Lehmann on “Recognition as a Substitute for Conflict of Laws?”

Matthias Lehmann, University of Bonn, has posted ‘Recognition as a Substitute for Conflict of Laws?’, a chapter in a forthcoming book on ‘General Principles of European Private International Law’ (Stefan Leible, ed.), on SSRN. The piece weighs a whole spectre of arguments for and against an EU version of the Full Faith and Credit Clause in the US constitution. It summarizes over a decade scholarly debate in Europe, fuelled by of ECJ decisions and Commission proposals. In the end, Lehmann rejects a general rule of recognition with regard to ‘legal situations’ created in other Member States. Yet he favours obliging authorities and courts to recognise such situations where they are recorded in official documents or public registers, provided that appropriate conditions and safeguards are in place. Among the latter is a sufficient connection between the legal situation and the Member State of origin of the document or register entry as well as a well-defined public policy exception. Lehmann concludes that recognition will not replace conflict of laws, but may be a welcome second pillar for achieving harmonious solutions in a judicial area with rising mobility of its citizens. He therefore encourages the European Commission to pursue his ambitious idea of introducing a rule of recognition into EU law.

The piece can be downloaded here.

Declaration on the Legal Status of Applicants for International Protection from Third Countries to

the European Union

As a follow up to my post on the 25th Meeting of the GEDIP in Luxembourg I would like to add now the final document containing the **Declaration on the Legal Status of Applicants for International Protection from Third Countries to the European Union,** which Prof. van Loon has very kindly provided.

DECLARATION ON THE LEGAL STATUS OF APPLICANTS FOR INTERNATIONAL PROTECTION FROM THIRD COUNTRIES TO THE EUROPEAN UNION

THE EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW

At its Twenty-fifth meeting held in Luxembourg, from 18 to 20 September 2015,

Considering that the current influx of applicants for international protection, among other migrants, from third countries to the European Union and their presence – even of a temporary character – in the Member States gives rise to urgent and important questions concerning their legal status, including in civil law, and requires that special attention be given to the clarification, and consistency across the European Union, of this status;

Recalling that the Area of Freedom, Security and Justice of the European Union covers both policies on border checks, asylum and immigration, and judicial cooperation in civil matters;

Considering that it is crucial that the measures to be taken meet both the immediate and future challenges arising from the influx of migrants from third countries;

Recalling, in particular:

– the Treaty on the Functioning of the European Union, the Charter of Fundamental Rights of the European Union, the United Nations Convention of 20 November 1989 on the Rights of the Child, and the United Nations Convention of 28 July 1951 relating to the Status of Refugees and its Protocol of 31 January

1967, all of which apply across the European Union,

– the Directives of the European Parliament and Council 2011/95/EU, 2013/32 and 2013/33/EU as well as Council Directive 2001/55/EC [1],

– Regulation (EC) 2201/2003 of the Council [2] and the Hague Conventions on the Protection of Children of 19 October 1996[3] and on the Protection of Adults of 13 January 2000 [4] ;

CALLS ON THE INSTITUTIONS OF THE EUROPEAN UNION AND ON THE MEMBER STATES

1. TO ENSURE

Recording and recognition of facts and documents relating to civil status

– a) regarding any national of a third country and any stateless person present on the territory of a Member State of the European Union having presented an application for recognition of refugee status or granting of subsidiary protection status, or having obtained such status, registration as soon as possible – even provisionally – of the important facts relating to their personal status, such as births, marriages and deaths, as well as recognition of these records and documents relating thereto within the European Union;

Exercise of jurisdiction by national authorities to take measures of protection in civil matters

– b) regarding any child, especially when unaccompanied or separated from his or her parents, and any vulnerable adult, seeking or having obtained international protection, the exercise by the authorities of the Member State on whose territory that person is present of their jurisdiction to take measures of protection in civil matters whenever his or her situation so requires;

Refugee status, subsidiary protection status and provisional residence permits

– c) the coordination and mutual recognition, to the extent possible, of decisions on the recognition of refugee status, the granting of subsidiary protection status as well as the granting of provisional residence permits to applicants for international protection.

2. TO TAKE INITIATIVES WITH A VIEW

Promotion of the instruments of private international law relating to personal status

– a) to promoting the universal ratification of instruments of private international law aimed at ensuring legal certainty and mutual recognition of personal status, including the Hague Convention on Protection of Children (1996) [5] .

Common ratification of existing instruments and enhancing their effectiveness

– b) to considering the possibility of signing and ratifying existing instruments at the global level, adopted by the United Nations, its specialized agencies and other intergovernmental organizations, that may contribute to establishing a coherent global legal framework for migration, including of workers and their families, and the possibility of strengthening coordination and cooperation among States needed for the effective implementation of these instruments.

Footnotes

[1] Directives *2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals and stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast),* and *2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).* These directives apply across the European Union with the exception of Denmark, Ireland and the United Kingdom. Ireland and the United Kingdom are nevertheless bound by the preceding versions (2004/83/EC, 2008/85/EC and 2003/9/EC) of these directives. In respect of *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof,* it is to be noted that no decision has (yet) been taken by the Council to make the directive applicable by a decision establishing "*the existence of a mass influx of displaced persons*" as foreseen in Article 5.

[2] *Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning*

jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) 1347/2000 ("Regulation Brussels II A"). This Regulation applies across the European Union with the exception of Denmark.

[3] *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.* This Convention applies across the European Union (for Italy as of 1 January 2016).

[4] *Convention of 13 January 2000 on the International Protection of Adults*. This Convention is applicable in Austria, Czech Republic, Estonia, Finland, France, Germany, and the United Kingdom (Scotland only), and has been signed by Cyprus, Greece, Ireland, Luxembourg and The Netherlands. Outside of the European Union the Convention is applicable in Switzerland.

[5] Currently this Convention, outside of the European Union, is applicable only in the following States: Albania, Armenia, Australia, Ecuador, Georgia, Monaco, Montenegro, Morocco, Russia, Switzerland, Ukraine and Uruguay. The Convention has been signed by Argentina and the United States

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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 lata* and *de lege ferenda*
Michel REYMOND
Jurisdiction under Article 7 no. 1 of the Recast Brussels I Regulation: The Case of Contracts for the Supply of Software
Jan VON HEIN
Protecting Victims of Cross-Border Torts under Article 7 No. 2 Brussels I*bis*: Towards a more Differentiated and Balanced Approach

Surrogacy across State Lines: Challenges and Responses

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.