“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.

The conclusions of the first meeting of the Hague Expert's Group on Parentage / Surrogacy

In 2015, the Council on General Affairs and Policy of the Hague Conference decided that an Experts' Group should be convened to explore the feasibility of advancing work on the private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements (for

further information on the Parentage / Surrogacy project, see here).

The Experts' Group on Parentage / Surrogacy met from 15 to 18 February 2016 (the full report is available here). The discussion, based on a background note drawn up by the Permanent Bureau, revealed significant diversity in national approaches to parentage and surrogacy.

The Group noted that "the absence of uniform private international law rules or approaches with respect to the establishment and contestation of parentage can lead to conflicting legal statuses across borders and can create significant problems for children and families", including limping parental statuses, uncertain identity of the child, immigration problems, uncertain nationality or statelessness of the child, abandonment including the lack of maintenance. "Common solutions", the Group observed, "are needed to address these problems".

In particular, as regards the *status quo*, the Group noted the following.

(*a*) Most States do not have specific private international law rules regarding assisted reproductive technologies and surrogacy agreements.

(*b*) Regarding jurisdiction, issues mostly arise in the context of legal parentage being established by or arising from birth registration, voluntary acknowledgment of legal parentage or judicial proceedings. The experts reported, however, that jurisdiction issues tend to arise not as a stand-alone topic, but rather in connection with recognition.

(*c*) Regarding applicable law, there is a split between those States whose private international law rules point to the application of the *lex fori* and those whose private international law rules may also lead to the application of foreign law.

(*d*) Regarding recognition, the Group acknowledged the diversity of approaches of States with respect to the recognition of foreign public documents such as birth certificates or voluntary acknowledgements of parentage, and noted that there is more congruity of practice with respect to the recognition of foreign judicial decisions.

Based on the foregoing, the Group determined that "definitive conclusions could not be reached at the meeting as to the feasibility of a possible work product in

this area and its type or scope" and expressed the view that "work should continue" and that, at this stage, "consideration of the feasibility should focus primarily on recognition". The Group therefore recommended to Council, whose next meeting is scheduled to take place on 15 to 17 March 2016 (see here the draft agenda), that the Group's mandate be continued.

Preliminary Draft for a Reform of Swiss International Insolvency Law

Marjolaine Jakob, the author of this post, is a researcher at the University of Zurich, Faculty of Law.

In October 2015, the Swiss Federal Department of Justice and Police (Eidgenössisches Justiz- und Polizeidepartement) published a preliminary draft for the reform of the 11th title of the Swiss Private International Law Act (SPILA) on insolvency proceedings and compensation proceedings (Articles 166–175 rev-SPILA) along with an explanatory report. Simultaneously, the consultation procedure (Vernehmlassungsverfahren) was opened, which ended on February 5, 2016. The preliminary draft and the explanatory report are available here.

Summary of the content of the preliminary draft

The preliminary draft aims at improving the existing rules against the background of recent national and international developments in cross-border insolvency law. A complete revision is not intended. The new rules are supposed to facilitate the procedure and the requirements for the recognition of foreign bankruptcies.

Amongst other amendments, the proposal contains the following modifications:

- It is proposed to abandon the requirement of reciprocity, which is currently still a pre-requisite for the recognition of foreign bankruptcies (cf. art. 166 para 1. lit. c SPILA).
- Following international trends, indirect jurisdiction is to be extended. In

future, not only bankruptcy orders rendered at the debtor's domicile but also those rendered in the state of the centre of main interests of the debtor (under the condition that the debtor was not resident in Switzerland at the time of the opening of the foreign bankruptcy proceedings) should be recognized (art. 166 para. 1 lit. c nr. 2 rev-SPILA).

- Currently, the recognition of a foreign bankruptcy order necessarily leads to the opening of secondary insolvency proceedings with regard to the debtor's assets located in Switzerland. Claims secured by pledge and privileged claims of creditors domiciled in Switzerland are satisfied in advance. The preliminary draft provides for a rule according to which a a waiver of secondary insolvency proceedings is possible where there is no need for a protection of claims secured by pledge and domestic creditors (art. 174a para. 1 rev-SPILA). In the event of the court approving the request for a waiver, the foreign bankruptcy administrator is supposed to have all powers that the debtor had before the foreign bankruptcy proceedings were opened. Accordingly, assets located in Switzerland would be at the disposal of the foreign bankruptcy administrator in this case (art. 174a para. 2 rev-SPILA).
- The draft also contains a rule according to which domestic authorities and institutions shall coordinate their actions with foreign authorities and institutions (art. 174b rev-SPILA).
- Furthermore, it is proposed that foreign judgments on avoidance claims and insolvency related claims are to be recognised by Swiss courts subject to certain prerequisites (art. 174c rev-SPILA).

Subsequent legislative process

As a next step, the Swiss Federal Office of Justice will prepare a report on the results of the consultation procedure. Based on this report, the Federal Council (Bundesrat), i.e. the Swiss government, will decide on the further procedure.

The Federal Council has the option to submit a final draft to the Federal Parliament, which may either adhere to the preliminary draft or contain limited or extensive amendments. In either case, the final draft is issued a long with a dispatch (Botschaft). Subsequently, the final draft will be discussed in the Parliament.

The Federal Council might, however, also decide to no longer pursue the revision

of the 11th title of SPILA or to instruct the Swiss Federal Office of Justice to undertake further clarifications regarding the revision project.

Parliaments Around the World, at the U.S. Library of Congress

The U.S. Library of Congress has just published its first multinational report which considers some fundamental questions underlying the practice of comparative law: who makes the laws, and how are the laws made? The report covers eleven diverse jurisdictions from Asia, North America and Europe, and discusses the constitutional status and role of the national parliament, its structure and composition, and the lawmaking process in each jurisdiction. For students and scholars of comparative law–and in particular the comparative lawmaking process–this report is a very useful reference tool.

"U.S. Discovery and Foreign Blocking Statues," by Professor Vivian Curran

A new article titled "U.S. Discovery and Foreign Blocking Statues," forthcoming in the Louisiana Law Review, has just been posted to SSRN by Professor Vivian Curran from the University of Pittsburgh. The article tackles the interaction between U.S. discovery and the foreign blocking statutes that impede it in France and other civil law states, and how to understand this interaction at a time when companies are multinational in composition as well as in their areas of commerce. To be sure, U.S. courts continue to grapple with the challenge of understanding

why they should adhere to strictures that seem to compromise constitutional or quasi-constitutional rights of American plaintiffs, while French and German lawyers and judges struggle with the challenges U.S. discovery poses to values of privacy and fair trial procedure in their legal systems. Each of these issued is addressed in Professor Curran's article.

Another Reminder: Early-Bird Registration for 77th ILA Conference Ends on 29 February

It has already been announced on this blog that the 77th Biennial Conference of the International Law Association will take place **from 7 to 11 August 2016** in Johannesburg, South Africa.

This year's main topic will be **'International Law and State Practice: Is there a North/South Divide?'**

Further information and programme details are available at the official conference website.

This post is meant to remind our readers that early-bird registration ends on 29 February 2016. We are looking forward to seeing many of you in Johannesburg, so don't forget to register!

Reminder: Conference From

Common Rules to Best Practices – Rotterdam-MPI

As announced earlier on this blog, on 25 and 26 February 2016 a conference will be held at Erasmus University Rotterdam (Netherlands) on the theme **From common rules to best practices in European Civil Procedure**, jointly organized by Erasmus School of Law and the Max Planck Institute in Luxembourg.

The conference brings together many distinguished academics, practitioners, EU and national legislators and policy makers, discussing in panels the need for common rules to facilitate judicial cooperation and mutual trust, procedural innovation and e-justice in the EU, alternative dispute resolution, and best practices on the operationalization of judicial cooperation in civil matters.

The updated program and more information is available here. Please register as soon as possible if you intend to come!