Commission report European Order for Payment

In October 2015, the long awaited Commission Report on the application of Regulation No 1896/2006 creating a European Order for Payment Procedure (that was due December 2013) was published. It generally and optimistically concludes that:

> *Overall, the objective of the Regulation to simplify, speed up and reduce the costs of litigation in cases concerning uncontested claims and to permit the free circulation of European payment orders in the EU without exequatur was broadly achieved, though in most Member States the procedure was only applied in a relatively small number of cases.*
> *From the studies and consultation carried out, it appears that there have been no major legal or practical problems in the use of the procedure orin the fact that exequatur is abolished for therecognition and enforcement of the judgments resulting from the procedure.*

On the basis of a limited and somewhat outdated set of data the following observations are made. Annually, approximately 12.000 to 13.000 applications for the procedure are received. Most orders are issued in Germany and Austria (approx. 4.000). In seven other Member States, the number of applications is between 300-700, while in the remaining Member States the use of the procedure is very limited.

The time lapse between the application and issuing the order (that should normally not be more than 30 days according to Art. 12 of the EOP Regulation) varies considerably per Member State. Some Member States are able to issue the order within one or several weeks, while the majority of the Member States take several months and up to nine months. Only six Member States have an average length of the procedure lower than 30 days, according to available data upon which the report is based. Another important element for assessing the effectiveness of the procedure is the number of oppositions against the European order for payment; if opposition is lodged the case should proceed according to domestic procedural rules (Art. 16 and 17 EOP Regulation). This percentage varies largely, from approx. 4% (in Austria) to over 50% (in Greece). Looking at the numbers, the general trend is that in Member States where the procedure is

used often the opposition rate is low, whereas in Member States where the procedure is rarely used the opposition rate is high. It would be interesting to know what causes what – the chicken and egg dilemma.The costs of the procedure vary considerably per Member State as well, and when translation of documents is required (which is the case in most countries, as the majority only accepts documents in the domestic language), the costs of the procedure are high. Furthermore, Member States have varying methods to calculate court fees.

The report rightfully concludes that Art. 20 of the EOP Regulation requires clarification as has been proposed for the European Small Claims Procedure (see our earlier post). From national case law and a number of cases that have reached the Court of Justice, notably *eco cosmetics and Raiffeisenbank St. Georgen* (joined cases C-119 and C-120) it is clear that not all situation where a remedy should be available due to defect service are covered by the Regulation. The Court of Justice ruled that national law should provide such remedy. This is clearly a shortcoming of the Regulation also considering that remedies in the Member State of enforcement are limited if not absent, and it (further) undermines the uniform application. On a positive note, the report concludes that generally no problems were reported in the enforcement of EOPs, except for the general lack of transparency of debtors' assets for enforcement purposes in a cross-border context. This optimistic conclusion may, however, also be due to the lack of information on the actual enforcement track, which can generally be troublesome in many Member States. Regarding the *Banco Español* case (C-618/10) addressing the issue of order for payment and unfair contract terms (it concerned a clause on interest), the Report concludes that Art. 8 of the EOP Regulation requiring the court to examine whether the claim appears to be founded on the basis of the information available to it, the courts have sufficient room to take account of the principle of effectiveness. They can, for instance, on the basis of Art. 10 issue only a partial order. In addition, a full appreciation takes place after opposition. One might still question whether this satisfactorily resolves the issue, especially how this relates to the encouraged full automatization and digitalization of the procedure and how it shifts the burden to the consumer.

The report urges to raise awareness of the procedure, and suggests that the electronic processing should be maintained and improved; most Member States do not provide electronic submission possibilities for (all) parties yet. Concentration of jurisdiction, as some Member States have done, is advised, as

this contributes to a swift resolution of the procedure. Swiftness in general is a problem; the report once again stresses the fact that late payments are a key cause of insolvencies in small and medium-sized enterprises. If then the EOP procedure takes 6 months, the beneficiary effect of the procedure is annihilated.

Happy holidays!

Essay Contest: Nappert Prize in International Arbitration

Thanks to the generosity of Sophie Nappert (BCL'86, LLB'86), the Nappert Prize in International Arbitration will be awarded for the second time in 2016 after an enormously successful inaugural competition in 2014. The Nappert Competition is open to all students, junior scholars and junior practitioners from around the world. To be eligible for the prize, authors must be either currently enrolled in a B.C.L, LL.B., J.D., LL.M., D.C.L., or Ph.D. program (or their local equivalents). Those who are no longer in school must have taken their most recent degree within the last three years, or have been admitted to the bar (or the local equivalent) for no more than three years (whichever is later).

Prizes: First place: Can $4,000; Second place: Can. $2,000; Third place: Can $1,000. Winning one of the awards will also carry with it the presentation of the paper at a symposium to be held at McGill in autumn 2016 (the expenses of the winners for attending the symposium will be covered). The precise date of the symposium will be fixed in the coming months. The best oralist will receive an award of Can. $1,000.

Deadline: April 30, 2016.

The essay:
• must relate to commercial or investment arbitration;

• must be unpublished (not yet submitted for publication) as of April 30;
• must be a maximum of 15, 000 words (including footnotes);
• can be written in English or in French;
• should use OSCOLA or some other well-established legal citation guide (e.g. McGill Red Book; Bluebook);
• must be in MS Word format.

Jurors for the 2016 competition will be:
• Sébastien Besson, Partner, Lévy Kaufmann-Kohler, Geneva
• Chester Brown, Professor of International Law and International Arbitration, The University of Sydney Faculty of Law
• José Feris, Deputy Secretary-General, ICC International Court of Arbitration, Paris
• Henry Gao, Associate Professor, Singapore Management University
• Meg Kinnear, Secretary-General, International Centre for Settlement of Investment Disputes, Washington, DC
• Cesar Pereira, Partner, Justen, Pereira, Oliveira, and Talamini, São Paolo
• Abby Cohen Smutny, Partner, White & Case LLP, Washington, DC

Submissions are to be emailed to Camille Marceau, Camille.Marceau@mail.mcgill.ca, as an attached file before April 30, 2016. Submissions should be accompanied by a statement affirming the author's eligibility for the competition, confirmation that the work is original to the author, and confirmation of the unpublished status of the paper. Review of the papers will start after April 30. For more information, kindly email Mlle. Marceau, Camille.Marceau@mail.mcgill.ca, or Professor Andrea K. Bjorklund, andrea.bjorklund@mcgill.ca, Faculty of Law, McGill University.

Romano on questions of family

status in European PIL

Professor *Gian Paolo Romano* (University of Geneva) has just published a highly insightful paper entitled "Conflicts and Coordination of Family Statuses: Towards their Recognition within the EU?" The briefing note was prepared on request of the European Parliament as a contribution to a workshop on "Adoption: Cross-border legal issues" for JURI and PETI Committees, which took place on 1 December 2015. The paper focusses on, in the author's words, "intra-EU conflicts of family statuses" that are bound to arise under the current legislative situation: Over the years, the European Union has adopted a wide set of Regulations that cover international jurisdiction, applicable law and recognition with regard to the legal effects flowing from a family status, while the creation or termination of family statuses are predominantly excluded from the Regulations' scope. Thus, the question whether and on which grounds a family status awarded by one Member State is to be recognized in other Member States is still widely left to domestic PIL, often resulting in conflicts of inconsistent family statuses between Member States, which, at this stage, cannot be resolved in legal proceedings. After reflecting upon those conflicts being contrary to human rights as well as to the objectives and fundamental freedoms of the European Union and demonstrating their potential to frustrate the aims of European PIL instruments, the author discusses four possible legislative strategies for preventing conflicts of family statuses across the European Union or alleviating their adverse effects.

The compilation of briefing notes is available here (please see page 17 *et seqq*. for Professor *Romano's* contribution).

Save the Date: 3rd Yale-Humboldt Consumer Law Lecture on 6 June

2016

On 6 June 2016, the 3rd Yale-Humboldt Consumer Law Lecture will take place at Humboldt-University Berlin. This year's speaker will be Professor Richard Brooks (Yale Law School/Columbia Law School), Professor Henry Hansmann (Yale Law School) and Professor Roberta Romano (Yale Law School).

The program reads as follows:

- 2.00 p.m. Welcome by *Professor Susanne Augenhofer* and the Vice President for Research of Humboldt University, *Professor Dr. Peter A. Frensch*
- 2.15 p.m. *Professor Richard Brooks*, Columbia Law School
- 3.15 p.m. Coffee break
- 3.45 p.m. *Professor Henry B. Hansmann*, Yale Law School
- 4.45 p.m. Break
- 5.00 p.m. *Professor Roberta Romano*, Yale Law School
- 6.00 p.m. Panel Discussion
- 7.00 p.m. Reception

Further information regarding the event is available here. Participation is free of charge but registration is required. Please register online before 27 May 2016.

The annual Yale-Humboldt Consumer Law Lecture brings faculty members from Yale Law School and other leading US law Schools to Berlin where they spend time at Humboldt Law School. During their stay, and as part of a variety of activities, the three visitors will interact with colleagues as well as with doctoral candidates and students. Highlight of their stay is the Yale-Humboldt Consumer Law Lecture, which is open to all interested lawyers. The speakers' remarks will be followed by discussion.

The Yale-Humboldt Consumer Law Lecture aims at encouraging an exchange between American and European lawyers in the field of consumer law, understood as an interdisciplinary field that affects many branches of law. Special emphasis will therefore be placed on aspects and questions which have as of yet received little or no attention in the European discourse.

EU Civil Justice: Current Issues and Future Outlook

This seventh volume in the Swedish Studies in European Law series (Hart Publishing, Oxford) brings together some of the most prominent scholars working within the fast-evolving field of EU civil justice. Civil justice has an impact on matters involving, inter alia, family relationships, consumers, entrepreneurs, employees, small and medium-sized businesses and large multinational corporations. It therefore has great power and potential. Over the past 15 years a wealth of EU measures have been enacted in this field. Issues arising from the implementation thereof and practice in relation to these measures are now emerging. Hence this volume will explore the benefits as well as the challenges of these measures. The particular themes covered include forum shopping, alternative dispute resolution, simplified procedures and debt collection, family matters and collective redress. In addition, the deepening of the field that continues post-Lisbon has occasioned a new level of regulatory and policy challenges. These are discussed in the final part of the volume which focuses on mutual recognition also in the broader European law context of integration in the area of freedom, security and justice.

The editors

Burkhard Hess is Director at the Max Planck Institute Luxembourg for International, European and RegulatoryProcedural Law.

Maria Bergström is Senior Lecturer in EU law at the Faculty of Law, Uppsala University.

Eva Storskrubb is Marie Curie Research Fellow at Uppsala University

ERA-Conference: “New EU Rules for Digital Contracts – The Commission proposals on contract rules for the supply of digital content and online sales across the EU”

The Academy of European Law (ERA) will host a conference on the new proposals for Directives on contracts for the supply of digital content (COM(2015) 634 final) and contracts for the online and other distance sales of goods (COM(2015) 635 final), which were published by the European Commission on 9 December 2015 and contain a set of fully harmonized rules on e-commerce. The conference is organized by *Dr Angelika Fuchs* (ERA) and will take place on **18 February 2016** in **Brussels**. The event will offer a platform to discuss the new legislative package, which has already become the subject of highly controversial debate, at an early stage in the legislative process by bringing together representatives of the European Commission and the European Parliament as well as legal practitioners, stakeholders and academics.

Key topics will be:

- Scope of the proposed Directives
- How to define conformity?
- Remedies and exercise of remedies
- Specifics for the supply of digital content
- Looking ahead: High standards or low costs for online trade?

The full conference programme is available here.

The speakers are

- **Razvan Antemir**, Director Government Affairs, EMOTA, Brussels
- **Professor Hugh Beale QC**, University of Warwick, Harris Manchester College, University of Oxford
- **Samuel Laurinkari**, Senior Manager, EU Government Relations, eBay Inc., Brussels
- **Professor Marco B.M. Loos**, Centre for the Study of European Contract Law, University of Amsterdam
- **Pedro Oliveira**, Senior Adviser, Legal Affairs Department, BUSINESSEUROPE, Brussels
- **Ursula Pachl**, Deputy Director General, BEUC – The European Consumer Organisation, Brussels
- **Professor Dirk Staudenmayer**, Head of Unit – Contract Law, DG Justice, European Commission, Brussels
- **Professor Matthias E. Storme**, Institute for Commercial and Insolvency Law, KU Leuven
- **Axel Voss MEP**, Rapporteur, JURI Committee, European Parliament, Brussels / Strasbourg
- **Diana Wallis**, President of the European Law Institute, Vienna
- **Professor Friedrich Graf von Westphalen**, *Rechtsanwalt*, Friedrich Graf von Westphalen & Partner, Cologne

The conference language will be English. For further information and registration, please see here.

The ECJ on the notions of "damage" and "indirect consequences of the tort or delict"

for the purposes of the Rome II Regulation

In *Florin Lazar*, a judgment rendered on 10 December 2015 (C-350/14), the ECJ clarified 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, the law applicable to a non-contractual obligation arising out of a tort is "the law of the country in which the damage occurs 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 concerned a traffic accident occurred in Italy, which resulted in the death of a woman. Some close relatives of the victim, not directly involved in the crash, had 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.

In these circumstances, the issue arose of whether, in order to determine the applicable law under 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, whether the prejudice for which the claimants were seeking reparation could be characterised as a "direct damage" within the meaning of Article 4(1), or rather as an "indirect consequence" of the event, with no bearing on the identification of the applicable law.

In its judgment, the Court held that the damage related to the death of a person in an accident which took place in the Member State of the court seised and sustained by the close relatives of that person who reside in another Member State must be classified as "indirect consequences" of that accident, within the meaning of Article 4(1).

To reach this conclusion, the ECJ began by observing that, according to Article 2

of the Rome II Regulation, “damage shall cover any consequence arising out of tort/delict”. The Court added that, as stated in Recital 16, the uniform conflict-of-laws provisions laid down in the Regulation purport to “enhance the foreseeability of court decisions” and to “ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage”, and that “a connection with the country where the *direct* damage occurred … strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage”.

The Court also noted that Recital 17 of the Regulation makes clear that “in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively”.

It follows that, where it is possible to identify the occurrence of direct damage, the place where the *direct* damage occurred is the relevant connecting factor for the determination of the applicable law, regardless of the indirect consequences of the tort. In the case of a road traffic accident, the damage is constituted by the injuries suffered by the direct victim, while the damage sustained by the close relatives of the latter must be regarded as indirect consequences of the accident.

In the Court’s view, this interpretation is confirmed by Article 15(f) of the Regulation which confers on the applicable law the task of determining which are the persons entitled to claim damages, including, as the case may be, the close relatives of the victim.

Having regard to the *travaux préparatoires* of the Regulation, the ECJ asserted that the law specified by the provisions of the Regulation also determines the persons entitled to compensation for damage they have sustained personally. That concept covers, in particular, whether a person other than the direct victim may obtain compensation “by ricochet”, following damage sustained by the victim. That damage may be psychological, for example, the suffering caused by the death of a close relative, or financial, sustained for example by the children or spouse of a deceased person.

This reading, the Court added, contributes to the objective set out in Recital 16 to ensure the foreseeability of the applicable law, while avoiding the risk that the tort or delict is broken up in to several elements, each subject to a different law

according to the places where the persons other than the direct victim have sustained a damage.

Commission presents new proposals for fully harmonised directives on e-commerce

As already announced in its Digital Single Market Strategy adopted on 6 May 2015, the Commission has, on 9 December 2015, finally presented a legislative initiative on harmonised rules for the supply of digital content and online sales of goods. The Commission explains: "This initiative is composed of (i) a proposal on certain aspects concerning contracts for the supply of digital content (COM(2015)634 final), and (ii) a proposal on certain aspects concerning contracts for the online and other distance sales of goods (COM(2015)635 final). These two proposals draw on the experience acquired during the negotiations for a Regulation on a Common European Sales Law. In particular, they no longer follow the approach of an optional regime and a comprehensive set of rules. Instead, the proposals contain a targeted and focused set of fully harmonised rules" (COM(2015)634, p. 1). From the perspective of legal policy, this change of approach can only be applauded (see already in this sense *von Hein*, Festschrift Martiny [2014], p. 365, 389: "Die beste Lösung dürfte aber eine effektive Harmonisierung des europäischen Verbraucherrechts auf einem verbindlichen Niveau darstellen, das optionale Sonderregelungen für den internationalen Handel überflüssig machen würde.") According to the Commission, "[t]he proposals also build on a number of amendments adopted by the European Parliament in first reading concerning the proposal for a Regulation on the Common European Sales Law, in particular the restriction of the scope to online and other distance sales of goods and the extension of the scope to certain digital content which is provided against another counter-performance than money" (COM(2015)634, p. 1).

On the relationship between the new directive on certain aspects concerning contracts for the online and other distance sales of goods and the existing Brussels I*bis* and Rome I Regulations, the Commission elaborates (COM(2015)635, p. 4):

"The proposal is compatible with the existing EU rules on applicable law and jurisdiction in the Digital Single Market. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), which provide rules to determine the competent jurisdiction and applicable law, apply also in the digital environment. These instruments have been adopted quite recently and the implications of the internet were considered closely in the legislative process. Some rules take specific account of internet transactions, in particular those on consumer contracts. These rules aim at protecting consumers inter alia in the Digital Single Market by giving them the benefit of the non-derogable rules of the Member State in which they are habitually resident. Since the current proposal on the online and other distance sales of goods aims at harmonising the key mandatory provisions for the consumer protection, traders will no longer face such wide disparities across the 28 different legal regimes. Together with the proposed new contract rules for online and other distance sales of goods as set out in this proposal, the existing rules on private international law establish a clear legal framework for buying and selling in a European digital market, which takes into account both consumers' and businesses' interests. Therefore, this legislative proposal does not require any changes to the current framework of EU private international law, including to Regulation (EC) No 593/2008 (Rome I)."

Fulli-Lemaire on the private

international law aspects of the PIP breast implants scandal

In a recent article, Samuel Fulli-Lemaire, a Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg and a PhD candidate in Private International Family Law at the Paris II – Panthéon-Assas University, examined the private international law aspects of the PIP breast implants scandal.

The article, in French, appeared under the title *Affaire PIP: quelques réflexions sur les aspects de droit international privé* in the first issue for 2015 of the *Revue internationale de droit économique*, together with other papers concerning the PIP case.

Here's an abstract of the article, provided by the author.

It is now common knowledge that the PIP company, domiciled in France, fraudulently mixed industrial-grade and medical-grade silicone gels to make its breast implants. The victims, women who have received the defective implants and have subsequently developed medical conditions, or who wish to have the implants removed or replaced as a precaution, can claim damages from a variety of actors. Because the victims, the clinics where the operations were performed, and the companies that were part of the supply chain, as well as their insurers, are domiciled in states spread all over the world, this case raises innumerable private international law issues.

This paper focuses on some of these issues, specifically those related to the tort actions which the victims can bring against the manufacturer, its executives, its insurer, and the notified body, which is the entity that was tasked with ensuring that PIP complied with its obligations under the European Union legal framework for medical products. In each case, both international jurisdiction and applicable law will be addressed.

To that end, some technical questions have to be answered first, for instance determining the place where the damage is sustained following the insertion of a potentially defective implant, or to what extent criminal courts can be expected to apply private international rules.

But on a more fundamental level, the PIP case highlights some of the shortcomings of the product liability regime in the single market. To take just one striking example, a French judge ruling on a claim against the manufacturer would apply the rules of the 1973 Hague Convention on the law applicable to products liability, while a German judge would apply the specific provision for product liability of the Rome II Regulation, a discrepancy which might ultimately result in the two claims being subject to different laws. Even though this particular field of the law has been harmonized by the 1985 Product Liability Directive, significant differences remain between the legislations of Member States, and these could have a decisive influence on the outcome of the cases.

This is just one factor that parties should take into account when deciding before which court to start proceedings, and it is likely that the significant forum shopping opportunities afforded to the victims by the Brussels I Regulation will be put to good use by the best-informed among them.

This state of affairs might legitimately be regarded as a lesser evil, since what is ultimately at stake is the compensation of victims of actual or possible bodily harm brought about by the fraudulent behaviour of a manufacturer. But the unequal treatment of victims, particularly depending on their domicile, cannot be regarded as satisfactory, any more than the considerable risk that contradictory or incoherent decisions will be rendered by the courts of different Member States, as some lower courts in Germany and France have already done.

The development of class actions, as introduced recently in French law, albeit in a very limited way, could help suppress or mitigate these difficulties, but accommodating these mechanisms within the framework of European private international law will create additional challenges.

U.S. Federal Judicial Center

Publication on “Discovery in International Civil Litigation”

The Federal Judicial Center (FJC) has just published the most recent item in their series on international litigation. The text, entitled “Discovery in International Civil Litigation: A Guide for Judges,” was written by Timothy Harkness, Rahim Moloo, Patrick Oh and Charline Yim. The guide joins a variety of other titles, including those on mutual legal assistance treaties (T. Markus Funk), the Foreign Sovereign Immunities Act (David Stewart), international commercial arbitration (S.I. Strong), recognition and enforcement of foreign judgments (Ron Brand), and international extradition (Ronald Hedges).

The new text can be downloaded from the FJC website here. The other texts are also available for download at fjc.gov. If you would like a free copy of the new discovery guide or any of the judicial guides on international law, just contact the FJC.