Fictitious Service of Process in the EU – Requiem for a Nightmare?

An article by A. Anthimos, Czech Yearbook of International Law 2017 volume VIII (Forthcoming), accessible at SSRN.

Abstract. Fictitious forms of service have dominated for decades the notification of documents abroad. The insecurity caused by these means of service led to the ratification of the 1965 Hague Service Convention by a significant number of countries. Still, the problem has not been solved, because the Convention did not dare to take the steps towards abolition of fictitious service. The sole exception being, stipulated under Article 19, for documents instituting proceedings. The EU-Service Regulation followed the same path. For nearly 10 years, fictitious service was not discarded by national courts in all cases. However, a recent judgment of the ECJ interpreted the Service regulation as banning all forms of fictitious service. This ruling led to a shift in national jurisprudence. However, at the same time it triggered reactions.

The purpose of this paper is to contribute to the discussion surrounding the ECJ ruling, by highlighting its repercussions both within the framework of the Service Regulation, and potentially in the ambit of the multilateral Hague Service Convention.

The application of foreign law under constitutional and treaty-based review (Paris, 23 September

2016)

In cooperation with the *Centre de droit privé fondamental* of the University of Strasbourg and the *Centre d'études sur l'efficacité des systèmes juridiques continentaux* of the University of Reims Champagne-Ardenne, the *Société de législation comparée* organises an international conference entitled:

The application of foreign law under constitutional and treaty-based review

(Le droit étranger à l'épreuve des contrôles de constitutionnalité et de conventionnalité)

Scholars and practitioners in the fields of private international law from different backgrounds will meet in Paris to identify new models of control in the application of foreign law within Western legal systems and compare them with a view to understanding the place of the Otherness today in Europe and in Americas.

Date: 23 September 2016

Venue: Cour de Cassation, Grand'Chambre, 5, Quai de l'Horloge, 75001 – Paris.

Conference Directors:

Gustavo Cerqueira, Senior Lecturer at the University os Reims (France)

Nicolas Nord, Senior Lecturer at the University of Strasbourg, Vice-Dean of the Faculty of Law (France)

With the participation of :

Bertrand Louvel, First-President of the French Cour de cassation

Dominique Hascher, Chairman of the Société de législation comparée

Jean Massot, Honorary Section's President at the French Conseil d'Etat

Danièle Alexandre, Emeritus Professor at the University of Strasbourg

Paul Lagarde, Emeritus Professor at the University of Paris I Panthéon-Sorbonne

Sylvaine Poillot-Peruzzetto, Councillor at the Cour de cassation in extraordinary service

Guillaume Drago, Professor of the University of Panthéon-Assas Paris II

Prolegomena :

Jean-Sylvestre Bergé, Professor at the University of Jean Moulin Lyon 3

Julien Boudon, Professor at the University of Reims, Dean of the Faculty of Law

French Perspectives :

Alice Meier-Bourdeau, Attorney at the French Conseil d'État and Cour de cassation

Hugues Fulchiron, Professor at the University of Jean Moulin Lyon 3

Pascal de Vareilles-Sommières, Professor at the University of Paris I Panthéon-Sorbonne

Comparative Perspectives :

Serena Forlati, Associate Professor at the University of Ferrara

Fernanda Munschy, Attorney at the Bar of Strasbourg

Gustavo Cerqueira, Senior Lecturer at the University of Reims Champagne-Ardenne

Alejandro Garro, Associate Professor at the University of Columbia

Patrick Kinsch, Professor at the University of Luxembourg

Gustavo Monaco, Professor at the University of São Paulo

Didier Opertti-Bádan, Former Ministry of Foreign Affaires of Uruguay

See whole program here.

No participation fee.

Registration and further information:

Gordon Choisel / gordon.choisel@legiscompare.com

Request for a preliminary ruling from the Riigikohus (Estonia) on Cyberspace Violations of a Legal Person's Rights

The Estonian Riigikohus has requested, on 7 April 2016, a preliminary ruling from the CJEU on a case concerning violations of a legal person's rights committed on the internet: *Bolagsupplysningen OÜ, Ingrid Ilsjan v. Svensk Handel AB*, Case C-194/16). The Estonian court has asked the following questions:

> 1. Is Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be interpreted as meaning that a person who alleges that his rights have been infringed by the publication of incorrect information concerning him on the internet and by the failure to remove comments relating to that information can bring an action for rectification of the incorrect information and removal of the harmful comments before the courts of any Member State in which the information on the internet is or was accessible, in respect of the harm sustained in that Member State?

2. Is Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be interpreted as meaning that a legal person which alleges that its rights have been infringed by the publication of incorrect information concerning it on the internet and by the failure to remove comments relating to that information can, in respect of the entire harm that it has sustained, bring proceedings for rectification of the information, for an injunction for removal of the comments and for damages for the pecuniary loss caused by publication of the incorrect information on the internet before the courts of the State in which that legal person has its centre of interests?

3. If the second question is answered in the affirmative: is Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be interpreted as meaning that:

— it is to be assumed that a legal person has its centre of interests in the Member State in which it has its seat, and accordingly that the place where the harmful event occurred is in that Member State, or

— in ascertaining a legal person's centre of interests, and accordingly the place where the harmful event occurred, regard must be had to all of the circumstances, such as its seat and fixed place of business, the location of its customers and the way and means in which its transactions are concluded?

Many thanks to Dr. Christina Mariottini (HCCH/ILA) and Meeli Kaur for the tip-off!

Ontario Court Enforces American

Judgments Against Iran

Under the *State Immunity Act*, foreign states are generally immune from being sued in Canada. This includes being sued on a foreign judgment. However, in 2012 Canada enacted legislation to give victims of terrorism the ability to sue a foreign state that sponsored the terrorism. It also made it easier for foreign judgments against such a state to be enforced in Canada.

In *Tracy v The Iranian Ministry of Information and Security*, 2016 ONSC 3759 (released June 9, 2016; likely to be posted in the week of June 13, 2016, in CanLII) the Ontario Superior Court of Justice had to consider these legislative reforms and how they applied to a series of American judgments rendered against Iran in favour of American victims of terrorist acts which Iran was found to have sponsored. The court held that Iran was not immune from the enforcement proceedings and that accordingly the American judgments were enforceable against certain assets of Iran in Ontario.

The decision is reasonably detailed. It involves interpretation of the *State Immunity Act* and the *Justice for Victims of Terrorism Act*. It also considers issues relating to the limitation period and the enforcement of punitive damages awards (in this case, in the hundreds of millions of dollars). Not all of the analysis resonates as convincing and there is considerable scope for a possible appeal. For example, Iran's argument that the loss or damage suffered by the victim had to have been, on the language of s 4(1) of the *JVTA*, suffered after January 1, 1985, did not prevent the enforcement of American decisions in respect of acts of terror which happened before that date because, the court held, the victims continued to suffer harm on an ongoing basis. This seems vulnerable to challenge. In addition, the court's reasoning as to why the enormous punitive damages awards were not contrary to public policy is extremely brief.

However, on any appeal, Iran does have a significant procedural problem to overcome. It did not defend the enforcement actions when they were initially brought in Ontario. All of the immunity arguments were canvassed by the court as part of Iran's motion to have the resulting default judgments set aside, on the issue of whether Iran might have a viable defence on the merits. But at no point did Iran offer any explanation for the initial failure to defend. While not conclusive, this weighs against setting the judgments aside even if Iran can show

merit to its position on immunity.

The timing of the court's decision against Iran could pose challenges for the current Canadian government, which is currently working to re-engage with Iran after the previous government cut ties in 2012 (see news story here). In addition, a Montreal-based professor has recently been jailed in Iran and this has caused considerable concern in Canada (see news story here).

Save the date: Conference in Lucerne on the Hague Choice of Law Principles on 8/9 September

The University of Lucerne and the Hague Conference on Private International Law (HCCH) will be co-organizing a conference on the implementation of the Hague Choice of Law Principles ("*Towards a Global Framework for International Commercial Transactions: Implementing the Hague Principles on Choice of Law in International Commercial Contracts*") on 8/9 September 2016. The conference serves to analyze the impact and prospects of the 2015 Principles on Choice of Law in International Commercial Contracts (the Hague Principles) in the context of other relevant legal instruments applicable to international commercial transactions. It brings together distinguished academics, experts, private practitioners and representatives from various international institutions.

Scholars and practitioners in the fields of private international law and commercial law and dispute resolution are encouraged to participate.

Conference Directors: Prof. Dr. Daniel Girsberger, University of Lucerne (Switzerland), Dr. Christophe Bernasconi, Secretary-General (HCCH)

Venue: University of Lucerne, Auditorium 9, Frohburgstrasse 3, CH-6002 Lucerne (Switzerland)

Speakers: Jürgen Basedow, Neil B. Cohen, Andrew Dickinson, Roberto Echandi, José Angelo Estrella Faria, Franco Ferrari, Lauro Da Gama e Souza Jr, Thomas Kadner Graziano, Peter Mankowski, Jan L. Neels, Emily O'Connor, J.A. Moreno Rodríguez, Geneviève Saumier, Linda Silberman, Renaud Sorieul

Participation fee: CHF 250.– (including documentation, catering and dinner on Thursday, 8 September 2016; accommodation not included)

Registration and further information: https://regis.buchertravel.ch/event/HCCH_2016

Contact: Mrs. Lisbeth Meule (lisbeth.meule@unilu.ch)

UNCITRAL – Heading for an International Insolvency Convention?

by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany.

UNCITRAL Working Group V (Insolvency Law) has issued a report on the work of its forty-ninth session, which took place in New York from 2 – 6 May 2016. The Working Group continued its deliberations on the cross-border insolvency of multinational enterprise groups, the recognition and enforcement of insolvency-derived judgments and the obligations of directors of enterprise group companies in the period approaching insolvency. Furthermore the report communicates that a meeting of an open-ended informal group established to consider the feasibility of developing a convention on international insolvency issues has taken place. This is rather exciting, as the development of an international insolvency convention by UNCITRAL would constitute the next big step in international insolvency law leaving behind the defiencies of soft law. The report is available at: http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html.

Reminder: ILA 77th Biennial International Conference 2016

The International Law Association (ILA) invites you to join the ILA 77th Biennial International Conference 2016 which will take place from **7 to 11 August 2016** at the Sandton Convention Centre in Johannesburg, South Africa.

The main theme of the conference will be **'International Law and State Practice: Is there a North – South Divide?'**

The keynote address at the opening session will be given by **Judge Navi Pillay**, the former UN High Commissioner for Human Rights. Programme details as well as further information on the illustrious panel of renowned speakers from across the globe are available at the conference website.

The regular registration closes **30 June 2016**. If you have not yet registered you can do so by clicking here.

The ILA looks forward to seeing you in Johannesburg!

Job Opening: Research Fellow (Wissenschaftliche/r Mitarbeiter/in) in Private International Law / Transnational

Commercial Law at the EBS Law School, Wiesbaden (Germany)

The EBS Law School in Wiesbaden, Germany, is looking for a highly skilled and motivated research fellow on a part-time basis (50%).

The position will entail research within the team of the Chair for Civil Law, Civil Procedure and Private International Law (Prof. Dr. Matthias Weller, Mag.rer.publ.) and within the EBS Research Center for Transnational Commercial Dispute Resolution (TCDR) on a number of new and ongoing projects focusing on Private International Law, Transnational Commercial Law and International Civil Litigation.

The position includes teaching and programme management for the "EBS Law Term" on Transnational Commercial Law, an intense academic programme in English from September to December each year for incoming international students from all over the world, mainly from the partner law faculties of the EBS Law School. For further information on this programme: http://www.ebs.edu/lawterm.

Requirements:

- a university law degree (e.g. JD, preferably the German "Erste Juristische Prüfung")
- qualifications or at least substantial interest in Private International Law and Transnational Commercial Law
- excellent English language skills

The position is limited to two years but can be prolonged. The work location is Wiesbaden, a city close to Frankfurt, Germany. The work involves 19,75 hours per week (50%). The payment is subject to negotiations with the University, depending on the level of qualifications, but will not be lower than the average payment for research fellows (*Wissenschaftliche Mitarbeiter*) there. The faculty offers to obtain a doctoral degree on the basis of a thesis (*Dissertation*) if the faculty's requirements for admission are met.

How to Apply:

Please send your application with reference to **"ZRV_WiMi_Law Term"** via email to antonella.nolten@ebs.edu. The application should include a cover letter, a CV containing, if applicable, list of publications and/or teaching evaluations and electronic copies of all relevant certificates. Please do not hesitate to contact Antonella Nolten in case of further questions.

We are looking forward to hearing from you!

German Federal Court of Justice (Bundesgerichtshof) rules on the validity of arbitration agreements (Claudia Pechstein)

by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany.

Claudia Pechstein, an internationally successful ice speed skater, claims damages against the International Skating Union (ISU) because of a two-year-suspension for doping. The essential question was whether an arbitration agreement signed by *Pechstein* is effective. This agreement includes amongst other things the exclusive jurisdiction of the Court of Arbitration for Sport (CAS) in Lausanne. Pechstein claimed that the arbitration agreement was invalid under § 19 GWB (German Antitrust Legislation) because the ISU (nationally and internationally only the ISU organizes competitions in ice speed skating) has abused its dominant position. *Pechstein* had to sign the arbitration agreement to be admitted to the competition. She claimed that the list of arbitrators of the CAS, from which the parties must each select an arbitrator, has not been

prepared impartially because the sports federations and Olympic committees have a clear predominance in creating the list.

However, the German Federal Court of Justice (Bundesgerichtshof) does not agree with these propositions. The Court, by its decision of 7 June 2016, docket no. KZR 6/15, ruled that the action is inadmissible because of the arbitration agreement. The Court held that the ISU is indeed dominant in the organization of international speed skating competitions, but has shown no abusive conduct because the associations and the athletes do not confront each other as guided by fundamentally conflicting interests. There was no structural imbalance in the composition of the tribunal ruling on *Pechstein's* suspension. Furthermore, in the Court's view, *Pechstein* has signed the agreement voluntarily, even if she otherwise could not have participated in the contest. A consideration of the mutual interests in the light of § 19 GWB justifies the application of the arbitration clause. However *Pechstein* is entitled to invoke the internationally competent Swiss courts following the arbitral procedure.

2nd Liechtenstein Conference on Private International Law on 30 June 2016

Despite the fact that thousands of legal persons and personal relations are subject to Liechtenstein Private International Law, Liechtenstein law has retained some unique features. Whether the unique features should be maintained, or provide the reasoning for a reform agenda, will be discussed at the 2nd Liechtenstein Conference on 30 June 2016 organised by the Propter Homines Chair for Banking and Securities Law at the University of Liechtenstein.

The presentations will deal with Liechtenstein international company, foundation and trust law, conflicts of law relating to banks, prospectus liability and collectus

investment schemes, as well as matters of succession and the potential of Liechtenstein as an arbitration venue. All presentations will be held in German.

Please find further information here.

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