Committee on Legal Affairs I: Possible legal basis for instrument on minimum standards in civil procedure

Written by Edina Márton
On 21 December 2015, the Committee on Legal Affairs of the European Parliament issued a Working Document on establishing common minimum standards for civil procedure in the European Union – the legal basis (PE572.853v01-00). The Rapporteur, Emil Radev, outlines the scope of the legislative competence of the EU regarding civil procedure law and discusses provisions of the EU Treaties as possible legal basis for harmonising national civil procedure laws in the EU.
The Working Document is available here.

Cour de cassation refers preliminary question regarding Art. 5(3) Brussels I to the ECJ

It has not been mentioned on this blog that the French Cour de cassation has submitted a request for a preliminary ruling to the ECJ regarding Article 5(3) Brussels I Regulation (Concurrence Sàrl v Samsung Electronics France SAS, Amazon Services Europe Sàrl – Case C-618/15) on 23 November 2015. The question relates to the interpretation of the phrase »the place where the harmful event occurred or may occur« and reads as follows:

> *»Is Article 5(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters to be interpreted as meaning that, in the event of an alleged breach of a prohibition on resale outside a selective distribution*

network and via a marketplace by means of online offers for sale on a number of websites operated in various Member States, an authorised distributor which considers that it has been adversely affected has the right to bring an action seeking an injunction prohibiting the resulting unlawful interference in the courts of the territory in which the online content is or was accessible, or must some other clear connecting factor be present?« (OJ 2016 C 38/38, footnote omitted.)

Thanks to Edina Márton for the tip-off!

Towards an 'enhanced cooperation' among 17 Member States in the area of property regimes of international couples

This post has been written by Ilaria Aquironi.

On 2 March 2016 the European Commission adopted a proposal for a Council decision authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships (COM(2016) 108 final).

This stance comes close after the failure, in December 2015, to reach a political agreement among all Member States on the proposals relating to matrimonial property regimes and registered partnerships adopted in 2011.

Over the last few weeks, seventeen Member States – namely Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland and Sweden – addressed a request to the Commission to propose a decision authorising the

establishment of enhanced cooperation between themselves in this field.

As a response, the Commission adopted the aforementioned proposal for a Council decision authorising enhanced cooperation, as well as a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2016) 106 final) and a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships (COM(2016) 107 final).

The adoption of the decision authorising enhanced cooperation requires a qualified majority of Member States within the Council and the consent of the European Parliament. The adoption of the two regulations implementing the enhanced cooperation requires unanimity by the participating Member States and the consultation of the European Parliament.

The non-participating Member States will continue to apply their national private international law rules to cross-border situations dealing with matrimonial property regimes and the property consequences of registered partnerships, and will remain free to join the enhanced cooperation at any time.

Slovenia: conference "Corporate Entities at the Market"

It is a tradition of the University of Maribor to organise conferences "**Corporate Entities at the Market**". This year the conference will include issues related to cross-border debt collection. The conference is supported and partly financed by the European Commission, in the framework of EU Project BIARE. The conference is divided into five sessions:

1st Session: Corporate Law – Current Issues Related to ZGD-1 and Amendments
2nd Session: Commercial Legal Transactions
3rd Session: Cross-border Disputes in Civil and Commercial Matters

(International session, English-Slovene interpretation) – 1. part
4th Session: Cross-border Disputes in Civil and Commercial Matters (International session, English-Slovene interpretation) – 2. part
Poster Session: National System of Enforcement from Perspective of Bruxelles Ia (Slovenia, Croatia, Austria, Germany, Italy, Czech Republic, Portugal, Netherlands, France, Lithuania, Estonia, Belgium, Sweden, UK, Greece).

The program is available here. The conference will take place on 19–21 May 2016 in Portoroz, Slovenia. The registration form can be accessed here.

Lehmann on Jurisdiction and Applicable law in Prospectus Liability Cases

Against the backdrop of the CJEU's judgment in Kolassa (Case C-375/13, see here and here for previous posts), Matthias Lehmann has written an article that is forthcoming in the August issue of the Journal of Private International Law. The article can be downloaded here.

The abstract reads as follows:

> *In its Kolassa judgment, the CJEU has for the first time decided which national court in the EU has jurisdiction for claims against an issuer of securities based on an allegedly false prospectus. This contribution analyses this fundamental and at the same time ambiguous ruling.*
>
> *The ruling's most important part concerns tort jurisdiction, in particular the identification of the place where loss is suffered by the investor. The court's mixture between the domicile of the investor and the location of the bank that manages his account is unsatisfying and leads to problems, which will be analysed. With regard to the place of conduct, the decision will be criticized for hesitating between four different connecting factors, the relation of which*

among each other remains unclear. Moreover, this contribution argues that prospectus liability never falls under the consumer provisions or the contractual head of jurisdiction in the Brussels I(a) Regulation because such liability is delictual in nature. Contrary to the CJEU's assumption, the particularities of the securities holding system do not play any role in the determination of the competent court.

Finally, it will be shown that the judgment is not limited to the determination of the competent court, but also affects the governing law for prospectus cases. It will be argued that the consequences of the Kolassa judgment under the Rome II Regulation are so drastic that a legislative reform of this Regulation has become necessary.

The legislative process of the EU regulation on public documents reaches its final stage

This post has been written by Ilaria Aquironi.

After nearly three years of negotiations, the time apparently has come for the adoption of a regulation aimed at simplifying the requirements for presenting certain public documents in the European Union (the initial proposal may be found here).

The regulation aims at promoting the free movement of EU citizens (*a*) by facilitating the circulation within the European Union of certain public documents (those regarding, *inter alia*, birth, death, marriage, legal separation and divorce, registered partnership, adoption, parenthood), as well as their certified copies, and (*b*) by simplifying other formalities, such as the requirement of certified copies and translations of public documents.

Here's a summary of the key developments occurred over the last two years.

In February 2014, the European Parliament adopted its position at first reading on the proposed regulation. In June 2015, the Council approved, as a general approach, a compromise text (contained in document 6812/15 and its annex I, in combination with document n. 3992/15, and annexes *I*, *II* and *III* here) and further agreed that it should constitute the basis for future negotiations with the European Parliament.

In October 2015, an agreement was reached between the Council and the European Parliament on a compromise package; the agreement was then confirmed by COREPER and the compromise package was endorsed by the European Parliament's Committee on Legal Affairs.

The Chair of the latter Committee addressed a letter to the Chair of COREPER II to inform him that, should the Council formally transmit its position to the European Parliament in the form presented in the Annex to that letter, he would recommend to the plenary that the Council's position be accepted without amendment, subject to legal-linguistic verification, at the European Parliament's second reading.

In December 2015, the Council adopted a political agreement on the compromise package and instructed the Council's legal-linguistic experts to proceed with the revision of the text.

The text resulting from the revision carried out by the legal-linguistic experts can be found here (Council document No 14956/15 of 25 February 2016).

The Council is expected to discuss the adoption of its position at first reading on 10 and 11 March 2016.

"The Nature or Natures of

Agreements on Choice of Court and Choice of Law," an upcoming ASIL Webinar

The American Society of International Law Private International Law Interest Group (ASIL PILIG) is sponsoring a webinar entitled "The Nature or Natures of Agreements on Choice of Court and Choice of Law." The session, which is free but requires a reservation, will take place on Wednesday, March 2, at 11:30 am Eastern time (10:30 am Central, 8:30 am Pacific) and features two giants of private international law – Professor Adrian Briggs of the University of Oxford and Professor Symeon Symeonides of Willamette University.

ASIL's description of the event is as follows:

> *To judge from judicial decisions over the last 20 years, the English common law version of private international law has come to treat agreements on choice of court as contractual agreements that will be enforced in almost exactly the same way as any other bilateral contractual agreement. This had led the courts to some conclusions, particularly in the context of remedies against breach, which look surprising as features in the landscape of private international law. But this narrow contractual focus, which takes it for granted that agreements on choice of court are promissory terms of a contract, liable to be enforced as such, has blinded lawyers to the possibility of viewing them as (multiple) unilateral notices. But Regulation (EU)1215/2012, otherwise known as the Brussels I Regulation, provides the basis for one alternative understanding of what is involved in making an agreement on choice of court.*
>
> *When it comes to (agreements on) choice of law, the English courts have managed to avoid having to decide whether such terms in a contract are promissory in nature. The idea that they may be non-promissory terms has yet to be worked through; but it may provide a more satisfactory basis for providing answers than the alternative, that they are promissory terms.*

Attendees can download papers and register here. The aim of the discussion will therefore be to consider the nature or natures of agreements on choice of court

and on choice of law.

AG Opinion in Case C-572/14 Austro Mechana on the Scope of Tort in Brussels I

Tobias Lutzi, the author of this post, is an MPhil Candidate at the University of Oxford.

AG Saugmandsgaard Øe has delivered his opinion in Case C-572/14 *Austro-Mechana*, raising an interesting question as to the scope of Art. 5(3) Brussels I (= Art. 7(2) Brussels I recast).

The case concerns the so-called 'blank-cassette levy' that sellers of recording equipment have to pay under § 42b(1), (3) of the Austrian Copyright Act (Urheberrechtsgesetz – UrhG). The levy constitutes a compensation for the right to make private copies for personal use provided in § 42 UrhG. It is collected on behalf of the individual copyright holders by a copyright-collecting society called Austro-Mechana. According to the ECJ's decision in Case C-521/11 *Amazon.com*, this system is consistent with the requirements of Art. 5(2) of the Copyright Directive (Directive 2001/29/EC).

Austro-Mechana had seized an Austrian court based on Art. 5(3) Brussels I in order to seek payment of the blank-cassette levy from five subsidiaries of Amazon, established in Luxembourg and Germany, which were selling mobile phones and other recording material in Austria. Austro-Mechana argued that the blank-cassette levy was intended to compensate the harm suffered by the copyright holders by reason of the copies made pursuant to § 42 UrhG and would thus fall within the scope of Art. 5(3). Amazon objected that the levy was payable upon the mere act of selling recording equipment, which in itself was neither unlawful nor harmful; the copyright holders would only suffer harm from the (equally lawful) use of the equipment by third parties; as a consequence, Art. 5(3) would be

inapplicable to the present case. Amazon did not contest, however, that if Art. 5(3) would apply, Austria would be the place of the harmful event.

In his opinion, AG Saugmandsgaard Øe first gives a detailed account of the blank-cassette levy system created under §§ 42, 42b UrhG (paras 28–51). In order to decide whether a claim brought under this system would fall within the scope of Art. 5(3) Brussels I, he then refers to the well-known two-stage test from Case C-189/87 *Kalfelis*, according to which an action falls under Art. 5(3) if it 'seeks to establish the liability of a defendant' and is 'not related to a "contract" within the meaning of Article 5(1)' (para 56). The AG first assesses the second condition and rightly points out that the defendants' obligation to pay compensation under § 42b UrhG was not 'freely entered into' and could thus not be qualified as contractual (paras 58–61).

The difficulty of the present case, however, clearly lies in the first condition established in *Kalfelis*, the role of which has always remained somewhat unclear and subject to debate. While its German translation ('Schadenshaftung') and the ECJ's decision in Case C-261/90 *Reichert (No 2)* seemed to indicate that a claim would only 'seek to establish the defendant's liability' in the sense of Art. 5(3) if its aim was to have the defendant ordered to 'make good the damage he has caused', the court's recent decision in Case C-548/12 *Brogsitter* seems to be understood, by some, as promoting a wider interpretation of Art. 5(3), covering all obligations not falling under Art. 5(1). Yet, AG Saugmandsgaard Øe seems to adhere to the former interpretation when he states that 'a "claim seeking to establish the liability of a defendant" must be based on a harmful event, that is to say, an event attributed to the defendant which is alleged to have caused damage to another party' (para 67).

Surprisingly, though, the AG considers as this harmful event the fact 'that Amazon EU and Others failed, as is alleged, deliberately or through negligence, to pay the levy provided for in Article 42b of the UrhG, thus causing damage to AustroMechana' (para 72). Therefore, he concludes, 'a case of this type is an absolutely quintessential instance of a matter relating to tort or delict' (para 75).

This understanding of Art. 5(3) seems hardly reconcilable with the commonly accepted interpretation of Art. 5(3) established in Case 21/76 *Bier*, according to which the 'harmful event' refers to the (initial) event 'which may give rise to liability'. Besides, if it were correct, the first condition established in *Kalfelis*,

which the AG appears to uphold, would be rendered completely meaningless since every claim potentially falling under Art. 5(3) is ultimately motivated by the defendant's failure to comply with an alleged obligation.

Instead, the correct question to ask seems to be whether the initial sale of recording material constitutes a 'harmful event' in the sense of Art. 5(3). Of course, the ECJ may still hold that it does, promoting a rather broad reading of the notion of 'tort, delict or quasi-delict' that also accommodates lawful behavior if it triggers a legal obligation to pay some sort of compensation. But the court may also come to the conclusion that the obligation to pay a 'blank-cassette levy' simply does not constitute a 'matter relating to tort, delict or quasi-delict', relegating the claimant to proceedings in the defendants' home jurisdiction(s) pursuant to Art. 2(1) Brussels I (= Art. 4(1) Brussels I recast).

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 2/2016: Abstracts

The latest issue of the *"Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)"* features the following articles:

R. Wagner, **A new attempt to negotiate a Hague Convention on Recognition and Enforcement**

In 1992 the United States of America proposed that the Hague Conference for Private International Law should devise a worldwide Convention on Recognition and Enforcement of Judgments in Civil and Commercial Matters. Especially the states of the European Union were in favor of harmonizing also the bases of jurisdiction. At the very end the Hague Conference was not able to finalize the negotiations of a convention with a broad scope including rules on bases of jurisdiction and on enforcement and recognition. On the lowest common denominator the conference concluded the Convention of 30 June 2005 on Choice

of Court Agreements (Choice of Court Convention). This convention came into force on 1 October 2015 for Mexico and the European Union (without Denmark). The original idea of a convention with a broad scope has never been forgotten. The following article provides an overview of new developments in the Hague Conference and presents a preliminary draft text of the Working Group on the judgments project.

M.-Th. Ziereis/S. Zwirlein, **Article 17 (2) EGBGB and the Rome III Regulation**

According to Art. 17 (2) German Introductory Act to the Civil Code (EGBGB) within Germany a divorce may only be decreed by a state court. This prohibits private divorce. This essay shows that Art. 17 (2) EGBGB is a conflict of laws rule concerning the law applicable to the formal requirements of a divorce and can therefore be applied alongside the Rome III regulation.

A. Staudinger/C. Bauer, **The concept of contract pursuant to Art. 15 (1) lit. c Brussels I Regulation (Art. 17 (1) lit. c Brussels Ia Regulation) in cases where usually intermediaries are involved – a de-limitation between package travel- and investment contracts**

This contribution deals with a judgement of the ECJ referring to the concept of contract in the field of International Civil Procedure Law according to Art. 15 (1) lit. c Brussels I Regulation (Art. 17 (1) lit. c Brussels Ia Regulation). The decision is about the liability of an issuing bank based on the investment contract. It offers an occasion both to discuss the current jurisprudence and comparable constellations in law on package travel where intermediaries are involved, especially the *Maletic*-case. This jurisdiction anyway is not "overruled". The European legal qualification of the relation between the consumer and the intermediary further on should be understood depending upon the certain circumstances, although a trend can be observed for a contractual comprehension. The judgement illustrates the division of labor between European and national judges and underlines the importance of the choice of the defendant. Depending on whether the claimant sues only one or both of the involved parties it might affect the possible place of jurisdiction. In the light of the present as well as of the *Maletic*-judicature it becomes apparent the mutual influence of the respective relations regarding the scope of application of Brussels Ia-Regulation respectively of the jurisdiction over consumer contracts.

Th. Pfeiffer, **Tort claims as contractual obligations under the Brussels jurisdictional regime – Characterizing the main claim according to a preliminary question?**

This article analyzes the ECJ's recent *Brogsitter*-judgment. It explains that, under previous case law relating to art. 5 no. 1 Brussels I-Regulation 44/2001, this provision was applicable only if the underlying claim itself was based on a contractual obligation, whereas, under *Brogsitter*, it is also sufficient that an interpretation of the contract is indispensable for determining the lawfulness of the allegedly tortuous conduct. The article points out that this new concept amounts to a characterization of the main claim based on the nature of a preliminary question. In particular, the article analyzes the practical advantages and disadvantages of the ECJ's new position with special regard to cases of concurring contractual and tort-related disputes. In its conclusions, the article favors recognizing that – contrary to the ECJ's existing case law – the special headings of jurisdiction in article 5 should be interpreted as to permit the court to also adjudicate on other claims resulting from the same facts, even if the latter, because of their nature, are not directly covered by this particular jurisdictional heading.

P. Kindler, **Jurisdiction and Directors' Liability vis-a-vis the Company**

In its sentence of 10 September 2015, the ECJ held that the application of Article 5 (1) and (3) of the Brussels I Regulation is precluded, provided that the defendant, in his capacity as director and manager of a company, performed services for and under the direction of that company in return for which he received remuneration (cf. Articles 18 to 21 of the Regulation). Furthermore, pursuant to Article 5 (1) of the Regulation an action brought by a company against its former manager on the basis of an alleged breach of his obligations under company law comes within the concept of "matters relating to a contract". It is for the court to determine the place where the manager in fact, for the most part, carried out his activities in the performance of the contract. Finally, under Article 5 (3) of the Regulation, an action based on an allegedly wrongful conduct is a matter relating to tort or delict where the conduct complained of may not be considered to be a breach of the manager's obligations under company law. The author welcomes the judgment as it points out clearly under which circumstances a manager is to be classified as a "worker" for the purposes of Article 18 (2) of the Regulation. The judgment is less clear with respect to Article 5 (3) of the

Regulation.

M.-P. Weller/C. Harms, **The shareholder's liability for pre-entry charges in the light of Brussels I and EuInsVO**

According to the German jurisprudence, the shareholders of a German Limited Liability Company are liable for all debts and pre-entry charges of the company arising in the period between the establishment of the company, i.e. the signing of the articles of association, and the subsequent registration in the company's register. The following article discusses the international jurisdiction for claims of the company against its shareholders resulting out of the liability for pre-entry charges (= Vorbelastungshaftung).

M.-P. Weller/I. Hauber/A. Schulz, **Equality in international divorce law – talaq and get in the light of Art. 10 Rom III Regulation**

The following article discusses the principle of non-discrimination in international divorce proceedings. It especially focuses on Article 10 of the Rom III Regulation and draws attention to the question of whether the provision is meant to safeguard the principle of equal gender treatment in general or whether a case-by-case analysis is required in order to establish if the one of the parties has actually been treated unequally. Answering this question is of great importance with regard to both the Islamic "*talaq*" and divorce under Jewish Law.

D. Coester-Waltjen, **Co-motherhood in South African Law and the German birth registry**

Several legal systems – within and outside Europe – introduced rules which allow two partners of the same sex to be registered in the birth certificate as legal parents of a child. The number of these jurisdictions is growing – just recently being joined by Austria – up to then a system, which was relatively reluctant in the area of medically assisted reproduction and same sex unions. Although German criminal law does not forbid the artificial insemination of a woman living in a registered same sex partnership, family law rules do not provide a parental role for the female partner of the child's mother except by step-child adoption. Nevertheless, German registrars and judges have to deal with birth certificates naming two women as parents of a child – more frequently in recent times. In almost all cases the birth certificates were issued in a foreign country. Do these documents have to be recognized, which questions of private international law

are concerned, and which consequences may follow from this kind of parenthood, especially with regard to the nationality of the child?

The Berlin Court of Appeal had to deal with these issues. The facts of the case differ from those which had been presented to the Court of Appeal in Celle and in Cologne before. And this is true for the reasoning and the finding of the learned judges too. This article addresses the questions which conflict rules are applicable to a "parentage of choice", which limitations have to be observed, and which consequences will follow from the established parentage.

A. Dutta, **Trusts in Schleswig-Holstein? – A didactic play on transferring property under the wrong law?**

The case note addresses the question of how a testamentary trust has to be interpreted in the applicable German succession law as a system without a trust tradition, considering also the new Succession Regulation and possible implications of the European fundamental freedoms on the recognition of foreign trusts.

C. Thomale, **On the recognition of Californian Judgments of Paternity regarding surrogacy arrangements in Switzerland**

The Swiss Supreme Court denied recognition of a Californian Judgment of Paternity, which declared an ordering parent lacking any genetic connection with the child to be the child's legal father. The opinion feeds into current debates on surrogacy, notably reshaping the meaning of "best interest of the child". The comment analyses the decision, based upon which a transnational need for reform is identified.

F. Temming, **The qualification of the rules granting dismissal protection of employees according to sections 105, 107 of the Austrian Arbeitsverfassungsgesetz – is there finally a change of position regarding the case-law of the Austrian High Court of Vienna?**

The Austrian High Court of Vienna has published two judgments on the topic of dismissal protection of employees. The cases deal with collective preventive dismissal protection and repressive individual dismissal protection granted by sections 105, 107 of the Austrian Arbeitsverfassungsgesetz. These rules cause problems in the realm of international jurisdiction and conflict of laws because

they combine co-determination rights together with the rights of individual employees. The resulting question is how to qualify the pertinent sections for the purposes of international jurisdiction and conflict of laws. The two judgements are noteworthy because they put an end to the Court's long standing case-law of qualifying these sections as being totally part of the law of co-determination. Instead, the applicable law is labour law. However much these new development can be welcomed the way of dealing with the works council right to be consulted before the employer terminates the employment contract is still subject to dogmatic criticism. There is a good case of characterising this matter as being only part of the law of co-determination and thus applying neither Art. 8 nor Art. 9 of the Rome I Regulation. With regards to the substantive law these two judgements give a good opportunity to revisit the prerequisites regarding the personal scope of the German Betriebsverfassungsgesetz in cross-border and external situations.

M. Dregelies, **The lex auctoritatis in Polish and German law**

Although agency is important and necessary in modern business life, a codification of the lex auctoritatis is missing in the Rome I Regulation and the German Private International Law (EGBGB). As a result, the lex auctoritatis has been developed by judicial lawmaking and the doctrine. In 2011 the Polish parliament passed a new code on private international law, including the first Polish codification of a lex auctoritatis. After a short overview of the Polish substantive law, this article illustrates the need for a change in the German court ruling by comparing the Polish with the German solution and pointing out their problems. The Polish codification is recommended as the start of a new discussion of a uniform European lex auctoritatis.

Van Calster – European Private

International Law (2nd edition)

A fully updated, second edition of the textbook European Private International Law by Geert Van Calster (University of Leuven) has just been published (Hart Publishing, 2016).

The blurb reads:

Usable both as a student textbook and as a general introduction for legal professionals, *European Private International Law* is designed to reflect the reality of legal practice throughout the EU. This second edition provides a thorough, up-to-date overview of core European private international law, in particular the Brussels I, Rome I and Rome II Regulations (jurisdiction, applicable law for contracts and tort), while additional chapters deal with private international law and insolvency, freedom of establishment, corporate social responsibility and finally a review of two Regulations in the family law arena: Brussels II bis (matrimonial matters and parental responsibility) and the EU Succession Regulation.

More information is available here.