obligations, restricted to or including those arising out of violations of privacy and personality rights" are floated, with varying degrees of enthusiasm, but without any clear picture emerging as to what the problem(s) is/are at a European level and how these options may contribute to an overall "solution". Although concrete proposals will emerge, such as those identified on these pages by Professor von Hein, the debate is lacking in focus. If the European Parliament's JURI Committee has now retreated from its former, strongly held position into the legislative outback, what hope is there for its current initiative? Wouldn't it be better to wait, at least, until the full review of the Rome II Regulation by the Commission, scheduled – at least according to the black letter of the Regulation – for next year?

As the foregoing comments may suggest, my own strong preference would be to

wait, and to maintain the *status quo* for the time being, for the following reasons:

1. In terms of the law applicable to non-contractual obligations arising out of cross-border publications, there is nothing in the Working Paper to suggest that the problem is a pressing one, or that immediate legislative intervention by the European Union is "necessary". "Libel tourism" may be a cause for concern in some quarters on both sides of the Atlantic, but the focus of that debate is on rules of jurisdiction and on the English substantive law of defamation, and the difficulties do appear to have been somewhat overstated. There is also, in my view, a real risk, by hasty legislative intervention, of exacerbating existing problems or creating new ones, for example by a rule of applicable law that might subject a local publication (for example, the Manningtree and Harwich Standard) to the privacy laws of a foreign country where the subject of an article is habitually resident and where the article (in hard copy or online form) has not been read except by the subject and his lawyers.
2. We are in the middle of the review of the Brussels I Regulation, whose rules (in contrast to those of the Rome II Regulation) do apply to cross-border disputes involving privacy and personality rights. That process, which raises issues of major commercial importance (most obviously, the effectiveness of choice of court and arbitration provisions in commercial contracts) has already been drawn out, and we should not impose a further obstacle of requiring at the same time a mutually acceptable and viable solution to the question as to which law should apply in these cases. Either the Brussels I review should be allowed to proceed first, with questions concerning the law applicable to be considered thereafter, or the present subject area should be stripped out of the Brussels I review leaving private international law (and substantive law) aspects of privacy and personality rights to be considered separately, but on a firmer footing than the present debate.
3. It must be recognised that the rules of applicable law in the Rome II Regulation are not (and should not be) rule or outcome selecting. The privacy or defamation laws of the subject's country of habitual residence, or the country where the publisher exercises editorial control, or of any other country to which a connecting factor may point may be more or less favourable to each of the parties. Further, all of the Member States are parties to the European Convention on Human Rights and obliged to

respect both private life (Art. 8) and freedom of expression (Art. 10) within the margins of appreciation allowed to them. Those requirements must be observed by all Member State courts and tribunals, in accordance with their own constitutional traditions, whether they are applying their own laws or the laws of a Member or non-Member State identified by the relevant local rule of applicable law. In terms of the legislative structure of the Rome II Regulation, they are a matter of public policy (Art. 26) and not of identifying the country whose law applies. It follows that the impact of rules of applicable law on these Convention rights would appear to be more practical than legal. Might a night editor at a newspaper hesitate to run a story about a foreign footballer's private life if he cannot be sure that it will not expose him and the publisher to a claim based on a "foreign law"? Might an impecunious European aristocrat step back from bringing legal action to protect his family's privacy if it requires him to pay expensive foreign lawyers in order to determine his rights? Moreover, the temptation (as in these examples) to focus on the mass media and on "celebrities" must also be resisted – the position of the web blogger or the office worker, whose rights are equally valuable, must also be considered. Any attempt to formulate a rule of applicable that balances the interests of both parties, and facilitates the effective enforcement of Convention rights, must take account of these and other practical issues, but (despite the Mainstrat report) a sufficient evidential basis is presently lacking.

4. In view of the constitutional sensitivity of this area (acknowledged in a declaration at the time of the Treaty of Amsterdam*, although apparently not repeated upon adoption of the Lisbon Treaty), it is vital that the debate should be properly focussed and resourced from the outset. A review of the present state of the law must open up not only the Art. 1(2)(g) exception, but also the terms and effect of the eCommerce Directive and the "country of origin" principle that it is claimed to embody, as well as the interface between private international law rules and the Convention rights. The size, importance and complexity of this undertaking should not be underestimated, and the temptation for the legislator to jump in with two feet should be strongly resisted. Laudably, Diana Wallis has not made this error, but her Working Paper demonstrates how much remains to be done to identify the problem and assess potential solutions. Significant additional resources, both within and outside the European legislative machine, will be required in order to

create even the potential for a satisfactory outcome to the process. In the present climate, it may be questioned whether this is the best use of scarce resources. Sensible and sensitive, pan-European legislation regulating private international law or other aspects of civil liability for violations of privacy and personality rights may be thought “desirable”, but is it really necessary and, if so, is it achievable and at what cost?

** Declaration on Article 73m of the Treaty establishing the European Community*

> *Measures adopted pursuant to Article 73m of the Treaty establishing the European Community shall not prevent any Member State from applying its constitutional rules relating to freedom of the press and freedom of expression in other media.*