Netherlands journal PIL – 2021, issue 3

The third issue of 2021 of the Dutch journal on private international law (NIPR) is available. A number of papers are dedicated to Brexit and private international law.

Brexit en ipr/brexit and pilSumner, Eerst de echtscheiding, dan de afwikkeling! Brexit en het internationaal privaatrecht / p. 433-453

Abstract

Brexit has changed a lot in the legal landscape. There are few areas of the law that have been unaffected, and international family law is no exception. In this article, attention will be paid to the various areas of international family law that have been affected by the Brexit, drawing attention to the new legal regimes that are applicable with respect to these areas of the law (for example divorce, child protection and maintenance). Each section will further discuss how the new regime differs from the old regime, drawing attention to particular difficulties that may occur in the application of these new rules to the specific situation of the United Kingdom.

Berends, Internationaal insolventierecht tussen het Verenigd Koninkrijk en Nederland na de Brexit / p. 454-470

Abstract

What are the legal consequences in the Netherlands of a British insolvency proceeding since Brexit? In the Netherlands, there is no Act on this matter, and the answers must be found in case law. A foreign representative does not need to apply for recognition. He can exercise his rights unless an interested party prevents him from doing so in a legal procedure, for instance on the ground that the recognition of the insolvency proceeding would be contrary to public policy. A foreign proceeding has the applicable legal consequences according to the law of the State where the insolvency proceeding was opened, with some exceptions. Execution against the debtor's assets in the Netherlands remains possible.

What are the legal consequences in the United Kingdom of a Dutch insolvency proceeding since Brexit? The United Kingdom has enacted the Model Law of the United Nations Commission on International Trade Law. A foreign representative must apply for recognition. Upon recognition, individual actions concerning the debtor's assets and execution are stayed, unless such actions and execution are necessary to preserve a claim against the debtor. The consequences of recognition can be modified or terminated if the Court is not satisfied that the interests of interested parties are adequately protected. The so-called Gibbs Rule applies: a party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled.

Bens, Brussel na de Brexit: nieuwe regels in burgerlijke en handelszaken? / p. 471-492

Abstract

The UK formally left the EU on 31 January 2020, although the Brussels Ibis Regulation remained applicable in and for the UK until the end of the transition period on 31 December 2020. This article analyses the changes in the framework for international jurisdiction and the recognition and enforcement of decisions in cross-border civil and commercial matters between the Netherlands and the UK after 1 January 2021. After setting the historical context, the transitional provisions provided for the Brussels regime in the Withdrawal Agreement are scrutinised. It is argued that, considering these arrangements and the current EU framework for judicial co-operation in civil and commercial matters, the Brussels Convention and the NL-UK Enforcement Treaty of 1967 are not applicable to proceedings instituted after 1 January 2021. Consequently, the rules governing

international jurisdiction and the cross-border recognition and enforcement of judgements applicable to ‘new’ cases and judgements are outlined and salient problems are highlighted. It is argued that most of these rules are not new, but are rather cast in a different perspective through Brexit, thereby raising some ‘old’ problems that require careful (re-)consideration of the post-Brexit legal framework.

Other articles

L.M. van Bochove, De voorzienbaarheid herzien? De fluctuerende invulling van het vereiste dat bevoegdheid ex artikel 7(2) Brussel I*bis* redelijkerwijs voorzienbaar is / p. 493-506

Abstract

This article discusses the requirement that the jurisdiction over matters in tort, based on Article 7(2) Brussels Ibis Regulation, is reasonably foreseeable for the defendant. An analysis of CJEU case law shows that the interpretation of what is ‘reasonably foreseeable’ fluctuates. Often, the threshold is set rather low, but in two recent cases the CJEU seems to have adopted a stricter interpretation. In VEB/BP and Mittelbayerischer Verlag, the foreseeability requirement actually precludes the attribution of jurisdiction on the basis of established (sub-)criteria, including the place of damage and the centre of main interest. This article attempts to identify the rationale for the use of different yardsticks of reasonable foreseeability. It offers two possible explanations: the degree of the culpability of the defendant and the desired outcome in terms of jurisdiction, in particular the opportunity to use jurisdiction rules as a means to promote the enforcement of EU law. However, both explanations are problematic, in view of the Regulation’s scheme and objectives. This paper argues in favour of a uniform, rather strict interpretation, which ensures that the defendant can reasonably foresee the jurisdiction of the court and avoids a multitude of competent courts. Current law offers no legal basis to consider the enforcement of (EU) law as a factor to establish a reasonably foreseeable jurisdiction; this would require intervention by the European legislator.

Schmitz, Rechtskeuze in consumentenovereenkomsten: artikel 6 lid 2 Rome I-Verordening en de Nederlandse rechter / p. 507-331

Abstract

Party autonomy has been a widely accepted principle of private international law ever since the Rome Convention. Yet, the right to choose the applicable law is often restricted when weaker parties are involved. According to Article 6(2) Rome I Regulation, the parties to a consumer contract may choose the applicable law provided that this choice does not deprive 'the consumer of the protection afforded to him' by the objectively applicable law (the law of his habitual place of residence). In the Netherlands, academic opinion is still divided on the issue of how 'deprived of protection' should be interpreted. Some argue that the objectively applicable law trumps the chosen law, even if the latter is more beneficial for the consumer. Others want to apply the law that better protects the consumer – regardless of whether it is the chosen or the objectively applicable law. This question goes hand in hand with a (possibly complex) legal comparison between both systems of law. How this comparison needs to be exercised is unclear. Delving deeply into Dutch case law shows that Dutch judges do not have a 'joined approach'. This paper uses a case study to illustrate that following a certain approach when applying Article 6(2) Rome I can alter the level of protection that the consumer enjoys. A lack of guidance from the European Court of Justice could be at fault here; and national courts should refer a question as to the 'right way' of applying Article 6(2) Rome I to the Court.

te Winkel, X.P.A. van Heesch, The *Shell* judgment – a bombShell in private international law? / p. 532-542

Abstract

This article discusses the recent judgment of the District Court of The Hague in Milieudefensie et al. v. RDS (May 26, 2021, ECLI:NL:RBDHA:2021:5337). It reviews the most important substantive rulings of the Court and then focusses on the private international law aspects of the case. Milieudefensie et al. argued that the adoption of the concern policy for the Shell Group by RDS qualifies as the Handlungsort and that Dutch law is therefore applicable to their claims based on Article 7 Rome II Regulation. RDS disagreed with this line of reasoning for

multiple reasons. Since there is (as yet) no legal precedent regarding this discussion, both Milieudefensie and RDS relied on the analogous application of case law that concerned the interpretation of the Handlungsort under the Brussels Ibis Regulation. The legal debate between the parties regarding this aspect and the conclusion of the Court are set out in this article. The authors conclude with an analysis of the assessment of the Court and suggest that, given the impact of this ruling and the fact that there is no legal precedent, the Court ex officio should have requested a preliminary ruling from the Court of Justice.

Case note

Arons, HvJ EU 12 mei 2021, zaak C-709/19, ECLI:EU:C:2021:377, *NIPR* 2021, 267 (*VEB/BP*) / p. 543-550

Abstract

In this judgment the CJEU has ruled on localising purely financial losses in order to determine jurisdiction in tort claims. A claimant may sue a defendant on the basis of Article 7(2) of the Brussels Ibis Regulation in the court of another Member State at the place where the harmful event occurred or may occur. The CJEU has reiterated that the 'place where the harmful event occurred' may not be construed so extensively as to encompass any place where the adverse consequences of an event caused damage to the claimant.

For jurisdiction on this basis a close connection has to be established between the place where the damage occurred and the court addressed by the claimant. This ensures certainty for the defendant: the defendant has to be able to reasonably foresee the court(s) where he may be sued.

The mere location of an investment account is not sufficient to establish the required close connection; additional circumstances are required (paras. 34 and 35). In the Kolassa case (C-375/13) information was published and notified by the defendant in a prospectus aimed at investors in Austria. The CJEU ruled that foreseeability is not ensured if the claim is brought before the courts in the Member State where the investment account used for the purchase of securities listed on the stock exchange of another State is situated, and the issuer of those securities is not subject to statutory reporting obligations in the Member State where the investment account is held by the purchaser (para. 34). A claim can only be brought on the basis of Article 7(2) against a listed company for

publishing misleading information to investors in the jurisdiction where that company had to comply, for the purposes of its listing, with statutory reporting obligations. It is only in that Member State that a listed company can reasonably foresee the existence of an investment market and incur liability (para. 35).