The liability of a company director from the standpoint of the Brussels I Regulation

This post has been written by Eva De Götzen.

On 10 September 2015, the ECJ delivered its judgment in *Holterman Ferho Exploitatie* (C-47/14), a case concerning the interpretation of Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).

More specifically, the case involved the interpretation of Article 5(1) and Article 5(3) of the Regulation, which provide, respectively, for special heads of jurisdiction over contractual matters and matters relating to a tort or delict, as well as the interpretation of the rules laid down in Section 5 of Chapter II (Articles 18 to 21), on employment matters. The said provisions correspond, today, to Articles 7(1) and (2) and Articles 20 to 23 of Regulation No 1215/2012 of 12 December 2012 (Brussels Ia Regulation).

The request for a preliminary ruling arose from a dispute involving a German national resident in Germany, Mr Spies von Büllesheim, who had entered a Dutch company's service as a managing director, in addition to being a shareholder of that company. He had also been involved in the managing of three German subsidiaries of the company, for which he served as a director and an authorised agent.

The company brought a declaratory action and an action for damages in the Netherlands against Mr Spies von Büllesheim, claiming that he had performed his duties as director improperly, that he had acted unlawfully and that, aside from his capacity as a director, he had acted deceitfully or recklessly in the performance of the contract of employment under which the company had hired him as a managing director.

The Dutch lower courts seised of the matter took the view that they lacked jurisdiction either under Article 18(1) and Article 20(1) of the Brussels I Regulation, since the domicile of the defendant was outside the Netherlands, or

under Article 5(1)(a), to be read in conjunction with Article 5(3).

When the case was brought before the Dutch Supreme Court, the latter referred three questions to the ECJ.

The first question was whether the special rules of jurisdiction for employment matters laid down in Regulation No 44/2001 preclude the application of Article 5(1)(a) and Article 5(3) of the same Regulation in a case where the claimant company alleges that the defendant is liable not only in his capacity as the managing director and employee of the company under a contract of employment, but also in his capacity as a director of that company and/or in tort.

The ECJ observed in this respect that one must ascertain, at the outset, whether the defendant could be considered to be bound to the company by an "individual contract of employment". This would in fact make him a "worker" for the purposes of Article 18 of Regulation No 44/2001 and trigger the application of the rules on employment matters set forth in Section 5 of Chapter II, irrespective of whether the parties could also be tied by a relationship based on company law.

Relying on its case law, the ECJ found that the defendant performed services for and under the direction of the claimant company, in return for which he received remuneration, and that he was bound to that company by a lasting bond which brought him to some extent within the organisational framework of the business of the latter. In these circumstances, the provisions of Section 5 would in principle apply to the case, thereby precluding the application of Article 5(1) and Article 5(3).

The ECJ conceded, however, that if the defendant, in his capacity as a shareholder in the claimant company, was in a position to influence the decisions of the company's administrative body, then no relationship of subordination would exist, and the characterisation of the matter for the purposes of jurisdiction would accordingly be different.

The second question raised by the Hoge Raad was whether Article 5(1) of the Brussels I Regulation applies to a case where a company director, not bound by an employment relationship with the company in question, allegedly failed to perform his duties under company law.

The ECJ noted that, generally speaking, the legal relationship between a director

and his company is contractual in nature for the purposes of Article 5(1), since it involves obligations that the parties have freely undertaken. More precisely, a relationship of this kind should be classified as a "provision of services" within the meaning of the second indent of Article 5(1)(b). Jurisdiction will accordingly lie, pursuant to the latter provision, with the court for the place where the director carried out his activity.

To identify this place, one might need to determine, as indicated in *Wood Floor Solutions*, where the services have been provided for the most part, based on the provisions of the contract. In the absence of any derogating stipulation in any other document (namely, in the articles of association of the company), the relevant place, for these purposes, is the place where the director in fact, for the most part, carried out his activities in the performance of the contract, provided that the provision of services in that place is not contrary to the parties' agreed intentions.

Finally, inasmuch as national law makes it possible to base a claim by the company against its former manager simultaneously on the basis of allegedly wrongful conduct, the ECJ, answering the third question raised by the Hoge Raad, stated that such a claim may come under "tort, delict or quasi-delict" for the purposes of Article 5(3) of the Brussels I Regulation whenever the alleged conduct does not concern the legal relationship of a contractual nature between the company and the manager.

The ECJ recalled in this connection that the Regulation, by referring to "the place where the harmful event occurred or may occur", intends to cover both the place where the damage occurred and the place of the event giving rise to it. Insofar as the place of the event giving rise to the damage is concerned, reference should be made to the place where the director carried out his duties as a manager of the relevant company. For its part, the place where the damage occurred is the place where the damage alleged by the company actually manifests itself, regardless of the place where the adverse consequences may be felt of an event which has already caused a damage elsewhere.

Issue 2015.3 of the Dutch journal on Private International Law (NIPR)

The third issue of 2015 of the Dutch Journal on Private international Law, Nederlands Internationaal Privaatrecht, contains contributions on the Hague Convention on Choice of Court Agreements, financial losses under the Brussels I Regulation, Recognition of Dutch insolvency orders in Switzerland, and Indonesian Private International Law.

Marta Pertegás, 'Guest Editorial: Feeling the heat of disputes and finding the shade of forum selection', p. 375-376.

***Tomas Arons, 'Case Note: On financial losses, prospectuses, liability, jurisdiction (clauses) and applicable law. European Court of Justice 28 January 2015, Case C-375/13 (Kolassa/Barclays Bank)'**, p. 377-382.*

The difficult question of where financial losses are directly sustained has been (partly) solved by the European Court of Justice on 28 January 2015. In Kolassa the ECJ ruled that an investor suffers direct financial losses as a result of corporate misinformation (i.e. misleading information published by a company issuing (traded) shares or bonds) in the place where he holds his securities account. The impact of this ruling is not limited to the question of international jurisdiction. The Rome II Regulation prescribes that the law applicable to tort claims is the law of the country in which the direct losses are sustained. The second part deals with the question whether an investor can be bound by an exclusive jurisdiction clause in the prospectus or other investor information document. In the near future the ECJ will rule on this matter in the Profit Investment SIM case. [free sample]

Raphael Brunner, 'Latest Legal Practice: Switzerland discovers the Netherlands on the international insolvency map', p. 383-389.

By a decision of March 27, 2015 the Swiss Federal Court ruled for the first time in a leading case that the Swiss Courts have to recognize Dutch insolvency orders. It is astonishing that up until now Dutch insolvency orders have not been

recognised by the Swiss Courts and hence Dutch insolvency estates and liquidators or trustees (hereafter referred to as liquidators) neither had access to the assets of a Dutch insolvency estate in Switzerland nor to the jurisdiction of the Swiss Courts. The reason for this is that the private international laws of Switzerland and the Netherlands pursue completely different approaches in international insolvency matters. The new decision by the Swiss Federal Court is interesting both from a (theoretical) perspective of private international law as well as from the (practical) perspective of a Dutch liquidator of a Dutch insolvency estate having assets in Switzerland or claims against debtors in Switzerland.

Tiurma Allagan, 'Foreign PIL – Developments in Indonesia: The Bill on Indonesian Private International Law', p. 390-403.

This article discusses the background and contents of the proposal for an Indonesian Private International Law Act that was issued in November 2014.

If you are interested in contributing to this journal please contact the editorial manager Ms Wilma Wildeman at w.wildeman@asser.nl.

The Departure of the European Law of Civil Procedure

Two weeks ago I had the pleasure of announcing the publication of the new edition of the EU-Zivilprozessrecht: EuZPR, authored by Prof. Schlosser and Hess. The Department of European and Comparative Procedural Law of the Max Planck Institute Luxembourg has decided to combine the launching of the book with a seminar entitled "The Departure of the European Law of Civil Procedure", to take place next November 11, at the MPI premises in Luxembourg. The seminar will count with the presence of Prof. Schlosser himself; other prominent speakers will be Judge Marko Ileši? (CJEU) and Prof. Jörg Pirrung. To download the full programme of the event click here.

The seminar starts at 4 pm and will be followed by a reception. It is open to all those willing to attend upon registration (contact person: secretariat-prof.hess@mpi.lu).

TDM Call for Papers: Special Issue on Africa

TDM is pleased to announce a forthcoming special issue on international arbitration involving commercial and investment disputes in Africa.

Africa's accelerating economic development is attracting a substantial increase in cross-border commerce, trade, and investment on the continent, and disputes arising from this increased economic activity are inevitably bound to follow. International arbitration will be the preferred method for resolving many of these disputes. Indeed, the growing focus on international arbitration to resolve commercial and investment disputes relating to Africa is reflected, among other ways, in the fact that the International Council on Commercial Arbitration (ICCA) will be holding its 22nd Congress for the first time in Africa in May 2016 in Mauritius.

To a great extent, the issues that arise in international arbitration in or relating to Africa will be no different than those that arise in arbitrations around the globe. Converging international arbitration procedures and the predictability and stability afforded by the New York Convention and Washington Convention help to ensure that this is the case. Yet party autonomy remains a core value of the international arbitral system, and, as such, regional approaches and local culture will continue to shape African-related arbitrations to a degree, just as they do elsewhere. Africa's rapid development is also likely to play a role in shaping international arbitration in this region.

This special issue will explore topics of particular interest and relevance to international arbitration in light of Africa's unique and evolving situation. The issue will focus on sub-Saharan Africa and will address issues pertaining to both

commercial and investment arbitration. It will also likely explore alternative methods for resolving disputes, including litigation, mediation, and local dispute-resolution mechanisms.

Possible topics for submission to the special issue might include:

* The proliferation of international arbitral institutions in Africa and what the future holds for institutional arbitration on the African continent;

* The attitudes of African states and state-owned enterprises towards international commercial arbitration;

* Salient issues in the OHADA international arbitration framework;

* The influence of China and other Asian countries on international arbitration in Africa;

* Issues in enforcing arbitral awards in African states;

* Evolving attitudes in Africa towards bilateral investment treaties (BITs) and the extent to which BITs are (or are not) helping African states attract foreign direct investment;

* South Africa's draft investment law and other notable country-specific developments in Africa;

* Cultural issues impacting international arbitration in Africa;

* Empirical studies relating to international arbitration in Africa;

* Capacity building for arbitrators, judges, and practitioners in the region; and

* Alternative methods of resolving cross-border commercial and investment disputes in Africa.

We invite all those with an interest in the subject to contribute articles or notes on one of the above topics or any other relevant issue.

This special issue will be edited by Thomas R. Snider (Greenberg Traurig LLP), Professor Won Kidane (Seattle University Law School and the Addis Transnational Law Group), and Perry S. Bechky (International Trade & Investment Law PLLC).

Please address all questions and proposals to the editors at SniderT@gtlaw.com, kidanew@seattleu.edu, and pbechky@iti-law.com, copied to info@transnational-dispute-management.com.

Commercial Choice of Law in Context: Looking Beyond Rome (article)

A new article by Dr. Manuel Penadés Fons, London School of Economics, has been published at the Modern Law Review, (2015) 78(2) MLR 241–295.

Abstract

English courts are frequently criticised for their flexible approach to the finding of implied choice and the use of the escape clause in the context of the Rome I Regulation/Convention on the law applicable to contractual obligations. This paper argues that such criticism is misplaced. Based on empirical evidence, the article shows that those choice of law decisions are directly influenced by their procedural context and respond to the need to balance the multiple policy issues generated by international commercial litigation. In particular, English decisions need to be assessed in light of three distinct factors: the standard of proof required at different stages of the procedure in England, the national policy to promote England as a center for commercial dispute resolution and the incentives to export English law in certain strategic industries. The use of implied choice and the escape clause to achieve these ends constitutes a legitimate practice that does not frustrate the aims of the EU choice of law regime.

Coming soon: Yearbook of Private International Law Vol. XVI (2014/2015)

This year's volume of the Yearbook of Private International Law is just about to be released. The Yearbook is edited by Professors Andrea Bonomi (Lausanne) and Gian Paolo Romano (Geneva) and published in association with the Swiss Institute of Comparative Law. This year's edition is the first volume to be published by Otto Schmidt (Cologne), ISBN 978-3-504-08004-4. It is 588 pages strong and costs 189,00 €. For further information, please click here.

The new volume contains the following contributions:

Doctrine
Linda J. SILBERMAN
Daimler AG v. Bauman: A New Era for Judicial Jurisdiction in the United States
Rui Manuel MOURA RAMOS
The New Portuguese Arbitration Act (Law No. 63/2011 of 14 December on Voluntary Arbitration)
Francisco GARCIMARTÍN
Provisional and Protective Measures in the Brussels I Regulation Recast
Martin ILLMER
The Revised Brussels I Regulation and Arbitration – A Missed Opportunity?
Ornella FERACI
Party Autonomy and Conflict of Jurisdictions in the EU Private International Law on Family and Succession Matters
Gian Paolo ROMANO
Conflicts between Parents and between Legal Orders in Respect of Parental Responsibility

Special Jurisdiction under the Brussels I-*bis* Regulation
Thomas KADNER GRAZIANO
Jurisdiction under Article 7 no. 1 of the Recast Brussels I Regulation: Disconnecting the Procedural Place of Performance from its Counterpart in Substantive Law. An Analysis of the Case Law of the ECJ and Proposals *de lege*

Divorce in the Venezuelan System of Private International Law
Maria João MATIAS FERNANDES
International Jurisdiction under the 2013 Portuguese Civil Procedure Code
Petra UHLÍROVÁ
New Private International Law in the Czech Republic

Forum
Chiara MARENGHI
The Law Applicable to Product Liability in Context: Article 5 of the Rome II Regulation and its Interaction with other EU Instruments
Marjolaine ROCCATI
The Role of the National Judge in a European Judicial Area – From an Internal Market to Civil Cooperation

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New book published in the MPI Luxembourg Book Series: Protecting Privacy in Private International and Procedural Law and by Data Protection. European and American Developments

Ensuring the effective right to privacy regarding the gathering and processing of personal data has become a key issue both in the internal market and in the international arena. The extent of one's right to control their data, the implications of the 'right to be forgotten', the impact of the Court of Justice of the European Union's decisions on personality rights, and recent defamation legislation are shaping a new understanding of data protection and the right to privacy. This book, edited by B. Hess and Cristina M. Mariottini, explores these

issues with a view to assessing the status quo and prospective developments in this area of the law which is undergoing significant changes and reforms.

Contents:
Foreword, PEDRO CRUZ VILLALÓN
The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines: Current Issues and Future Challenges, CHRISTOPHER KUNER
The CJEU Judgment in Google Spain: Notes on Its Causes and perspectives on Its Consequences, CRISTIAN ORO MARTINEZ
The CJEU's Decision on the Data Retention Directive, MARTIN NETTESHEIM
The CJEU's decision on the Data Retention Directive: Transnational Aspects and the Push for Harmonisation – A Comment on Professor Martin Nettesheim, GEORGIOS DIMITROPOULOS
The Protection of Privacy in the Case Law of the CJEU, BURKHARD HESS
Freedom of Speech and Foreign Defamation Judgments: From New York Times v Sullivan via Ehrenfeld to the 2010 SPEECH Act, CRISTINA M MARIOTTINI

Further information is available here (English) and here (German).

Professor Ron Brand on "The Continuing Evolution of U.S. Judgments Recognition Law"

Professor Ronald A. Brand, the Chancellor Mark A. Nordenberg University Professor and the Director of the Center for International Legal Education at the University of Pittsburgh School of Law, has just posted a new article to SSRN regarding the "Continuing Evolution of U.S. Judgments Recognition Law." It is available for download here. It generally deals with the history of such law from *Hilton v. Guyot* to the present day, demonstrates some of the problems indicated by recent cases, and comments on the federalism concerns that are delaying the ratification of the 2005 Hague Choice of Courts Convention in the United States.

A more detailed abstract is below.

The substantive law of judgments recognition in the United States has evolved from federal common law, found in a seminal Supreme Court opinion, to primary reliance on state law in both state and federal courts. While state law often is found in a local version of a uniform act, this has not brought about true uniformity, and significant discrepancies exist among the states. These discrepancies in judgments recognition law, combined with a common policy on the circulation of internal judgments under the United States Constitution's Full Faith and Credit Clause, have created opportunities for forum shopping and litigation strategies that result in both inequity of result and inefficiency of judicial process. These inefficiencies are fueled by differences regarding (1) substantive rules regarding the recognition of judgments, (2) requirements for personal and quasi in rem jurisdiction when a judgments recognition action is brought (recognition jurisdiction), and (3) the application of the doctrine of forum non conveniens in judgments (and arbitral award) recognition cases. Recent cases demonstrate the need for a return to a single, federal legal framework for the recognition and enforcement of foreign judgments. This article reviews the history of U.S. judgments recognition law, summarizes current substantive law on the recognition and enforcement of foreign judgments, reviews recent decisions that demonstrate the three specific problem areas, and proposes a coordinated approach using federal substantive law on judgments recognition and state law on related matters in order to eliminate the current problems of non-uniformity and inefficient use of the courts.

"Judicial Education and the Art of Judging"–2014 University of

Missouri Symposium Publication

Last fall, the University of Missouri Center for the Study of Dispute Resolution convened an international symposium entitled “Judicial Education and the Art of Judging: From Myth to Methodology.” Panelists included judges, academics and judicial education experts from the United States, Canada and Australia.

The symposium arose out of the recognition that although there is a large and ever-increasing body of literature on matters relating to judicial appointments, judicial independence, judicial policy making and the like, there is an extremely limited amount of information on how someone learns to be a judge. The conventional wisdom in the common law world holds that judges arrive on the bench already equipped with all the skills necessary to manage a courtroom and dispense justice fully, fairly and rapidly. However, many judges have written about the difficulties they have had adjusting to the demands of the bench, and social scientists have identified a demonstrable link between judicial education and judicial performance. As a result, it is vitally important to identify and improve on best practices in judicial education.

The symposium sought to improve the understanding of judicial education by considering three related issue: (1) what it means to be a judge and what it is about judging that is different than other sorts of decision-making; (2) what the goal of judicial education is or should be; and (3) how judges can and should be educated. While most of the discussion took place within the context of common law legal systems, much of the material is of equal relevance to civil law systems.

Articles from this symposium are freely available here. The table of contents shows below.

Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest? S.I. Strong
What Judges Want and Need: User-Friendly Foundations for Effective Judicial Education Federal Circuit, Judge Duane Benton and Jennifer A.L. Sheldon-Sherman
Judicial Bias: The Ongoing Challenge, Kathleen Mahoney
International Arbitration, Judicial Education, and Legal Elites, Catherine A.

Rogers
Towards a New Paradigm of Judicial Education, Chief Justice Mary R. Russell
Writing Reasoned Decisions and Opinions: A Guide for Novice, Experienced, and Foreign Judges S.I. Strong
Judging as Judgment: Tying Judicial Education to Adjudication Theory, Robert G. Bone
Of Judges, Law, and the River: Tacit Knowledge and the Judicial Role, Chad M. Oldfather
Educating Judges—Where to From Here?, Livingston Armytage
Judicial Education: Pedagogy for a Change, T. Brettel Dawson

AG Wahl on the localisation of damages suffered by the relatives of the direct victim of a tort under the Rome II Regulation

This post has been written by Martina Mantovani.

On 10 September 2015, Advocate General Wahl delivered his opinion in Case C-350/14, *Florin Lazar*, regarding the interpretation of Article 4(1) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). Pursuant to this provision, a non-contractual obligation arising out of a tort is governed, as a general rule, by the law of "the place where the damage occurred", irrespective of the country in which the event giving rise to the damage occurred "and irrespective of the country or countries in which the indirect consequences of that event occur".

The case concerns a fatal traffic accident occurred in Italy.

Some close relatives of the woman who died in the accident, not directly involved in the crash, brought proceedings in Italy seeking reparation of pecuniary and

non-pecuniary losses personally suffered by them as a consequence of the death of the woman, *ie* the moral suffering for the loss of a loved person and the loss of a source of maintenance. Among the claimants, all of them of Romanian nationality, some were habitually resident in Italy, others in Romania.

Before the Tribunal of Trieste, seised of the matter, the issue arose of whether, for the purposes of the Rome II Regulation, one should look at the damage claimed by the relatives in their own right (possibly to be localised in Romania) or only at the damage suffered by the woman as the immediate victim of the accident. Put otherwise, the question was whether the prejudice for which the claimants were seeking reparation could be characterised as a "direct damage" under Article 4(1), or rather as an "indirect consequence of the event", with no bearing on the identification of the applicable law.

According to AG Wahl, a "direct damage" within the meaning of Article 4(1) does not cover the losses suffered by family members of the direct victim.

In the opinion, the Advocate General begins by acknowledging that, under the domestic rules of some countries, the close relatives of the victim are allowed to seek satisfaction in their own right (*iure proprio*) for the pecuniary and non-pecuniary losses they suffered as a consequence of the fatal (or non-fatal) injury suffered by the victim, and that, in these instances, a separate legal relationship between such relatives and the person claimed to be liable arises and co-exists with the one already set in place between the latter and the direct victim.

In the Advocate General's view, however, domestic legal solutions on third-party damage should not have an impact on the interpretation of the word "damage" in Article 4(1), which should rather be regarded as an autonomous notion of EU law. The latter notion should be construed having due regard, *inter alia*, to the case law of the ECJ concerning Article 5(3) of the 1968 Brussels Convention and of the Brussels I Regulation (now Article 7(2) of the Brussels I*a* Regulation), in particular insofar as it excludes that consequential and indirect (financial) damages sustained in another State by either the victim himself or another person, cannot be invoked in order to ground jurisdiction under that provision (see, in particular, the judgments in *Dumez and Tracoba, Marinari* and *Kronhofer*).

That solution, the Advocate General concedes, has been developed with specific

reference to conflicts of jurisdictions, on the basis of considerations that are not necessarily as persuasive when transposed to the conflicts of laws. The case law on Brussels I, with the necessary adaptation, must nevertheless be treated as providing useful guidance for the interpretation of the Rome II Regulation.

Specifically, AG Wahl stresses that the adoption of the sole connecting factor of the *loci damni* in Article 4(1) of the Rome II Regulation marks the refutation of the theory of ubiquity, since, pursuant to the latter provision, torts are governed by one law. The fact of referring exclusively to the place where the damage was sustained by the direct victim, regardless of the harmful effects suffered elsewhere by third parties, complies with this policy insofar as it prevents the splitting of the governing law with respect to the several issues arising from the same event, based on the contingent circumstance of the habitual residence of the various claimants.

The solution proposed would additionally favour, he contends, other objectives of the Regulation. In particular, this would preserve the neutrality pursued by the legislator who, according to Recital 16, regarded the designation of the *lex loci damni* to be a "fair balance" between the interests of all the parties involved. Such compromise would be jeopardised were the victim's family member systematically allowed to ground their claims on the law of the place of their habitual residence. The preferred reading would moreover ensure a close link between the matter and the applicable law since, while the place where the initial damage arose is usually closely related to the other components of liability, the same cannot be said, generally, as concerns the domicile of the indirect victim.

In the end, according to AG Wahl, Article 4(1) of Regulation No 864/2007 should be interpreted as meaning that the damages suffered, in their State of residence, by the close relatives of a person who died as a result of a traffic accident occurred in the State of the court seised constitute "indirect consequences" within the meaning of the said provision and, consequently, the "place where the damage occurred", in that event, should be understood solely as the place in which the accident gave rise to the initial damage suffered by the direct victim.