

Fundamental Rights and Judicial Cooperation in the Decisions of the Court of Justice on the Brussels I Regulation 2009-2014: The Story So Far.

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Introduction

“...as from the date of entry into force of the Treaty of Lisbon, 1 December 2009, the fundamental principles of EU law and the EU system of judicial protection such as primacy, direct application, direct effect and interpretation in conformity, have become of full application in the whole domain of the AFSJ.”²

Ever since the enactment of the European Convention on Human Rights, fundamental rights have operated at and between national and EU law.³ With the enactment of the Charter of Fundamental Rights via (*inter alia*) Article 67, Title V of the TFEU, a further layer of fundamental rights has emerged. The Charter addresses the protection of six key rights, one of which is justice. As justice is a broad concept, for present purposes it is useful to identify those particular aspects of the Charter aligned with justice in a specific context. The relevant aspects of the Charter are Articles 6, on the preservation of individual liberty and security of person and Article 47 on the right to an effective remedy and a fair trial. The emergence of the Charter as a source of fundamental rights law provides an opportunity to consider and determine the tripartite⁴ relationship between national human rights law, EU law (including human rights law) and the Charter. This paper is focussed on the extent to which the Court of Justice is increasingly having regard to the Charter when interpreting secondary EU laws⁵ in the field of judicial cooperation in civil matters. The extent to which such EU laws are

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² J. de Zwaan, “The New Governance of Justice and Home Affairs: Towards Further Supranationalism,” in S. Wolff, F.A.N.J. Goudappel and J. W. de Zwaan (eds) *Freedom, Security and Justice After Lisbon and Stockholm*, TMC Asser Press, The Hague, 2011 at p.25.

³ H.S. Raulus, “Fundamental Rights in the Area of Freedom, Security and Justice,” in S. Wolff, F.A.N.J. Goudappel and J. W. de Zwaan (eds) n 2 *supra*.

⁴ C-7/98 *Dieter Krombach v Andrée Bamberski* 2000 ECR I-01935 at para 25; B. Juratowitch, “The European Convention on Human Rights and English Private International Law,” 2007 3(1) *Journal of Private International Law*, 173 at p.188.

⁵ C-483/11 *Boncea and Others*, Order of the Court (Sixth Chamber), 14 December 2011, [2011] ECR I-00198 and C-617/10 *REC Åkerberg Fransson*, Order of the Court (Grand Chamber), 7 May 2013 (unreported).

interpreted in accordance with the Charter demonstrates a particular aspect of the EU's "role [...] in setting fundamental right policies."⁶ In essence, the introduction of the Treaty of Lisbon and the policy objectives it seeks to achieve necessitate a coherent approach to embedding the Charter across the "EU constitutional legal order."⁷ Raulus recently concluded that due regard to the Charter required to be demonstrated through a combination of "the legislative process [...] judicial review of EU law [and] the accession of the EU to the ECHR."⁸ In response to the second point – namely judicial review of EU law- it is necessary to consider how the Court of Justice's jurisprudence⁹ on the interpretation of secondary EU laws is increasingly taking account of fundamental rights in the Charter.

In December 2014, five years will have passed since the enactment of both the Treaty of Lisbon and the Charter of Fundamental Rights. During that time, attention has focussed on the role of the CJEU and its role in supporting a particular policy objective of the Treaty of Lisbon, namely the establishment of an Area of Freedom, Security and Justice for the protection of EU citizens. In accordance with Article 81, a key aspect of that policy is the establishment of judicial cooperation in civil and commercial matters between the Member States through the approximation of laws and rules of jurisdiction. This policy is related to particular objectives in the Charter related to justice in the context of the right to access a court and an appropriate remedy (Articles 6 and 47). Prior to the Treaty of Amsterdam, the key measures taken in the related field of Justice and Home Affairs were the Brussels Convention on Jurisdiction in Civil and Commercial Matters 1968 and the Rome Convention on the Law Applicable to Contractual Obligations 1980. Whilst both instruments were enacted and regarded as "international instruments"¹⁰ the justification for their introduction,

⁶ H.S. Raulus, in S. Wolff, F.A.N.J. Goudappel and J. W. de Zwaan (eds), n 2 at p.214.

⁷ G. Sanna, "Article 47 of the EU Charter of Fundamental Rights and Its Impact on Judicial Cooperation in Civil and Commercial Matters," in G. Di Federico (ed), *The EU Charter of Fundamental Rights From Declaration to Binding Instrument*, Springer, Dordrecht, 2011 at p.161.

⁸ Raulus, in S. Wolff, F.A.N.J. Goudappel and J. W. de Zwaan (eds), n 2 at p.240.

⁹ V. Trstenjak and E. Beysen, "The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the CJEU," 2013 38(3) ELR 293 where the authors consider the "overlap of fundamental freedoms and fundamental rights" in the "application and *observance*" of fundamental rights, at p.293, word italicised for emphasis.

¹⁰ Some Member States enacted and regarded these measures as equivalent to "international instruments"; S. Peers, *EU Justice and Home Affairs Law*, 3rd ed, Oxford: University Press, 2011 at p.9-10, ; P. M. North, "The E.E.C Convention on the Law Applicable to Contractual Obligations (1980): Its History and Main Features," in P. M. North, (ed), *Contract Conflicts The EEC convention on the Law Applicable to Contractual Obligations: A Comparative Study*, North Holland Publishing Company, Amsterdam, 1982 at p.11-12.

¹¹ was to support the objectives of the EC at the time. ¹² Therefore, the interpretation of both instruments was not strictly focussed on ensuring compatibility with human or fundamental rights *per se*. Given the transference of judicial cooperation in civil and commercial matters from the third to the first pillar by the Treaty of Amsterdam, the EU has had competence to conclude secondary EU legislation operating between the Member States. ¹³ Article 81 of the Treaty confirms that judicial cooperation in civil and commercial matters between the Member States is required “in so far as necessary for the proper functioning of the internal market.” Whilst the requirement for necessity is regarded by Peers as less debatable in terms of satisfying the internal market requirement, ¹⁴ it must still nevertheless be established that measures to be taken at EU level cannot better be taken by the Member States. What this means is that the EU Commission must demonstrate two things. First, it must be demonstrated that continued divergences between Member States’ private international laws affect one of the four freedoms. Second, action by the EU to reduce divergences through the introduction of approximated EU laws must be proportionate. Since 2002, in order to address continued divergences, the EU has enacted a number of Regulations in EU private international law. The most prominent measures in the field of EU private international law are the Brussels I Regulation for Jurisdiction in Civil and Commercial Matters,¹⁵ the Brussels IIa Regulation for Jurisdiction in Matrimonial Matters and Child Custody ¹⁶ and the Rome I ¹⁷ and Rome II ¹⁸ Regulations on the Law Applicable to Contractual and Non-Contractual Obligations respectively. In particular the Brussels I Regulation seeks to provide a coherent set of general, exclusive and special jurisdiction rules for civil and commercial disputes. A hierarchy of jurisdiction rules (exclusive, general and special) in the Brussels I Regulation

¹¹ “Report by Mr. P. Jenard on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, 3 June 1971,” 1979 OJ C59/1 ; “Council Report on the Convention on the law applicable to contractual obligations, by Professors Mario Giuliano and Paul Lagarde,” 1980 OJ C282.

¹² P. Craig, “The Charter, the ECJ and National Courts,” in D. Ashiagbor, N. Countouris and I. Lianos (eds), *The European Union After the Treaty of Lisbon*, Cambridge: University Press, 2012 at p.79.

¹³ The Lugano Opinion also equips the EU with external competence to enter into agreements with non EU Member States, on behalf of the Member States; “*Opinion* 1/03 of the Court on the competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,” [2006] ECR I-1145.

¹⁴ Peers, n 10 at p.605.

¹⁵ EC 44/2001 OJ 2001 L12; *cf* to be replaced by EC 1215/2012 OJ 2012 L351/1, effective from 10/01/15.

¹⁶ EC 2201/2003 OJ 2003 L338/1.

¹⁷ EC 593/2008 OJ 2008 L177/6.

¹⁸ EC 864/2007 OJ 2007 L199/40.

determines whether a defendant domiciled in one Member State may be sued in the courts of another Member State. In addition, the Brussels I Regulation contains rules on when recognition and enforcement of foreign judgments can be automatically permitted or refused. The Brussels Ila Regulation also seeks to provide a set of coherent jurisdiction rules for matrimonial matters and for disputes relating to parental responsibility. The Rome I and II Regulations contain rules which determine what law applies to a contractual or non-contractual obligation respectively and when the *lex fori's* public policy or mandatory rules may be enforced to restrict the applicable law.¹⁹ It is worth noting of these four Regulations, it is only (*currently*) the Brussels Ila Regulation which seeks to “recognise the fundamental rights and observe the principles of the Charter [...] In particular [...] to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter ...”²⁰

The CJEU has continued to provide autonomous and independent interpretations to ensure consistency with the objectives of these secondary EU instruments. However, the enactment of the Charter in 2009 and the advancement towards accession of the ECHR by the EU²¹ reinforces De Burca’s recent thesis that due reference to and application of the Charter should be demonstrated in the CJEU’s decisions through (*inter alia*) greater regard for the reasoning offered in AGs’ Opinions.²² Generally speaking, the opinions of the Advocates’ General offer a significant insight into the Court’s *general* “supervisory role.”²³ More specifically, the decisions of the Court of Justice on the Brussels I Regulation continue to march towards an increasingly particularised jurisprudential framework for the autonomous interpretation of EU private international laws. As Trstenjak and Beysen’s recent contribution to the debate concludes, the key developments lie in the broadening or “gradual expansion”²⁴ of

¹⁹ Cf Juratowitch, n 4 at p.193 on the application of foreign law and compliance with the ECHR.

²⁰ Recital 33, Regulation EC 2201/2003, n16 ; Case C-491/10 PPU *Aguirre Zarraga v Simone Pelz* [2010] ECR -14247, paragraph 59 et seq ; C-400/10 *J Mc B. v L.E.* 2010 ECR I-08965 ; C-4/14 *Bohez v Wiertz*: 6 January 2014 (Request for Preliminary Ruling). It must also be noted that in January 2015, the Brussels I Regulation will be replaced by Regulation EC 1215/2012, the Brussels I Recast Regulation. Recital 38 of that Regulation also acknowledges “respect” for the Charter, specifically Article 47 ; Recital 38, Regulation EC 1215/2012, OJ L351/1 at p.5

²¹ Article 6 TEU ; P. Craig, “EU Accession to the ECHR: Competence, Procedure and Substance,” (2013) 36 *Fordham International Law Journal* 1115; Oxford Legal Studies Research Paper No.4/2014: available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354975 (accessed September 2014) at p.1114-1118.

²² G. De Burca, “After the EU Charter of Fundamental Rights: the Court of Justice as a Human Rights Adjudicator?” 2013 20(2) *Maastricht J of European and Comparative Law* 168 at p.169.

²³ A. Kaczorowska, *European Union Law*, 3rd ed, Routledge, 2013 at p.40.

²⁴ Trstenjak and Beysen, n 9 at p.294.

fundamental rights but crucially also “adjustments [...] on the grounds of justification for restrictions of those rights ...”²⁵ Accordingly, this chapter seeks to review a number of key CJEU cases on the Brussels I Regulation issued by the court in the period 2009-2014. It will be considered first, to what extent those recent decisions are first illustrative of that “gradual expansion”²⁶ towards a *lex specialis* in field of judicial cooperation generally and second how justice is taken account as a fundamental right in the Court’s decisions. Where available, the AG’s Opinions should continue to shed light on the future influence of the Charter in seeking to achieve autonomous, independent interpretations of the emerging set of EU private international laws.

The Area of Freedom, Security and Justice in Title IV of Treaty and the Charter of Fundamental Rights

Private international law rules are a set of “secondary rules”²⁷ which determine what court is competent to hear a dispute (jurisdiction) and which country's laws apply (*lex fori*, *lex loci*). These rules have been developed and interpreted by and between sovereign jurisdictions in pursuit of Kegelian notions of “conflicts justice”²⁸; namely certainty and predictability with due regard to the mutual principles of comity and reciprocity (trust and confidence) when recognising and enforcing judgments from other sovereign States. Since its inception, the EU moved forward with the “Europeanisation”²⁹ of jurisdiction rules and the reciprocal enforcement of judgments between the Member States. This has continued apace with a more far reaching programme of approximation of Member States’ rules of private international laws via (*inter alia*) the secondary EU instruments mentioned earlier, in furtherance of the policy to establish an “Area of Freedom, Security and Justice” (AFSJ).

Raulus has confirmed that there is a “close connection between the AFSJ policies and fundamental rights...”³⁰ Since the Tampere Council in 1999,³¹ the establishment of an Area

²⁵ Ibid.

²⁶ Ibid.

²⁷ A. Mills, *The Confluence of Public and Private International Law, Justice, Pluarlism and Subsidiarity in the International Constitutional Ordering of Private Law*, Cambridge: University Press, 2010 at p.19-20.

²⁸ G. Kegel “Fundamental Approaches,” in K. Lipstein (ed), *International Encyclopedia of International Law, Volume III/1, Private International Law*, Mohr Siebeck - Martinus Nijhoff Publishers, Leiden, Boston, 2011.

²⁹ P. Graziano and M. P. Vink, *Europeanization New Research Agendas*, Palgrave MacMillan, Basingstoke, 2007.

³⁰ Raulus, in S. Wolff, F.A.N.J. Goudappel and J. W. de Zwaan (eds), n 2 at p.229.

³¹ Kazcarowska, n 23 at p.44.

of Freedom, Security and Justice was affirmed as a “most important specific objective”³² of the EU. The AFSJ is an explicit objective of the Treaty of Lisbon, the TFEU and the Charter of Fundamental Rights. Article 2 of the Treaty of Lisbon provides, *inter alia*, that the “Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured...” Article 4 of the TFEU confirms that the AFSJ is an area of “shared competence between the Union and the Member States...” The Preamble of the Charter states that the “creation of an area of freedom, security and justice” is necessary to protect EU citizen’s fundamental rights. Measures taken by the EU in the field of AFSJ must be within the realms of the Union’s competence. In its desire to approximate jurisdiction rules in civil and commercial matters, the EU has taken action to update existing secondary EU laws and introduce new measures. Since (*inter alia*) the Treaty of Amsterdam in 1997 and more recently Articles 81 and 114 of the TFEU, the Court of Justice’s role in delivering autonomous, independent and arguably more particularised interpretations of these Regulations has continued to exert considerable influence on the evolution and interpretation of private international laws - on the one hand pragmatically viewed as the remit of sovereign states but on the other hand regarded as an emerging branch of EU private law.³³

The cornerstone of AFSJ is the principle of mutual recognition of Member States’ laws and procedures. The principle of mutual recognition, derived from the Court of Justice in *Cassis de Dijon*,³⁴ has ensured that Member States respect and recognise the rules and procedures of other Member States. This principle must be balanced with the general objective of the AFSJ where there is a “presumption of compliance, by other Member States, with European Union law, and, in particular, human rights.”³⁵ The discrete question that has arisen from a number of CJEU decisions on judicial cooperation is whether mutual recognition is “problematic from the fundamental rights protection point of view”?³⁶ In the field of judicial cooperation, the two broad areas where the tension between mutual recognition and fundamental rights has arisen have been either when applying the Regulations for the

³² Kaczarowska, n 23 at p.41.

³³ P.Letto-Vanamo and J. Smits (eds), *Coherence and Fragmentation in European Private Law*, Sellier: European Law Publishers, Munich, 2012.

³⁴ C-120/78 *Rewe-Zentral AG V Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon)* [1979] ECR 649.

³⁵ J. Polakiewicz, “The EU Law and the ECHR: Will the European Union’s Accession Square the Circle?” 2013 (6) EHRLR 592 at p.602 quoting AG Trstenjak’s Opinion in the Joined cases C-411/10 and C-493/10 *N.S* 22 5 October 2010 (not yet published) at paras 38, 41.

³⁶ Raulus, in S. Wolff, F.A.N.J. Goudappel and J. W. de Zwaan (eds), n 2 at p.229.

purposes of establishing jurisdiction in the courts of a Member State or in determining in what circumstances recognition and enforcement of another Member States' judgment can legitimately be refused. More specifically, the cases on the Brussels I Regulation to be considered later in this paper reflect the need for greater coherence between the potentially competing notions of mutual recognition, effective judicial cooperation and rights enshrined under the ECHR and the Charter. This has also been reflected in cases on the analogous Brussels IIa Regulation on jurisdiction, recognition and enforcement in matrimonial matters and parental responsibility. For example, in *C-400/10 PPU McB*, the CJEU confirmed that it was able to take account of the Charter when interpreting Brussels II Regulation.³⁷ The Court of Justice confirmed that the Charter should apply if *mutatis mutandis* with the ECHR.

In the context of judicial cooperation for civil and commercial matters, the challenge of reconciling mutual recognition with fundamental rights protection persists. Therefore, considering the decisions of the CJEU's approach and rationale in its interpretation of EU private international laws provides an opportunity to reflect on how the objectives of mutual recognition correlate with first the increasing expectations of fundamental rights protection via the application of Article 6 and 47 of the Charter and Article 67(1) of the TFEU. In a series of judgments prior to and since the introduction of the Charter, the CJEU has affirmed that the principle of mutual recognition cannot be applied at the expense of fundamental rights derived either from the ECHR or the Charter. Rodgerson identifies that the use of Article 6 of the ECHR in particular will operate "to prevent the enforcement of foreign judgments which have been obtained in breach of Article 6 ECHR."³⁸ In the *AFJS*, a more far reaching question posed by Polakiewicz is whether "human rights standards, based on either national, ECHR or EU law, may be invoked to *refuse* mutual recognition in cases where the relevant EU legislation does not provide for such a refusal ground."³⁹ The next section of this Chapter will consider how particular decisions on the Brussels I Regulation by the CJEU during the period 2009-2014 demonstrate the emergence of De Burca's second and third points on the

³⁷ *C-400/10 PPU J. McB v L.E.* n 20 ; S. Barriati, *Cases and Materials on EU Private International Law*, Hart, Oxford, 2011 at p.193-194.

³⁸ P. Rogerson, *Collier's Conflict of Laws*, 4th ed, Cambridge: University Press at p.431.

³⁹ J. Polakiewicz, "The EU Law and the ECHR: Will the European Union's Accession Square the Circle?" 2013 (6) EHRLR 592 at p.603. Word italicised for emphasis.

metamorphosis of the Charter, beyond its “adoption ... [to its] cit[ation] or argu[ment] before the Court ...[and] the Court’s engag[ment] ... and... prominence...”⁴⁰

A Gradual Expansion: Decisions of the Court of Justice to the Brussels I Regulation and the Charter

Before turning to the approach in recent CJEU cases, it is instructive to briefly consider the extent to which the pre-Lisbon and Charter case law from the Court of Justice considered the notion of fundamental rights, derived from interpretation of the ECHR, in its interpretation of both the Brussels Convention 1968 and the Brussels I Regulation. At this juncture, the distinction must be made between those cases which fall under the scope of the EU rules and those which remain subject to Member States’ residual jurisdiction and procedural mechanisms. Not only does this distinction define the temporal scope of the Regulations between the Member States, it also serves to highlight that the Charter’s influence is restricted to the “EU legal order.”⁴¹ The key cases in which the provisions of the ECHR have arisen under the Brussels Convention and Regulation are in relation to the restrictive review of the court’s jurisdiction, the compatibility of provisional and protective measures and the extent to which a foreign judgment may be refused recognition and enforcement. These will now be considered in turn.

C-7/98 Dieter Krombach v Andre Bamberski : Does Enforcement of a Foreign Judgment Infringe a Fundamental Right?

The case *C-7/98 Dieter Krombach v Andre Bamberski*⁴² illustrates the role of the Court in the tripartite relationship between national law, the Brussels Convention 1968 and fundamental rights under the ECHR. The core issue was whether a judgment from one MS could, under Article 27 of the Convention, be refused recognition in another Member State. In this case, the defendant was not present to be able to defend (*inter alia*) civil proceedings which took place in France. A judgment was issued against him which required him to pay compensation. The French judgment was sought to be enforced in Germany. In response, refusal to enforce

⁴⁰ De Burca, n 22 at p.168.

⁴¹ See for example L.F.M. Besselink’s recent comments on the case *C-399/11 Melloni v Ministerio Fiscal* [2013] QB 1067 in “The Parameters of Constitutional Conflict After Melloni,” 2014 ELR 531 at p.537, 539, 541. On national approaches, with English private international law as an exemplar, see Juratowitch n 4.

⁴² *C-7/98 Dieter Krombach v Andre Bamberski* OJ 2000 C163/1.

the judgment was sought because the defendant claimed he was “unable effectively to defend himself.”⁴³ Article 27 provided that refusal to enforce could only be permitted if enforcement was contrary to public policy. The Court of Justice held that whilst it was not possible to review the court of origin’s jurisdiction,⁴⁴ it would be for the national court to determine whether there had been a breach of Article 27 on the basis that enforcement of the judgment would be “at variance to an unacceptable degree with the legal order of the State in which enforcement is sought in as much as it infringes a fundamental right [...] *within that legal order.*”⁴⁵ In referring to the earlier Opinion 2/94, the CJEU confirmed that its role was to interpret the “limits”⁴⁶ of public policy under Article 27 of the Brussels Convention whilst at the same time ensuring that the “right to a fair hearing is [maintained as a] fundamental principle of Community law which must be guaranteed ...”⁴⁷ The Court confirmed that the public policy exception in the Brussels Convention could operate only in those “exceptional cases”⁴⁸ where the “opportunity to hear the defence of an accused person who is not present at the hearing ...”⁴⁹ In conclusion, the Court of Justice affirmed that the aim of mutual recognition of judgments was not to “undermin[e] the right to a fair hearing...”⁵⁰ Therefore whilst it would appear that fundamental rights trump mutual recognition, the Court was affirming its previous position in *C-49/84 Debaecker and Plouvier v Bouwman*.⁵¹ In essence, a check and balance approach operates in that refusal to recognise the judgment of another Member State under the public policy exception takes effect only in such situations breach of an essential fundamental right as provided for by the *national* court of enforcement can be established.

⁴³ Krombach, n 42 at para 16.

⁴⁴ *Krombach*, n 42 at para 31.

⁴⁵ *Krombach*, n 42 at para 37 ; words removed and italicised for emphasis.

⁴⁶ *Krombach*, n 42 at paras 1, 22, 23.

⁴⁷ *Krombach*, n 42 at para 42, words removed and added for syntax.

⁴⁸ *Krombach*, n 42 at para 44.

⁴⁹ *Krombach*, n 42 at para 44.

⁵⁰ *Krombach*, n 42 at para 43.

⁵¹ *Krombach*, n 42 at para 43 ; *C-49/84 Debaecker and Plouvier v Bouwman* [1985] ECR 1779.

C-394/07 Marco Gambazzi v Daimler Chrysler: Restrictions must not be “manifestly disproportionate”

The second key case brought under the Brussels I Regulation before the introduction of the Charter was *C-394/07 Marco Gambazzi v Daimler Chrysler*.⁵² The dispute in *Gambazzi* was concerned with the compatibility of a freezing order, or Mareva injunction, with the Brussels I Regulation. This freezing order was intended to prevent Mr Gambazzi from participating in court proceedings in which he was a defendant. The Advocate General in *Gambazzi* took the view that such an order was the “most serious restriction possible on the rights of the defence.”⁵³ In *Gambazzi*, the court affirmed that the balance to be struck between fundamental rights and public policy was to ensure that the “objectives [...] corresponded [with the] public interest pursued [and were not] disproportionate...”⁵⁴ In essence, the Court of Justice’s approach has been to offer “general criteria”⁵⁵ to be used by national courts in determining whether the objectives are proportionate relative to the defendant’s remedies and his right to be heard.

Taking Account of the Charter of Fundamental Rights in the Case Law of the Court of Justice on the Brussels I Regulation 2009-2014

Prorogation of Jurisdiction and Coherence with Article 47: C-112/13 A v B

In the case of *C-112/13 A v B*,⁵⁶ the Oberster Gerichtshof, Austria referred three questions to the CJEU which were concerned with the interaction between Articles 24 of the Brussels I Regulation and Article 47 of the Charter. The facts were as follows. A number of claimants sued ‘A’ for damages based on the allegation that A was responsible for the abduction of B’s family members in a non-Member State. The claimants argued that ‘A’ was domiciled in Austria and that the Austrian courts had jurisdiction. The first question asked by the Austrian court was whether in a situation where national law is not compliant with the Charter, it should not be applied and referred for further, national assessment. The second and third questions put to the Court was whether in circumstances where the defendant is absent and

⁵² *C-394/07 Marco Gambazzi v Daimler Chrysler* 2009 ECR I-02563.

⁵³ *Gambazzi*, n 52 at para 33.

⁵⁴ *Gambazzi*, n 52 at para 29.

⁵⁵ *Gambazzi*, n 52 at para 39.

⁵⁶ *C-112/13 A v B and Others*, Judgment of the Court (Fifth Chamber), 11 September 2014 (not yet published).

a representative is appointed to appear, this constitutes “appearance” - and thereby “tacit prorogation”⁵⁷ of jurisdiction - for the purposes of Article 24 of the Brussels I Regulation. The third related question was whether such an interpretation of Article 24 of the Brussels I Regulation was in accord with Article 47 of the Charter. The defendant argued that if appearance in this manner was established under Article 24, this would constitute a failure to take account of Article 6 of the ECHR and Article 47 of the Charter. In response, the claimants argued that if appearance was not established then this would be at odds with their right to an effective remedy under Article 47. With regard to the first question, Advocate General Bot observed that whilst there was a lack of definition of appearance under Article 24,⁵⁸ Article 24 was to be interpreted in support of the Regulation’s objectives.⁵⁹ Advocate General Bot was of the opinion that to ensure an “autonomous definition”⁶⁰ of the Article and a “high level of predictability”⁶¹ in relation to its potential effects on special jurisdiction rules,⁶² Article 24 *in particular* should be “narrowly construed.”⁶³ Advocate General Bot was also of the opinion that in such cases, jurisdiction did not constitute the entry of an appearance by the defendant such as required by Article 24 of the Brussels I Regulation and that tacit prorogation may operate only if “all the parties to the dispute – and above all, the defendant – have deliberately chosen that jurisdiction.”⁶⁴ In relation to the third question, the Advocate General reaffirmed the need for deliberate choice, a point confirmed by the Court of Justice in its decision.⁶⁵ The Judgment of the Court also distinguished the earlier case C-327/10 *Hypoteční banka a.s*⁶⁶ with the facts of the present case since “...the effect under national law that A must be regarded as having entered an appearance before the court seised.”⁶⁷

⁵⁷ *A v B*, n 56 ; Opinion of Advocate General Bot, 2 April 2014, at paras 36, 39, 40, 41, 42.

⁵⁸ *A v B*, n 56 Opinion of Advocate General Bot, at para 35.

⁵⁹ *A v B*, n 56, Opinion of Advocate General Bot, at para 35.

⁶⁰ *A v B*, n 56, Opinion of Advocate General Bot, at para 35.

⁶¹ *A v B*, n 56, Opinion of Advocate General Bot at para 37 ; affirmed in Judgment of the Court at para 57.

⁶² *A v B*, n 56, Opinion of Advocate General Bot, at para 39.

⁶³ *A v B*, n 56, Opinion of Advocate General Bot, at para 38.

⁶⁴ *A v B*, n 56, Opinion of Advocate General Bot, at para 42.

⁶⁵ *A v B*, n 56 Judgment of the Court at para 53-54 *et seq.*

⁶⁶ C-327/10 *Hypoteční banka a.s v Udo Mike Linder* 2011 ECR I-11543.

⁶⁷ *A v B*, n 56, Judgment of the Court, at para 60.

Exclusive Jurisdiction: C-483/12 Irmengard Weber v Mechthilde Weber

In the recent case *C-438/12 Irmengard Weber v Mechthilde Weber*,⁶⁸ the Court of Justice was requested by the Oberlandesgericht Munchen, Germany to consider which court could assert jurisdiction under Article 22. Article 22 provides exclusive jurisdiction for rights *in rem* over immovable property. The related question was that if the court first seised did not have exclusive jurisdiction by virtue of Article 22, could the continuation of proceedings there potentially restrict recognition of a subsequent judgment under Article 35(1)? The court was also asked whether, in accordance with the Regulation the court second seised - having exclusive *in rem* jurisdiction as the place where the object was situated - should stay proceedings in favour of the court first seised (*lis pendens*). Advocate General Jääskinen re-aligned the questions in the Preliminary Reference to follow the structure of the Regulation. In respect of the first question, he confirmed that the Italian courts as the courts first seised had already made a declaration declining jurisdiction over the subject matter of the dispute in favour of the German courts.⁶⁹ Since the “jurisdiction of the court first seised [could not be] be formally established”⁷⁰ the Advocate General confirmed that there was no *lis pendens* in operation in this case and proceedings in the court second seised need not be stayed. He relied on dicta in *Overseas Union Insurance*⁷¹ to justify that it was “inappropriate for it to stay proceedings pending before it...”⁷² The justification for the “reliable assessment”⁷³ this was premised on the fact that the court first seised did not have jurisdiction and could not therefore either determine the question of *lis pendens* nor issue a judgment capable of recognition under Articles 35(1) and 45(1). Furthermore, since the court second seised may very well have exclusive jurisdiction by virtue of Article 22, it would be unnecessary to require that court to stay proceedings. The Advocate General also provided an interpretation of Article 27 as to whether *lis pendens* required to operate “between the same parties.”⁷⁴ In line with earlier jurisprudence, the Advocate General confirmed that it was possible for parties to have different procedural titles in each case and be at least one of the parties in

⁶⁸ *C-438/12 Irmengard Weber v Mechthilde Weber* OJ C-159 16/05/14.

⁶⁹ *Irmengard Weber v Mechthilde Weber*, n 68 at para 17 of AG Opinion.

⁷⁰ *Irmengard Weber v Mechthilde Weber*, n 68 at para 37 of AG Opinion.

⁷¹ *C-351/89 Overseas Union Insurance and Others* [1991] ECR I-3317.

⁷² *Irmengard Weber v Mechthilde Weber*, n 68 at para 40 of AG Opinion.

⁷³ *Irmengard Weber v Mechthilde Weber*, n 68 at para 42 of AG Opinion.

⁷⁴ *Irmengard Weber v Mechthilde Weber*, n 68 at para 17 of AG Opinion.

both sets of proceedings. Both situations arose in this case: with the former criteria, one of the parties (Ms. I Weber) was a defendant to the first set of proceedings in Italy, whereas she was a claimant in proceedings brought against her sister (Ms. M. Weber) in Germany. The Advocate General confirmed that in a situation where the parties' were "not strictly identical,"⁷⁵ the court second seised still had to be satisfied that the "parties' interests are the same and inseparable."⁷⁶ Crucially, for the purposes of this analysis, the Advocate General took the view that if the court second seised was not limited to determining the "identity and indivisibility between the parties"⁷⁷ for the purposes of Article 27, a "denial of justice"⁷⁸ in breach of a parties' fundamental rights may occur. The Advocate General confirmed that Articles 6 and 13 of the ECHR and Article 47 of the Charter are

"individual rights which exist regardless of whether or not the natural or legal person concerned has interests inseparable from or identical to those of another person [...] An individual cannot be legitimately deprived of the opportunity of having his action examined without delay because another individual is the defendant in a dispute brought before the courts of another Member State."⁷⁹

In sum, the Advocate General concluded that in the present case the requirement to stay proceedings in the court second seised (which had exclusive jurisdiction) would "jeopardise the effective judicial protection of the parties"⁸⁰ and that the proceedings in both the Italian courts and the German courts were not *lis pendens* and therefore not subject to Article 27. The Advocate General also confirmed that the "right of the applicant to have access to justice [was] consistent with the right to effective juridical protection guaranteed by Articles 6 and 13 of the ECHR and the first and second paragraphs of Article 47 of the Charter."⁸¹ The Advocate General also remarked that in his/her opinion that the application of Article 27 would not render a breach of Article 47 since it was plainly evident in this case that all parties had been able to access justice in their chosen courts.

⁷⁵ *Irmengard Weber v Mechthilde Weber*, n 68 at para 53 of AG Opinion.

⁷⁶ *Irmengard Weber v Mechthilde Weber*, n 68 at para 54 of AG Opinion.

⁷⁷ *Irmengard Weber v Mechthilde Weber*, n 68 at para 53 of AG Opinion.

⁷⁸ *Irmengard Weber v Mechthilde Weber*, n 68 at para 55 of AG Opinion.

⁷⁹ *Irmengard Weber v Mechthilde Weber*, n 68 at para 55 of AG's Opinion. Words in brackets removed for syntax.

⁸⁰ *Irmengard Weber v Mechthilde Weber*, n 68 at para 58 of AG's Opinion.

⁸¹ *Irmengard Weber v Mechthilde Weber*, n 68 at para 87 of AG's Opinion.

In response, the Court of Justice itself re-aligned the order of the questions referred to but nevertheless still ruled that a judgment granted by a Member State court that did not take account of the exclusive jurisdiction rule in Article 22 “will not be recognised in the other Member States, in accordance with Article 35(1) of that regulation.”⁸² The Court also agreed that in the circumstances of the present case – the court second seised having exclusive jurisdiction - the issue of *lis pendens* did not arise.⁸³

Compatibility of Service via Public Notice with Article 6 ECHR/Article 47 Charter : C-292/10 G v Cornelius De Visser

In C-292/10 *G v Cornelius De Visser*,⁸⁴ Ms G raised proceedings in the German Landgericht Regensburg court in which she sought to establish Mr De Visser’s liability for infringement of her personality rights. Mr Visser was alleged to have posted partly naked photographs of Ms G without Ms G’s consent on a website with a German top level domain address (.de) both of which were owned by him. The difficulty in this case was that, despite investigations in Germany and the Netherlands, it was not possible to establish where Mr De Visser was domiciled (ie Germany, the Netherlands or somewhere else) and whether an eventual default judgment could be issued against him. Ms G initiated proceedings via public notice in Germany. There were a number of questions referred to the CJEU, a number of which were on the how Article 5(3) of the Brussels I Regulation could be applied to such infringement claims. For this paper, the two key, competing issues were the compatibility of serving proceedings in this manner with the Brussels I Regulation and, in the absence of being able to definitively establish the defendant’s domicile, the claimant’s right to an effective remedy under Article 47 of the Charter. The Court referred to C327-10 *Hypoteční banka*⁸⁵ and confirmed that where there was no evidence that an EU citizen was domiciled in a non-Member State, the “international jurisdiction of a court of a Member State is established [...] when the conditions for application of one of the rules of jurisdiction [...] are met.”⁸⁶ On the

⁸² C438/12 *Weber*, Judgment of the Court at paras 48, 55.

⁸³ *Weber*, n82, Judgment of the Court at 62-64.

⁸⁴ C-292/10 *G v Cornelius De Visser* [2012] ECR.

⁸⁵ C-327/10 *Hypoteční banka a.s.*, n 66.

⁸⁶ *De Visser*, n 84, Judgment of the Court at para 41. Words removed for syntax.

question of compatibility of the national procedural rules for public service of proceedings, the Court also confirmed that such rules were permitted provided they did not “infringe European Union law.”⁸⁷ and – in accordance with earlier CJEU authority from *Denilauler*⁸⁸ and *Gambazzi*⁸⁹ – that the “rights of the defence are observed.”⁹⁰ With regard to the effective application of Article 47 of the Charter, the Court was also at pains to observe that that latter requirement – rights of the defence – had to be balanced with the “applicant’s right to bring an action”⁹¹

The Court of Justice offered a three point response. First, it reinforced *Gambazzi* that there could be occasions where the rights of the defence “may be subject to restrictions.”⁹² Second, in reinforced *Hypnotecca* in stating that such restrictions had to “correspond [...] to the objectives of public interest.”⁹³ Third, in determining that such a restriction did not constitute “a disproportionate breach of those rights.”⁹⁴ it referred to Article 26(2) of the Brussels I Regulation which requires proceedings to be stayed where the defendant has not had “sufficient time [...] to arrange [a] defence or [take] all necessary steps.”⁹⁵ Having considered the earlier CJEU case law, the Court then turned the ECHR case of *Nunes Dias v Portugal*⁹⁶ to reinforce the point that service by public notice could be effected provided corresponding rights under Article 6 ECHR were “properly protected.”⁹⁷ This enabled the CJEU to conclude affirmatively that subject to “all investigations required by the principles of diligence and good faith are undertaken,”⁹⁸ such service was compatible with Article 6 ECHR and Article 47 of the Charter.

Protective Measures under the Brussels I Regulation : C-350/13 Antonio Gramsci Shipping Corp v Aivars Lembergs

⁸⁷ *De Visser*, n 84 at para 45.

⁸⁸ C-125/79 *Bernard Denilauler v SNC Couchet Frères*, 1980 ECR 1153 at para 13.

⁸⁹ *Gambazzi*, n 52 at para 23.

⁹⁰ *De Visser*, n 84 at para 47.

⁹¹ *De Visser*, n 84 at para 48.

⁹² *De Visser*, n 84 at para 49;

⁹³ *De Visser*, n 84 at paras 49-50, words removed for syntax.

⁹⁴ *De Visser*, n 84 at paras 49 and 51.

⁹⁵ *De Visser*, n 84 at para 51 words removed and added for syntax.

⁹⁶ *Nunes Dias v Portugal*, 2003 Reports of Judgments and Decisions VI.

⁹⁷ *De Visser*, n 84 at para 58.

⁹⁸ *De Visser*, n 84 at para 59.

In *C-350/13 Antonio Gramsci Shipping Corp v Aivars Lembergs*,⁹⁹ the question referred to the Court of Justice by the Latvian Court was whether it was compatible with the Regulation for the Courts of a Member State for a Mareva injunction¹⁰⁰ to be enforced in the courts of another Member State when damage to *third parties* may occur as a result of such enforcement. The Latvian Court asked two related questions. The first question was related to Article 34(1) of the Brussels I Regulation which provides that a judgment will not be recognised if it is “manifestly contrary to public policy in the Member State in which recognition is sought.” The first question was whether the circumstances permitted the refusal to enforce a judgment in accordance with Article 34(1) of the Brussels I Regulation? If so, the second and related question asked by the Latvian Court was whether Article 47 of the Charter extended to provisional measures that “limit the economic rights of a person who has not been a party to the proceedings”¹⁰¹ if that person can apply for those proceedings to be “varied or discharged”?¹⁰² In the intervening time, the Mareva injunction had been withdrawn. This plainly had the effect of negating the status of the case as one pending before the Courts of a Member State in accordance with Article 267 TFEU.¹⁰³ Whilst the Court recognised that “in exceptional circumstances, it can examine the conditions [to determine] jurisdiction,”¹⁰⁴ in accordance with *Di Donna*,¹⁰⁵ the Court plainly refused to give a ruling on the matter. The question therefore remains as to whether a Mareva injunction or similar procedural mechanism granted by the courts of a Member State, could legitimately constitute an infringement of the rights of third parties in breach of Article 47 of the Charter.

Refusal to Recognise a Foreign Judgment and Article 47 of the Charter: C-619/10 Trade Agency Ltd v Seramico Investments Ltd

In *C-619/10 Trade Agency Ltd v Seramico Investments Ltd*,¹⁰⁶ the issue of whether there was a “manifest and disproportionate breach of the defendant’s rights” contrary to Article 47 of the Charter was raised for the CJEU to consider. In essence, this case raised a question about

⁹⁹ *C-350/13 Antonio Gramsci Shipping Corp v Aivars Lembergs*, Order of the Court (Eighth Chamber), OJ C261, 11/08/14 ; L Collins, A Briggs, J Harris, JD McClean, C McLachlan and CGJ Morse (eds), *Dicey, Morris and Collins, The Conflict of Laws* Sweet and Maxwell, 15th ed, 2012 at para 14-160.

¹⁰⁰ An order of the English court granted against an *individual*, having extraterritorial effect.

¹⁰¹ *Gramsci*, n 99 at para 4(2).

¹⁰² *Gramsci*, n 99 at para 4(2).

¹⁰³ *Gramsci*, n 99 at para 11.

¹⁰⁴ *Gramsci*, n 99 at para 9.

¹⁰⁵ *C-492/11 Ciro Di Donna v Societa Imballaggi Metallic Salerno (SISMA)* 27 June 2013 (not yet published).

¹⁰⁶ *C-619/10 Trade Agency Ltd v Seramico Investments Ltd*, OJ C-331 27/10/12.

the competing priorities of mutual trust (a cornerstone of the Brussels I Regulation) on the one hand and the “right to a fair trial under Article 47 of the Charter”¹⁰⁷ on the other. In this case a claim form was raised and served by the claimants for payment by the defendants. In the absence of the defendant lodging a defence, the English High Court granted a default judgment. The claimants thereafter sought to have the judgment recognised and enforced in the District Court North Riga, Latvia. Article 54 (currently) provides that a person seeking enforcement of a judgment is required to present (in addition to a copy of the judgment) a certificate of enforceability from the court of a Member States where the judgment was issued. The claimant submitted a certificate in accordance with Article 54. The relevant provisions in this case are Articles 34, which provides limited grounds to refuse the recognition of a foreign judgment and Articles 35, which confirms (*inter alia*) that the test of public policy does not apply to rules of jurisdiction, and Article 36 which confirms (*inter alia*) that the substance of a judgment cannot be reviewed. The Latvian court duly granted the application for recognition and enforcement and the defendant lodged an appeal. A further appeal was raised to the Senate of the Supreme Court, on the basis that recognition and enforcement should be refused due to first, breach of “rights of defence”; second, the defendant’s lack of notice of English legal proceedings and, third, that the absence of reasons in the English default judgment was “manifestly contrary to Latvian public policy.”¹⁰⁸

There were two questions referred by the Latvian Senate of the Supreme Court to the Court of Justice. The first question, in the case of a request for enforcement of a judgment from another Member State under Article 34 of Brussels I, was whether an enforcing court could consider evidence from the certificate as grounds to refuse recognition of a judgment granted in default of appearance and the compatibility of the need for mutual trust. The Latvian Supreme Court started by looking at Article 54 and confirmed that whilst there was no requirement for the enforcing court to go beyond the information provided in the certificate, the (pre-Charter) case of C-283/05 *ASML*¹⁰⁹ confirmed that the “observance of the rights of the defence of a defendant in default of appearance is ensured by a double review, also carried out by the court hearing the application for recognition or enforcement of the foreign

¹⁰⁷ *Trade Agency*, n 106 at para 47.

¹⁰⁸ *Trade Agency*, n 106 at para 20.

¹⁰⁹ C-283/05 *ASML* [2006] ECR I-12041.

judgment.”¹¹⁰ Interestingly, the Latvian Supreme Court also regarded there to be a connection between the infringement of Latvian public policy on the one hand and both the ECHR and the Charter. It observed that both of the latter instruments necessitate that “national courts [have an] obligation to set out in their judgments the grounds on which they were adopted...”¹¹¹

In answering that question, the Court of Justice’s methodology was to consider both the “wording of the provision [and the] system established by the Regulation...”¹¹² In the earlier decision *C-420/07 Apostolides v Orams*,¹¹³ the CJEU confirmed that a defendant “should, where necessary, be able to appeal in an adversarial procedure against [a] declaration of enforceability if he considers one of the grounds for non-enforcement to be present.”¹¹⁴ The court confirmed that in line with the spirit of Recital 17 of Brussels I and the earlier case *C-139/10 Prism Investments*¹¹⁵ that the practical consequence of Recital 17 when the request for enforcement is made “may involve only a purely formal check of the documents...”¹¹⁶ The Court pointed out that when the enforcing court issues a declaration in accordance with Article 42(2), Article 43 may then raise the issue of enforceability in the enforcing court. The CJEU confirmed the earlier decision of *ASML* that Article 34(2) “aims to ensure that the rights of defence of a defendant in default of appearance delivered in the Member State of origin are observable by a double review.”¹¹⁷ It is at this stage that the court where enforcement is sought can, in accordance with *C-166/80 Klomps v Michel*¹¹⁸ undertake an “overall,”¹¹⁹ “independent assessment”¹²⁰ of the facts, including whether the defendant was served with proceedings. The Court referred to the AG Opinion where it was remarked that the certificate has “prima facie value”¹²¹ in so far as there are – inevitably - different courts involved in issuing and enforcing a given judgment.

¹¹⁰ *Trade Agency*, n 106 at para 22.

¹¹¹ *Trade Agency*, n 106 at para 24.

¹¹² *Trade Agency*, n 106 at para 27.

¹¹³ *C-420/07 Meletis Apostolides v D.C Orams and L.E. Orams* 2009 ECR I-03571.

¹¹⁴ *Apostolides*, n 113 at para 43.

¹¹⁵ *C-139/10 Prism Investments BV v Jaap Anne van der Meer* [2011] ECR I-09511.

¹¹⁶ *Trade Agency*, n 106 at para 28 -29.

¹¹⁷ *Trade Agency*, n 106 at para 32.

¹¹⁸ *Case 166/80 Klomps v Michel* [1981] ECR 1593.

¹¹⁹ *Trade Agency*, n 106 at para 33.

¹²⁰ *Trade Agency*, n 106 at para 38.

¹²¹ *Trade Agency*, n 106 at para 36.

The second question was whether a decision in default of appearance that does contain reasoning is compatible with the defendant's right to a fair hearing in accordance with Article 47 of the Charter. Here, the Court of Justice made three significant points. The first reinforced the view from *Apostolides v Orams* that Article 34(1) was "may be relied on only in exceptional cases."¹²² In asserting that Member States determine their own public policy objectives as a starting point, the CJEU's role - affirmed in a series of earlier cases¹²³ - is to "review the limits within which the courts of a Member State may have recourse to that concept *for the purposes of refusing recognition...*"¹²⁴ Second, there would require to be "breach of a fundamental principle [...] regarded as essential in the legal order of the State in which enforcement is sought..."¹²⁵ The third, connected and concluding point was that the right to a fair trial under Article 47 is a *coalescing* right in the sense that it "*results from the constitutional traditions common to the Member States...*"¹²⁶ On that basis, the enforcing court may, as a starting point, regard a judgment lacking in "assessment of subject-matter, basis and merits of the action, is a restriction on a fundamental right within the legal order of that Member State."¹²⁷ The Court confirmed that a range of factors that required to be taken into account (such as "nature of decision [...] procedural guarantees ... [availability of] an appropriate and effective appeal"¹²⁸) when determining whether the default judgment was *manifestly disproportionate* to the defendant's right of a fair trial. In line with the defences to recognition and enforcement and mutual recognition of judgments, a high threshold test would appear to be required.

Enforcement of Judgments under the Brussels I Regulation and Article 47 of the Charter

(I) C-156/12 GREP GmbH v Freistaat Bayern¹²⁹

The question in this case was, in matters concerned with declarations of enforceability of a judgment under Article 43 of the Brussels I Regulation, does the "right to legal aid"¹³⁰ form

¹²² *Trade Agency*, n 106 at para 48.

¹²³ *Krombach* n 42, *C-38/98 Renault* [2000] ECR I-2973 and *Apostolides*, n 113.

¹²⁴ *Trade Agency*, n 106 at para 49-50, words italicised for emphasis.

¹²⁵ *Trade Agency*, n 106 at para 51.

¹²⁶ *Trade Agency*, n 106 at para 52. Words italicised for emphasis.

¹²⁷ *Trade Agency*, n 106 at para 54.

¹²⁸ *Trade Agency*, n 106 at para 60. Words removed and added for syntax.

¹²⁹ *C-156/12 GREP GmbH v Freistaat Bayern*, Order of the Sixth Court, 13 June 2012 (unpublished decision).

¹³⁰ *GREP GmbH* n 129 at para 23.

part of a party's right to a fair trial under Article 47 of the Charter and/or Article 6 ECHR? The CJEU confirmed the approach in C283/05 *ASML*¹³¹ that a balance must be struck under the Brussels I Regulation to prevent "undermin[ing]... the rights of the defence..."¹³² Once again, the rhetoric from the Court was clear; this balance must reflect effective judicial protection, itself to be achieved in fulfilment of "the common constitutional traditions of the Member States..."¹³³ and thereby the ECHR. In short, the CJEU held that there was a requirement to include legal aid within the criteria for assessing how a party could effectively bring a declaratory request under Article 43. Nevertheless, such a requirement could be subject to a restriction imposed by the court of enforcement, provided that such a restriction on the rules granting of legal aid in that jurisdiction are not "manifest and disproportionate."¹³⁴ Again, for the purposes of reviewing proportionality, the CJEU provided an instructive set of indicators of what connecting factors would be necessary for the national court of enforcement to review. These included the nature, gravity and legal basis of the proceedings, success rate and the procedural rules and costs applicable.¹³⁵

(II) Preliminary Reference in C-4/14 *Bohez v Wiertz*

In the recent case of C-4/14 *Christophe Bohez v Ingrid Wiertz*¹³⁶ 6 January 2014, the Korkein oikeus court in Finland made a Preliminary Reference on a number of key questions, two of which are most relevant for this analysis. The first, and general question, asked to the Court is whether an order to enforce and payment of a principal obligations in a child custody or access case is outside the scope of the Brussels I Regulation. The second, and more particular question vis-à-vis fundamental rights – relative to Recital 33 of the Brussels IIa Regulation and the right of access - asks the Court of Justice to confirm first, which court has jurisdiction to examine the issue of enforcement of a periodic penalty payment and second whether the court of enforcement's role is limited to enforcement or whether it is permitted to enter into an examination of the reasons for failure to comply with rights of access. In some respects,

¹³¹ C-283/05 *ASML*, n109.

¹³² *GREP GmbH* n 129 at para 32.

¹³³ *GREP GmbH* n 129 at para 35 ; the court also referred to C-409/06 *Winner Wetten GmbH v Mayor of Bergheim* OJ C288/6 in support of this general principle.

¹³⁴ *GREP GmbH* n 129 at para 39.

¹³⁵ *GREP GmbH* n 129 at para 41 ; on costs the CJEU referred to C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland* 2010 ECR I-13849.

¹³⁶ C-4/14 *Christophe Bohez v Ingrid Wiertz* OJ C-71 08/03/14.

an analogy could be made with the *Trade Investments* case above, where the CJEU provided criteria as to how restrictions on defending the enforcement of a foreign judgment may be compliant with Article 47 of the Charter. At the time of writing this Chapter a decision is awaited. It therefore remains to be seen to what extent the CJEU will consider this case in the context of a right of access case under Brussels IIa. This case may also provide the CJEU with an opportunity to clarify particularised set of criteria as to whether restrictions on the court's powers to review a foreign judgment are not "manifestly disproportionate" to Article 24 of the Charter in the particular context of the Brussels IIa Regulation.

Conclusions

It was the purpose of this chapter seeks to review a number of key Preliminary Rulings from the CJEU on the Brussels I Regulation in the period 2009-present. It has been considered first, to what extent those decisions are illustrative of *lex specialis* generally in the field of judicial cooperation and specifically on fundamental rights. Second, where available, this chapter has sought to consider how the AG's Opinion in these cases may shed light on the future influence of the Charter in seeking to derive autonomous, independent interpretations of secondary EU Private International Laws. It is clear that Articles 6 and 47 of the Charter of Fundamental Rights is beginning to emerge as a distinct influence on the CJEU's interpretation of secondary EU measures for judicial cooperation in civil matters designed to advance the Treaty objective of an Area of Freedom, Security and Justice. The role of the national court is clearly significant; both in terms of the continued referral of questions in Preliminary Rulings which seek clarification on influence of the Charter and in its eventual interpretation of those Rulings. The CJEU has responded by integrating the influence of the Charter into its interpretation of Articles of the Brussels I Regulation. Whilst a "gradual expansion"¹³⁷ is occurring, two wider issues persist. The first issue is how the ideology of the Charter within the EU legal order will continue to restrict the mutual recognition of jurisdiction and judgments in civil and commercial matters. The second, related matter is that of effective interpretation. Whilst not all the cases referred to contained an Opinion from the Advocate General, if the objective of the CJEU is to "improve the quality and fairness of its judgments and strengthen its

¹³⁷ Trjstenjak and Baysen, n 9.

legitimacy...”¹³⁸ then, as de Burca attests, a more nuanced assessment of the “rulings of other courts or on the relevant jurisprudence of regional and international bodies when interpreting and establishing human rights standards under the EU Charter of Rights”¹³⁹ is necessary to ensure the tripartite relationship between national law, EU law and the Charter is firmly and expressly grounded in the CJEU’s interpretative approach.

¹³⁸ De Burca, n 22 at p.184.

¹³⁹ De Burca, n 22 at p.185.