Brexit – Immediate Consequences on the London Judicial Market

Prof. Burkhard Hess and Prof. Marta Requejo-Isidro, Max Planck Institute Luxembourg

One of the major misunderstandings of the Brexit is that it won't influence London's importance as a major place of dispute resolution in Europe. Up until now, the adverse consequences of leaving the European Judicial Area have been insufficiently discussed. A first seminar organized by the British Institute for International and Comparative Law and the Max Planck Institute Luxembourg for Procedural Law in May illustrated that the adverse legal consequences will start immediately, even within the transitional period of two years foreseen by Article 50 of the EU Treaty. We would like to briefly summarize the main findings of this seminar which can also be found (as a video) at the websites of the MPI Luxembourg and of BIICL.

Regarding private international and procedural law, all EU instruments on common rules for jurisdiction, parallel proceedings and cross-border enforcement will cease to exist after the transitional period, not only in areas such as insolvency and family matters, but also in the core areas of civil and commercial matters. Judgments given by English courts will no longer profit from the free movement of judgments. Their recognition and enforcement will depend on (outdated) bilateral agreements which were concluded between the 1930 and 1960s. As there are only six bilateral agreements, the autonomous, piecemeal provisions of EU Member States' regimes regarding the recognition of the judgments of third States will apply. Of course, there might be negotiations on a specific regime between the Union and the United Kingdom, but the EU Commission might be well advised to tackle the more pressing problems of the Union (i.e. the refugee crisis where no solidarity is to be expected from the UK) instead of losing time and strength in bilateral negotiations.

From the European perspective, there is now a need to carefully evaluate the benefits of a bilateral agreement with the United Kingdom on issues of private international law. The main interest of the Union won't be to maintain or to strengthen London's dominant position in the European judicial market: EU

Member States might equally provide for modern and highly-qualified legal services ready to attract commercial litigants and high-value litigation & arbitration. Examples in this respect are The Netherlands and Sweden. In addition, there is a genuine interest of the Union to see mandatory EU law applied in disputes related to the Internal Market by courts operating within its regulatory framework. A perfect example in this respect, as pointed out by Dr. Matteo Gargantini, – former senior research fellow at the MPI Luxembourg – is provided by the EU legal text concerning the financial markets. Here, the so-called MiFIR provides for a dense regulatory framework where a clear distinction is made between EU Member States and third States. In the future, the United Kingdom will qualify a third State in this respect. This entails that jurisdiction and arbitration clauses providing for the jurisdiction of English courts and/or for London as a seat of arbitration cannot be agreed. The pertinent provision (Article 46 § 6) of the MiFIR reads as follows:

> "Third-country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State."

This provision only applies to professional investors. For retail investors, Member States can even mandate that the investment firm establishes a branch in their territory, which of course would impact jurisdiction (also in the light of limitations to jurisdiction agreement vis-à-vis consumers). Here, the relevant provision is Art. 39 MiFID II, which says:

> "A Member State may require that a third-country firm intending to provide investment services or perform investment activities with or without any ancillary services to retail clients or to professional clients within the meaning of Section II of Annex II in its territory establish a branch in that Member State."

These provisions entail direct and immediate consequences. Jurisdiction and arbitration clauses in contracts will apply to future controversies, and as such, their validity will be scrutinized at the moment when a dispute arises. An agreement made today to establish London as the place of dispute resolution will no longer guarantee the validity of that respective clause in two years' time. In

other words, law firms would be well advised to no longer agree to these clauses as their validity will be challenged in every civil court within the European Union. Sending anti-suit injunctions abroad won't help either: firstly, their recognition by the courts of EU Member States is not guaranteed (and will depend on the fragmented autonomous laws of EU Member States). Secondly, mandatory EU law (the pertinent articles of MiFID II, for example) will certainly forbid any recognition within the Union. As a result, parties will lose additional money for unnecessary satellite litigation. Finally, the ratification of the Hague Choice of Court Convention or the Lugano Convention will not provide a means to overcome the problem as the MiFIR/MiFID will apply independently from any international framework. This example demonstrates that there might be much more interest on the English side in negotiating with the Union than the other way around. It also shows that there is a need to consider most carefully the immediate consequences of the Brexit.

European Parliament approves enhanced Cooperation in the Area of Property Regimes of International Couples and registered partnerships

In a plenary vote, the European Parliament has formally approved the two proposals on property regimes for international married couples or registered partnerships (see our earlier post) on 23 June 2016 (click here for the press release). The proposals will now need to be formally adopted by the 18 participating member states and will then be published in the Official Journal of the EU. They will apply in full 30 months and 20 days after publication.

UK court on Tort litigation Against Transnational Corporations

Ekaterina Aristova, PhD in Law Candidate, University of Cambridge authored this post on 'Tort litigation Against Transnational Corporations: UK court will hear a case for overseas human rights abuses'. She welcomes comments.

On 27 May 2016, Mr Justice Coulson, sitting as a judge in the Technology and Construction Court, allowed a legal claim against UK-based mining corporation Vedanta Resources Plc ("**Vedanta**") and its Zambian subsidiary Konkola Copper Mines ("**KCP**") to be tried in the UK courts. These proceedings, brought by Zambian citizens alleging serious environmental pollution in their home country, is an example of the so-called "foreign direct liability" cases which have emerged in several jurisdictions in the last twenty years. Other cases currently pending in the UK courts include a claim by a Colombian farmer alleging environmental pollution caused by Equion Energia Ltd (formerly BP Exploration), two environmental claims arising from oil spillages against Shell, litigation against iron ore producer Tonkolili Iron Ore Ltd for alleged human rights violations in Sierra Leone and a dispute between Peruvian citizens and Xtrata Ltd involving grave human rights abuses of persons involved in environmental protest against the mining operations.

Transnational corporations ("**TNCs**") have frequently been involved in various forms of corporate wrongdoing in many parts of the world. Severe abuses, reported by non-governmental organisations, range from murder to the violation of socio-economic rights. To date there has been only modest success in developing theoretical and practical solutions for legal enforcement of international corporate accountability. In the absence of an international legally binding instrument addressing human rights obligations of private corporations and the various regulatory problems in host states, a few jurisdictions have evidenced a growing trend of civil liability cases against TNCs. These cases are examples of private claims brought by the victims of overseas corporate abuse

against parent companies in the courts of the home states. While US courts continue to debate issues of jurisdiction over extraterritorial human rights corporate abuses, the UK courts have recently being consistent in allowing claims against local parent companies of TNCs. The case against Vedanta is the most recent example of this trend.

A. Facts of the case

On 31 July 2015, 1,826 Zambian citizens, residents of four communities in the Chingola region, commenced proceedings against Vedanta and KCM in the Technology and Construction Court of the High Court of England, alleging personal injury, damage to property, loss of income, and loss of amenity and enjoyment of land. The majority of the claimants are farmers who rely on the land and local rivers as their primary source of livehood. They also rely on the local waterways as the main source of clean water for drinking, washing, bathing and irrigating farms. The claimants' communities are located close to the Nchanga Copper Mine that is operated by KCM, an indirect subsidiary of Vedanta. The mine commenced operations in 1937, but Vedanta acquired a controlling share in KCM in 2004. KCM operates a mine as a holder of a mining licence in accordance with the local legislative requirements that operations be run through a locally domiciled subsidiary. The claimants allege that from 2005 they have been suffering from pollution and environmental damage caused by the mine's operations. They allege that the discharge of harmful effluent in the waterways has endangered their livelihoods and physical, economic and social wellbeing.

In September and October 2015, both defendants applied for a declaration that the English court does not have jurisdiction to hear the claims. The defendants argued that Zambia was an appropriate forum to try the claims since it is the place where the claimants reside and where the damage is said to have occurred. In the course of a three-day hearing in April 2016 both parties presented their arguments. The judgement allowing a legal claim against both defendants to be tried in England was delivered on 27 May 2016.

B. Jurisdiction over the Parent Company

(Vedanta)

The claimants argued that Vedanta breached the duty of care it owed to them of ensuring that KCM's mining operations did not cause harm to the environment or local communities. The allegations are based on evidence that the parent company exercised a high level of control and direction over the mining operations of its subsidiary and over the subsidiary's compliance with health, safety and environmental standards (para 31). In their argument, the claimants relied on the Court of Appeal's decision in *Chandler v Cape*, which recognised the possibility of parent company responsibility for injuries of its subsidiary's employee and set a test for the establishment of the parent company's duty of care. Based on their submission on the breach of the duty of care by Vedanta, the claimants argued that the English court has jurisdiction over the parent company "as of right" by virtue of Article 4 of the Brussels I Regulation recast ("**Brussels I**"). Vedanta claimed that the court should apply the *forum non conveniens* argument and stay proceedings in favour of Zambia. Furthermore, the parent company claimed that a case against Vedanta is "a device in order to ensure that the real claim, against, KCM, is litigated in the United Kingdom rather than in Zambia" (para 51). Finally, the parent company sought to establish that there is either no real issue between Vedanta and claimants or, alternatively, the claim is weak and it should impact court's decision on the jurisdiction over the case (para 52).

The judicial response to the arguments of the parties was straightforward and explicit. It was held that Article 4 provided clear grounds to sue Vedanta as a UK-domiciled company in the UK (para 53). Mr Justice Coulson placed considerable weight on the decision of the Court of Justice of European Union ("**CJEU**") in *Owusu v Jackson* preventing UK courts from declining jurisdiction on the basis of the *forum non conveniens,* when the defendant is domiciled in the UK. In the view of the judge the different facts of the present case and any criticism of CJEU's reasoning did not make *Owusu* judgement less binding (para 71). Finally, the judge considered the claimants' arguments on the overall control exercised by Vedanta over Zambian mining operations and ruled that there is a real issue to be tried between the claimants and Vedanta (para 77). It was recognised that, although the claimants' argument against Vedanta was a challenging one, the pleadings set out a careful and detailed case on the breach of duty of care which was already supported by some evidence (para 128).

C. Jurisdiction over the foreign subsidiary (KCM)

KCM also challenged jurisdiction of the UK court by applying for an order setting aside service of the claim form on it out of the jurisdiction. The defendant company claimed that the entire focus of the litigation was in Zambia, and the claim against Vedanta was "an illegitimate hook being used to permit claims to be brought [in the UK] which would otherwise not be heard in the UK" (para 93). In response, the claimants argued that it was reasonable to try claims against both companies in the UK and, alternatively, the claimants would not have access to justice in Zambia (para 94).

Once again the decision of the court did not leave any ambiguity about the jurisdiction of an English court to hear the case about Zambian operations. It was first held that the claim against KCM undoubtedly had a real prospect of success (para 99). It was then established that the claim against Vedanta was arguable under both English and Zambian law (para 124). Furthermore, the judge ruled that it was reasonable for the court to try the claim against Vedanta, who, as a holding company of the group, had "the necessary financial standing to pay out any damages that are recovered" (para 146). Therefore, it was concluded that KCM was a necessary and proper party to the claim against Vedanta (para 147).

Finally, the court unconditionally established that England is the proper forum in which to bring the claim against KCM in accordance with the tests established by *The Spiliada* decision and *Connelly v RTZ* case. The judge decided that the assessment of England as the appropriate forum should be considered in light of the claims against Vedanta (para 160). Following this conclusion, and the earlier finding of the real issue to be tried between the claimants and Vedanta, it was held that England is an appropriate place to hear the claims against two legal entities of the major international company (para 163). Moreover, it was established that the claimants would not obtain access to justice in Zambia should the trial take place there (para 184). In particular, the judge took into account evidence that the Zambian legal system is not well developed (para 176); that the vast majority of the claimants would be unable to afford legal representation (para 178); that there was an insufficient number of local lawyers able to proceed with a mass tort action of such scale (para 186); and that KCM will be likely to prolong the case (para 195).

D. Significance of the decision

The *Vedanta* decision represents another significant achievement for foreign victims and their lawyers struggling with the jurisdictional hurdles of foreign direct liability cases in the courts of the home states. Following decisions in such cases as *Connelly v RTZ, Lubbe v Cape* and *Ngcobo v Thor Chemicals,* the present case contributes to the development of the law relating to the jurisdiction of English courts over foreign violations of human rights by UK-based TNCs. First, the decision clearly confirmed the mandatory application of Article 4 in tort litigation concerning extraterritorial abuses of TNCs. The first tort liability claims in England were intensely litigated for several years on the *forum non conveniens* issue. However, the trial judge's insistence that *Owusu* decision constitutes a binding authority for all cases involving defendants domiciled in UK, now makes it more difficult for defendant corporations to mount arguments over inadmissibility of the extraterritorial adjudicatory jurisdiction over corporate overseas activities.

Secondly, although at this stage of the proceedings the judge did not consider the case on the merits, there is nonetheless acceptance that the parent company may be held responsible for the human rights abuses committed to the members of the community at the place where the subsidiary runs its operations. The judge considered the claimants' "single enterprise" submission about Vedanta being "the real architects of the environmental pollution" (para 78). Moreover, it was recognised that the argument that "Vedanta who are making millions of pounds out of the mine, […] should be called to account […] has some force" (para 78). The acknowledgement of the economic reality of the TNCs and the decisive role of the parent corporation in the overseas operations of the subsidiary speaks in favour of the increasing awareness about the legal gaps in the international corporate accountability. However, a final determination of the liability of TNCs awaits in future decisions.

Another set of issues is raised by the court's reliance on the decision in *Chandler v Cape*. Despite the fact that the case did not have any foreign element, some commentators have already concluded that the ruling may have an influence in the context of TNCs. The reasoning of Mr Justice Coulson has left no doubts that *Chandler* should be considered as an authority for the resolution of the tort liability cases involving foreign operations of UK-based parent companies. Moreover, it was once again confirmed that invoking duty of care is strategically

beneficial for the claimants since: (1) the claim against the parent company provides the required connecting factor of the claim with the UK; and (2) framing the case through the duty of care doctrine provides a means by which the extraterritoriality concerns may be addressed. These arguments are consistent with the judge's finding that arguing breach of the duty of care by the parent company "could have a direct impact on jurisdiction grounds" (para 44). This approach and claimants' success may result in an increase in foreign direct liability cases in the UK courts.

The judgement also provides interesting material for the analysis with respect to the evaluation of the patterns of corporate behaviour in the host states and weak remedies available for the victims of abuses in their states of residence. The judge put considerable weight on the findings about KCM's financial position. Evidence submitted by the claimants provided that there was a real risk that KCM on its own would be unable to meet the claims (para 24). Indeed, undercapitalisation of the subsidiary remains a significant risk for claimants in the tort litigation against TNCs. The limited liability principle in corporate law creates an incentive for shareholders to engage in high risk projects, which plausibly have the possibility to result in moral hazard. Specifically for mass tort actions involving TNCs, the obtainment of final judgment against a subsidiary with no real assets will effectively mean losing the case. By establishing the case against the parent company, the claimants automatically target a pool of assets that would not otherwise be available were litigation to be commenced against the subsidiary in the host state. The compensational nature of the foreign direct liability claims is what makes them most valuable for the claimants

To date English courts have been consistent in treating the parent company and the subsidiaries as distinct legal entities in the context of allocating responsibility within the corporate groups. Similarly, the case law did not derogate from the conventional concept of corporate legal form. However, the fact that Mr Justice Coulson considered the financial position of the subsidiary as raising "legitimate concerns" (para 82) while deciding on the jurisdiction over the parent company, coupled with the increasing number of cases against parent companies allowed in the courts of their home states, suggests that there may be a shift from the traditional approach to the nature of the corporate groups to the more realistic reflection of the economic reality of these complex structures.

Finally, the decision in *Vedanta* case to restrain from the policy judgement on the

assessment of the Zambian legal system (para 198) is in line with the previous practice of the UK courts. First, in *Connelly v RTZ*, the House of Lords avoided making any assessment on the ability of the South African justice system to guarantee the claimants access to justice. Instead, its judgment focused on the personal ability of the claimant to obtain financial assistance of pursuing complex and expensive litigation. Later, in the *Lubbe v Cape* the House of Lords again decided to refrain from considering the influence of such public interest factors in the private interests of the parties and the ends of justice. Similarly, Mr Justice Coulson held that "criticism of the Zambian legal system" was not "the intention or purpose" of the judgement and, therefore, could not be regarded as "colonial condescension". Nevertheless, findings on the court about weak remedies available for the claimants in Zambia have been already questioned by Zambian President Edgar Lungu, which again raises the issue of judicial imperialism of the developed states through exercise of the extraterritorial jurisdiction over overseas operations of local TNCs.

Whether the English courts will take the ground breaking decision to rule that the parent company should be held liable for the overseas operations of its subsidiary is open to debate. It may not even be answered in this case, with settlement remaining a real possibility. Martin Day, a partner at the firm representing the Zambian farmers, has already called for the defendants to "engage in meaningful discussions and try to resolve these claims". An out-of-court settlement will again leave legal practitioners, academics and human rights activists without a single UK precedent on parent company liability in tort litigation against TNCs.

Does the occurrence of purely

financial damage in a Member State justify in itself the jurisdiction of the courts of that State pursuant to Article 5 (3) of Regulation No 44/2001?

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

Universal Music, a record company established in the Netherlands, acquired the Czech company B&M in the course of 1998. The contracts providing for the sale and delivery of B&M's shares were drawn up by a Czech law firm. Because of negligence by an associate of the Czech law firm the contracts provided a much higher sale price for B&M shares than intended by Universal Music. This led to a dispute between Universal Music and B&M's shareholders which was brought before an arbitration board in the Czech Republic, following a settlement between the parties in 2005. Because of this settlement Universal Music allegedly suffered financial damage of some 2.5 million EUR. Subsequently Universal Music has brought proceedings against the Czech lawyers before the Dutch courts. The Dutch courts have requested the CJEU to answer the question, whether Article 5 (3) of Regulation No 44/2001 must be interpreted as meaning that the *place where the harmful event occurred* can be construed as being the place, in a Member State, where the damage occurred, if that damage consists exclusively of financial damage which is the direct result of an unlawful act committed in another Member State. However the only connecting factor to the Netherlands, besides Universal Music being established in that state, was that the bank account from which Universal Music paid the settlement amount was situated in *Baarn* (The Netherlands). Thus the CJEU now finds that such "purely financial damage which occurs directly in the applicant's bank account can not, in itself, be qualified as a 'relevant connecting factor', pursuant to Article 5(3) of Regulation No 44/2001". Obviously in order not to contradict its ruling in *„Kolassa"* (C-375/13) the CJEU clarifies that only where "other circumstances specific to the case also contribute to attributing jurisdiction to the courts for the place where a

purely financial damage occurred, that such damage could, justifiably, entitle the applicant to bring the proceedings before the courts for that place". Referring to *„Kronhofer*" the CJEU further states that the *place where the harmful event occurred* "does not refer to the place where the applicant is domiciled and where his assets are concentrated by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another Member State". As a consequence the place where the loss of the claimant´s assets occurs and the place where his assets are concentrated only can be qualified as the *place where the harmful event occurred*, pursuant to Article 5 (3), if other circumstances specific to the case also contribute to attributing jurisdiction to the courts for these places.

The full judgment is available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=180329&pageIndex=0&doclang=DE&mode=req&dir=&occ=first&part=1

CJEU Rules on the Recognition of Names in the EU: Bogendorff von Wolfersdorff

On 2 June 2016 the CJEU came down with its long awaited judgment in Nabiel Peter Bogendorff von Wolfersdorff v. Standesamt der Stadt Karlsruhe. Dealing (once more) with the question whether the freedoms conferred under Article 21 TFEU require Member States to recognize names of private individuals registered in another Member State the Court held that the refusal, by the authorities of a Member State, to recognise the forenames and surname of a national of that Member State, as determined and registered in another Member State of which he also holds the nationality, constitutes a restriction on the freedoms conferred under Article 21 TFEU on all citizens of the EU. However, the Court also found that such a restriction may be justified by considerations of public policy.

David de Groot from the University of Bern (Switzerland) has kindly prepared the following note:

Mr Bogendorff von Wolffersdorff was born as a German national named Nabiel Bagadi. After an adoption his name changed to Peter Nabiel Bogendorff von Wolffersdorff. He moved to Britain and acquired, while being habitually resident there, the British nationality and subsequently changed his name by deed poll to 'Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff'. The German authorities did not want to recognise his new name as it contained the words 'Graf' and 'Freiherr', which used to be titles of nobility in Germany. According to Article 109 of the Weimar Constitution – which is still applicable based on Article 123 Basic Law – any creation of new titles of nobility is prohibited in Germany. However, the titles of nobility at the time of abolition became an integral part of the surname. Thus in Germany there are still persons who have a former title of nobility in their name. The same issue his daughter had where the German authorities did not want to recognise her name 'Larissa Xenia Gräfin von Wolffersdorff Freiin von Bogendorff'. In that case, though, the *Oberlandesgericht Dresden* had decided that the German authorities had to recognise the name established in the United Kingdom.

The District Court of Karlsruhe referred the following question to the CJEU:

> *Are Articles 18 TFEU and 21 TFEU to be interpreted as meaning that the authorities of a Member State are obliged to recognise the change of name of a national of that State if he is at the same time a national of another Member State and has acquired in that Member State, during habitual residence, by means of a change of name not associated with a change of family law status, a freely chosen name including several tokens of nobility, where it is possible that a future substantial link with that State does not exist and in the first Member State the nobility has been abolished by constitutional law but the titles of nobility used at the time of abolition may continue to be used as part of a name?*

A refusal by the authorities of a Member State to recognise a name of its national established while the person exercised his free movement rights in another Member State is likely to hinder the exercise of the free movement rights enshrined in Article 21 TFEU. Furthermore confusion and serious inconvenience at administrative, professional and private levels are likely to occur. This is due to

the fact that the divergence between documents gives rise to doubt to the person's identity and the authenticity of the documents and the necessity for the person to each time dispel doubts as to his identity. Therefore, it is a restriction of Article 21 TFEU which can only be justified by objective considerations which are proportionate to the legitimate objective of the national provisions.

The German authorities had brought several reasons to justify the restriction on the recognition of the name. The first justification brought forward was the immutability and continuity of names. The Court stated that although it is a legitimate principle, it is not a that important principle that it can justify a refusal to recognise a name established in another Member State. The second justification concerned the fact that it was a singular name change, meaning that the name changed independent of another civil status change. Therefore, the name change was dictated on personal reasons.

The Court referred to the case *Stjerna v. Finland* from the European Court of Human Rights of 1994 where it was stated that there may exist genuine reasons that might prompt an individual to wish to change his name, however that legal restriction on such a possibility could be justified in the public interest. The Court, however also stated that the voluntary nature of the name change does not in itself undermine the public interest and can therefore not justify alone a restriction of Article 21 TFEU. Concerning the personal reasons to change the name the Court also referred to the *Centros* ruling on abuse of EU law, but did not state whether it actually applied to the case. Concerning the German argument that the name was too long, the Court stated that "such considerations of administrative convenience cannot suffice to justify an obstacle to freedom of movement."

The most important point made by the German authorities concerned the fact that the name established in the UK entailed former German titles of nobility. The Government argued that the rules on abolishment of nobility and therefore refusal to recognise new titles of nobility were a part of the German public policy and intended to ensure equal treatment of all German citizens. Such an objective consideration relating to public policy could be cable of justifying the restriction; however it must be interpreted strictly. This means that it can only apply when it is a genuine and sufficiently serious threat to a fundamental interest of society.

In *Sayn-Wittgenstein* the Court had held that it was not disproportionate for

Austria to attain the objective of the principle of equal treatment "by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements which may create the impression that the bearer of the name is holder of such rank." However the German legal system is different in that there is not a strict prohibition on maintaining titles of nobility as a part of the family name and it is also possible to acquire it through adoption. It would though not be in the interest of the German legislature if German nationals could under application of the law of another Member State adopt abolished titles of nobility and that these would automatically have to be recognised by the German authorities.The Court was though not sure whether the practice of the German authorities to refuse a name including former titles of nobility, while allowing some persons in Germany to bear such a name, is appropriate and necessary to ensure the protection of the public policy and the principle of equality before the law of all German citizens. As this is a question of proportionality it would be for the referring court to decide upon this.

The Court however marked certain factors that have to be taken into consideration while not being justifications themselves. First of all that Mr Bogendorff von Wolffersdorff exercised his free movement rights and holds double German and British nationality. Secondly, that the elements at issue do not formally constitute titles of nobility in either Germany or the United Kingdom. Thirdly, that the *Oberlandesgericht Dresden* in the case of the daughter of Mr Bogendorff von Wolffersdorff did not consider the recognition of a name including titles contrary to public policy. However, the court would also have to take into consideration that it concerned a singular name change which is based purely on personal choice and that the name gives impression of noble origins. The Court concluded, however, that even if the surname is not recognised based on the objective reason of public policy, it cannot apply to the forenames, which would have to be recognised.

As such it is not that much a surprise that the Court referred the case back as it concerned a matter of proportionality. But still the Court's judgment is a bit disappointing as some issues of the referred question are unsolved. For example the Court did never go into the part of the referred question concerning "the future substantial link" of the British nationality. The Court states that Mr Bogendorff von Wolffersdorff is dual German and British national, but it could also have stated that the future substantial link does not matter due to the

Micheletti case. Also Article 18 TFEU got lost after the rephrasing of the question and the Court then only concentrated on Article 21 TFEU.

What is though very surprising is that the Court only mentions the case law on abuse of law, but then leaves it open whether it is applicable or not. Considering that Mr Bogendorff von Wolffersdorff lived in the United Kingdom for four years and even acquired British citizenship makes it rather doubtful whether one could consider it an abuse; especially if one compares it for example to the facts of the *Torresi* case.

It is thus now up to the national court to decide whether all German citizens are equal, or whether some are more equal than others – and all of these are former nobility.

Summer Schools 2016, Greece

The Jean Monnet Center of Excellence and the UNESCO Chair at the Department of International and European Studies, University of Macedonia, Thessaloniki, Greece, is organising a Summer academy on European Studies and Protection of Human rights in Zagora, on Mount Pelion, Greece, consisting of two summer schools in English. The academic faculty in both summer schools are University professors and experts from all over Greece and the EU (Great Britain, Spain and Poland).

The first summer school is on **"Freedom, Security and Justice in the EU**". It will be held **from Friday July 8, afternoon until Monday, July 11, 2016, afternoon.** In particular, the summer school will last **25 hours.** The main areas of study will be:

- Institutional Structure and Development (EU institutions, Frontex, Eurojust, European Attorney) which will be analyzed by Prof.

Chrysomallis,
- European Citizenship and the protection of fundamental rights in the Area of Freedom Security and Justice by D. Anagnostopoulou,
- Internal and External Security by Prof. F. Bellou,
- Immigration and asylum policies by Prof. V. Hatzopoulos and I. Papageorgiou,
- EU Private International Law by M. Gardenes – Santiago (Autonomous University of Barcelona),
- European criminal law (N. Vavoula, Queen Mary)

For further information in this summer school click here.

The second summer school will begin on **Thursday, July 14 afternoon and will end on Tuesday, July 19.** It will last **40 hours** with a focus on the **protection of human rights in Europe**:

- International human rights protection mechanisms (International Covenants and International Conventions), taught by f. Professor P. Naskou Perraki (University of Macedonia)
- European Convention on Human Rights by Dr. Dagmara Dajska, expert of the Council of Europe, who will discuss the right for fair trial and the right to asylum,
- Freedom of Expression by Prof. I. Papadopoulos (University of Macedonia),
- Protection of Personal Data by Prof. E. Alexandropoulou (University of Macedonia),
- EU Charter of Fundamental Rights by Prof. L. Papadopoulou (Aristotle University of Macedonia),
- Prohibition of discrimination by Prof. D. Anagnostopoulou (University of Macedonia),
- LGBT Rights by Prof. Alina Tryfonidoy (Reading University),
- Protection of minorities and cultural rights by Dr. Nikos Gaitenidis, Head of the Observatory on Constitutional Values of the Jean Monnet Centre of Excellence, and
- Workshop on intercultural skills by Prof. I. Papavasileiou (University of Macedonia)

For further information on this summer school click here.

A Certificate of attendance will be issued to all while a Certificate of Graduation will be awarded to all those passing a multiple choice examination.

For additional information and applications to any of the schools, please refer to the links below or contact:

Assistant Professor Despina Anagnostopoulou, danag@uom.gr

or *Ms. Chrysothea Basia, chrybass@yahoo.com*

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:

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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).