The Ninth Circuit Confirms High Hurdle to Establish General Personal Jurisdiction Over Foreign Corporations

On July 16, 2015, the often-thought-of-as-"liberal" (but it may surprise you) Ninth Circuit issued a decision confirming the high hurdles to bring suit against non-U.S. corporations in U.S. courts (and also confirmed how hard it can be to bring suit against U.S. corporations for alleged harms occurring abroad). The plaintiff in the case, Loredana Ranza (a U.S. citizen residing in the Netherlands at the time of suit and now living in Germany), brought suit against her Netherlands employer, Nike European Operations Netherlands, B.V. (NEON), and its parent corporation, Nike, Inc., for violations of federal law prohibiting sex and age discrimination. The questions before the Court were (1) whether NEON was subject to general jurisdiction in Oregon, (2) whether Nike's contacts with Oregon could be attributed to NEON to establish general jurisdiction, and (3) whether the case should be dismissed on forum non conveniens grounds.

As to NEON, the Ninth Circuit noted that merely doing business in the forum state cannot suffice for purposes of general jurisdiction. The Court deemed it insufficient to establish general jurisdiction that NEON employees traveled frequently to Oregon and entered into business agreements there. Thus, because NEON did not have its principal place of business and was not incorporated in Oregon, it was not subject to general jurisdiction. **Note**: there has been some question following recent Supreme Court decisions whether merely "doing business" in the forum can establish general jurisdiction. The Ninth Circuit has come down on the side of "no," which could be very influential as other courts continue to deal with this issue.

Next, the Court considered whether Nike's contacts could be attributed to NEON to establish general jurisdiction. **Note the twist**: most imputation cases involve using a domestic subsidiary's contacts with the forum state to get jurisdiction over a foreign parent corporation. This question had been briefed but was not decided by the Supreme Court in its *Daimler* decision. Here, the Ninth Circuit

held that contacts could only be attributed when the subsidiary acts as the alter ego of the parent. Because the plaintiff could not show that the corporate formalities were not observed, Nike's contacts could not be imputed to NEON. In so holding, the Ninth Circuit interred its agency test for attribution, whereby contacts could be imputed when the subsidiary performed "important" work that the parent would have to do for itself if the subsidiary did not exist. In light of the alter ego test, it will now be incredibly hard to base jurisdiction on attribution of contacts in the Ninth Circuit.

Finally, since Nike was subject to general jurisdiction in Oregon, the Court considered whether the case should be dismissed on forum non conveniens grounds. According to the Court, "[o]n balance, the inconvenience of litigating this case in Oregon, the inefficiency and inadvisability of relitigating claims the Dutch ETC has already decided, and the adequacy of the ETC as an alternative forum establish that the District of Oregon is not an appropriate forum for Ranza's claims."

Taken as a whole, this case confirms that U.S. may be moving away from permissive jurisdictional rules, and that the U.S. may no longer be quite such a magnet forum.

Festschrift for Dagmar Coester-Waltjen

The publishing house Gieseking has recently released the "Festschrift für Dagmar Coester-Waltjen" (for more information see the publisher's website). Edited by Katharina Hilbig-Lugani, Dominique Jakob, Gerald Mäsch, Phillipp Reuß and Christoph Schmid the volume contains, in part II, a large number of (mostly, but not only German language) contributions relating to private international law and international civil procedure:

- *Tu?rul Ansay,* State Courts in Commercial Arbitration and Confidentiality (pp. 843 ff.)

- *Jürgen Basedow,* Gegenseitigkeit im Kollisionsrecht (pp. 335 ff.)
- *Katharina Boele-Woelki,* Van het kastje naar de muur – Zur Eheschließung in Deutschland bei bestehender registrierter Partnerschaft nach niederländischem Recht (pp. 349 ff.)
- *Josef Drex,* The European Unitary Patent System: On the 'Unconstitutional' Misuse of Conflict-of-Law Rules (pp. 361 ff.)
- *Reinhold Geimer,* Grenzüberschreitender Gewaltschutz in der Europäischen Union: Eine Facette der Europäisierung des internationalen Verfahrensrechts (pp. 375 ff.)
- *Peter Gottwald,* Aktuelle Probleme des Internationalen Schiedsverfahrensrechts (pp. 389 ff.)
- *Beate Gsell,* Die Zulässigkeit von Gerichtsstandsvereinbarungen mit Verbraucherbeteiligung und Drittstaatenbezug unter der neuen EuGVO (pp. 403 ff.)
- *Bettina Heiderhoff,* Der Erfolgsort bei der Persönlichkeitsrechtsverletzung im Internet (pp. 413 ff.)
- *Tobias Helms,* Neubewertung von Privatscheidungen nach ausländischem Recht vor dem Hintergrund der Entwicklungen im deutschen Sach-, Kollisions- und Verfahrensrecht (pp. 431 ff.)
- *Dieter Henrich,* Im Ausland begründete und im Inland fortgeführte heterosexuelle Lebenspartnerschaften (pp. 443 ff.)
- *Burkhard Hess,* Grenzüberschreitende Gewaltschutzanordnungen im Europäischen Justizraum (pp. 453 ff.)
- *Erik Jayme,* Zur Formunwirksamkeit von Testamenten im Internationalen Privatrecht (pp. 461 ff.)
- *Eva-Maria Kieninger,* Das internationale Sachenrecht als Gegenstand eines Rechtsakts der EU – eine Skizze (pp. 469 ff.)
- *Peter Kindler,* Gerichtsstandsvereinbarung und Rechtshängigkeitssperre: Zum Schutz vor Torpedo-Klagen nach der Brüssel Ia-Verordnung (pp. 485 ff.)
- *Helmut Köhler,* Wettbewerbsstatut oder Deliktsstatut? – Zur Auslegung des Art. 6 Rom-II-VO (pp. 501 ff.)
- *Herbert Kronke,* Internationales Beweisrecht in der Praxis des Iran-United States Claims Tribunal (pp. 511 ff.)
- *Volker Lipp,* Anerkennungsprinzip und Namensrecht (pp. 521 ff.)
- *Dirk Looschelders,* Die allgemeinen Lehren des Internationalen Privatrechts im Rahmen der Europäischen Erbrechtsverordnung (pp. 531

ff.)

- *Nigel Lowe,* Strasbourg in Harmony with The Hague and Luxembourg over Child Abduction? (pp. 543 ff.)
- *Ulrich Magnus,* Rom I und der EuGH – für die Auslegung der Rom I-VO bereits relevante EuGH-Rechtsprechung (pp. 555 ff.)
- *Peter Mankowski,* Primärrechtliche Anerkennungspflicht im Internationalen Familienrecht? (pp. 571 ff.)
- *Heinz-Peter Mansel,* Gesamt- und Einzelstatut: Die Koordination von Erb- und Sachstatut nach der EuErbVO (pp. 587 ff.)
- *Dieter Martiny,* Internationale Kindesentführung und europäischer Menschenrechtsschutz – Kollision unterschiedlicher Ansätze (pp. 597 ff.)
- *Thomas Pfeiffer,* Der internationale Anwendungsbereich des Mindestlohngesetzes (pp. 611 ff.)
- *Peter Picht,* „Wo die Liebe Wohnsitz nimmt" – Schlaglichter auf deutsch-schweizerische Ehegattenerbfälle in Zeiten der EuErbVO (pp. 619 ff.)
- *Hanns Prütting,* Der Fall Weber des EuGH und der dingliche Gerichtsstand des Art. 22 Nr. 1 EuGVVO (pp. 631 ff.)
- *Thomas Rauscher,* Nur ein Not-Sitz des Rechtsverhältnisses Zum gewöhnlichen Aufenthalt im Personalstatut (pp. 637 ff.)
- *Walter Rechberger,* Zu den Bewilligungsvoraussetzungen einer vorläufigen Kontenpfändung nach der EuKoPfVO (pp. 651 ff.)
- *Oliver Remien,* Unsicherheiten bei astreinte, dwangsom und Zwangsgeld im Europäischen Rechtsraum – zu Art. 55 EuGVVO 1215/2012 / Art. 49 EuGVVO 44/2001 sowie der GMVO in der Rechtspraxis – (pp. 661 ff.)
- *Philipp M. Reuß,* Gestaltung des europäischen abstammungsrechtlichen Kaleidoskops – Einige Überlegungen zur Anerkennung der niederländischen Duo-Mutterschaft in Deutschland (pp. 681 ff.)
- *Giesela Rühl,* Grenzüberschreitender Verbraucherschutz: (Nichts) Neues aus Brüssel und Luxemburg? (pp. 697 ff.)
- *Klaus Sachs und Evgenia Peiffer,* Schadensersatz wegen Klage vor dem staatlichen Gericht anstatt dem vereinbarten Schiedsgericht: Scharfe Waffe oder stumpfes Schwert im Arsenal schiedstreuer Parteien? (pp. 713 ff.)
- *Haimo Schack,* Beweisregeln und Beweismaß im Internationalen Zivilprozessrecht (pp. 725 ff.)
- *Peter Schlosser,* „Interventionsklagen" in Deutschland? (pp. 733 ff.)
- *Klaus Schurig,* Der Anlauf zu einem Paradigmenwandel im internationalen

Gesellschaftsrecht (pp. 745 ff.)

- *Rolf A. Schütze,* Das *chess clock* Verfahren und andere Probleme des Beweisrechts im internationalen Schiedsverfahren (pp. 757 ff.)
- *Kurt Siehr,* Zur Reform des deutschen Internationalen Abstammungsrechts (Art. 19 und 20 EGBGB) (pp. 769 ff.)
- *Hans Jürgen Sonnenberger,* Zur Reform der kollisionsrechtlichen Behandlung der Eingehung einer Ehe und anderer personaler Lebens- und Risikogemeinschaften – ein zweiter Zwischenruf (pp. 787 ff.)
- *Ulrich Spellenberg,* Die zwei Arten einstweiliger Maßnahmen der EheGVO (pp. 813 ff.)
- *Andreas Spickhoff,* Vorsorgeverfügungen im Internationalen Privatrecht (pp. 825 ff.)
- *Michael Stürner :* Die Rolle des Kollisionsrechts bei der Durchsetzung von Menschenrechten (pp. 843 ff.)
- *Rolf Stürner.* Prozessökonomie als gemeineuropäischer Verfahrensgrundsatz? (pp. 855 ff.)
- *Luboš Tichý:* Die Anerkennung des Trusts als ein spezifisches Problem des IPR (pp. 865 ff.)
- *Satoshi Watanabe:* The Ratification of the Hague Child Abduction Convention and its Implementation in Japan (pp. 883 ff.)
- *Marc-Philippe Weller:* Die lex personalis im 21. Jahrhundert: Paradigmenwechsel von der lex patriae zur lex fori (pp. 897 ff.)
- *Pelayia Yessiou-Faltsi:* Deutsche Urteile über die Vaterschaftsfeststellung von nichtehelichen Kindern aus der Sicht der griechischen öffentlichen Ordnung (pp. 913 ff.)
- *Reinhard Zimmermann:* Assessment of Damages: Three Specific Problems (pp. 921 ff.)

The Protection of Arbitration

Agreements within the EU after West Tankers, Gazprom, and the Brussels I Recast

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The ECJ's recent decision in *Gazprom* (Case C-536/13) is the latest addition to a series of judgments by the Court that have considerably reduced the remedies available to claimants who seek to enforce the negative dimension of an arbitration agreement, i.e. the other party's obligation not to initiate court proceedings. They have created a coherent framework for the protection of arbitration agreements within the EU, which has been sanctioned and complemented by the recast of the Brussels I Regulation. Yet, a number of questions still remain open – some of which are unlikely to be answered any time soon.

The current status quo

Traditionally, four types of remedies are available to parties seeking enforcement of the negative dimension of an arbitration agreement from a court. First, they may ask the court seised by the other party to stay or dismiss the proceedings. Second, they may ask another court to issue an injunction against the party in breach in order to restrain the latter from initiating or continuing litigation (so-called 'anti-suit injunctions'). Third, they may bring an action for damages to recover the loss incurred due to the litigation. Fourth, they may apply for the foreign judgment not to be recognized and enforced.

While courts in all member states of the EU regularly dismiss or stay proceedings brought in violation of an arbitration agreement, and refuse to recognize and enforce judgments obtained in breach of such an agreement, only English courts have granted anti-suit injunctions and awarded damages for breach of an arbitration agreement in the past. Yet, as far as litigation in the courts of EU member states is concerned, all of these remedies have been affected by the harmonized regime of jurisdiction and recognition and enforcement of judgments

in civil and commercial matters that has been established by the Brussels Convention and its successor regulations.

It is true, though, that regarding the **first remedy**, i.e. a dismissal or stay of local proceedings, there has never been much doubt that the European instruments do not require the courts of a member state to adjudicate if this would violate a valid arbitration agreement; instead, they have to send the case to arbitration, as required by Art. II(3) of the New York Convention. The ECJ's decision in *Gazprom* and the first paragraph of the new recital (12) of the Brussels I Recast merely confirm that this is still the case.

Access to the **second remedy**, i.e. anti-suit injunctions issued by English courts to prevent a party from litigating in breach of an arbitration agreement, has however been radically restricted by the ECJ's case law. Consistently with its reasoning in *Gasser* (Case C-116/02) and *Turner v Grovit* (Case C-259/02), the Court held in *West Tankers* that "even though proceedings [to enforce an arbitration agreement via an anti-suit injunction] do not come within the scope of [the Brussels I Regulation], they may nevertheless have consequences which undermine its effectiveness", if they "prevent a court of another Member State from exercising the jurisdiction conferred on it by [the Regulation]", which includes the decision on the jurisdictional defence based on an arbitration agreement. Accordingly, "it is incompatible with [the Regulation] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement."

While the new recital (12) tries to clarify the scope of the exclusion of arbitration in Art. 1(2)(d) of the Regulation, nothing in the legislative history of the Recast, which left the actual text of the regulation otherwise unchanged, suggests that it was supposed to reverse the decision of the Grand Chamber in *West Tankers*. Thus, it was to the surprise of many that Advocate General Wathelet, in his opinion on *Gazprom*, argued that "the EU legislature intended to correct the boundary which the Court [in *West Tankers*] had traced between the application of the Brussels I Regulation and arbitration" with the Recast. He opined that para. 2 of recital (12), which excludes decisions "as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed" from the rules on recognition and enforcement, should be understood as excluding "the verification, as an incidental question, of the validity of an arbitration agreement

[entirely!] from the scope of the Brussels I Regulation". Consequently, "the fact that the Tribunale di Siracusa [in *West Tankers*] had been seised of an action the subject-matter of which fell within the scope of the Brussels I Regulation would not have affected the English courts' power to issue anti-suit injunctions in support of the arbitration because […] the verification, as an incidental question, of the validity of an arbitration agreement is excluded from the scope of that regulation."

But as the question submitted to the ECJ concerned the pre-recast regulation (No. 44/2001), the Court – while implicitly rejecting the Advocate General's proposition that recital (12) "in the manner of a retroactive interpretative law, explains how that exclusion must be and *always should have been* interpreted" – did not need to (and did not) discuss this proposition; instead, the Court simply distinguished the present question of recognition and enforcement of "an arbitral award prohibiting a party from bringing certain claims before a court of that Member State from the question of the court issuing itself "an injunction […] requiring a party to arbitration proceedings not to continue proceedings before a court of another Member State", only the latter type of injunction being "contrary to the general principle which emerges from the case-law of the Court that every court seised itself determines, under the applicable rules, whether it has jurisdiction to resolve the dispute before it". Yet, the fact that the Court deemed such a distinction necessary and referred repeatedly to its decision in *West Tankers* may be seen as an indication that it does not consider this decision to be already overruled by the Recast.

Against this background, it certainly is surprising that the **third remedy**, i.e. damages for the breach of an arbitration agreement, has yet to be subject to a decision of the ECJ – and has neither been affected by any paragraph of the new recital (12). As English courts may no longer issue anti-suit injunctions – a remedy expressly admitted to prevent that "the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy" (Lord Millett in *The Angelic Grace* [1995] 1 Lloyd's Rep 87) – it seems very likely that damage awards will become much more prevalent in English courts. They have thus been allowed by the High Court after the ECJ's decision in *West Tankers* ([2012] EWHC 854 (Comm)) and awarded by the Court of Appeal in *The Alexandros T* [2014] EWCA Civ 1010.

Regarding the **fourth remedy**, i.e. the refusal to recognize and enforce a

judgment obtained in breach of an arbitration agreement, recital (12) now provides a clear solution, which seems to limit the ECJ's decision in *Gothaer* (Case C-456/11) and to reverse recent English case law (cf *The Wadi Sudr* [2009] EWCA Civ 1397). According to its paras 2 and 3, decisions as to the validity of an arbitration agreement are excluded from the provisions on recognition and enforcement, while decisions as to the substance of the dispute are subject to these provisions unless this would require a member state to violate its obligations (i.e. to enforce a valid arbitral award) under the New York Convention. This is not only a welcome step towards the legal certainty that the difficult relationship between the Regulation and the Convention indubitably requires but should also be understood as an attempt to counter-balance the absence of anti-suit injunctions within the Brussels I framework.

Open Questions

The case law of the ECJ and recital (12) of the Recast seem to provide a coherent and workable framework for the protection of arbitration agreements; they put a strong emphasis on the principle of mutual trust between the member states, but balance it out with their obligations under the New York Convention. Still, some questions remain open.

First, and foremost, the ECJ has held in *Gazprom* that the Regulation does not preclude the courts of a member state "from recognising and enforcing […] an arbitral award prohibiting a party from bringing certain claims before a court *of that Member State*". But does the same apply to an arbitral anti-suit injunction restricting proceedings before a court *of another member state*? Several of the Court's arguments – which are all carefully limited to the question of recognition and enforcement in the state where the relevant proceedings are brought – indicate that this might not be the case: while enforcing an arbitral award by ordering a party to stop or limit local proceedings raises "no question of an […] interference of a court of one Member State in the jurisdiction of the court of another Member State", enforcing an award by ordering a party to stop or limit proceedings elsewhere might indeed amount to such an interference. While there is no risk "to bar an applicant who considers that an arbitration agreement is void, inoperative or incapable of being performed from access to the court before which he nevertheless brought proceedings" if they can contest recognition and enforcement in this very court, the defendant will indeed be denied access to that court if the courts of another member state enforce an arbitral award by ordering

him to stay these proceedings. And while failure to comply with an arbitral anti-suit injunction "is not capable of resulting in penalties being imposed upon it by a court of another Member State", the enforcement of such an injunction in another member state would attach to the award that exact kind of penalty. Thus, while the recognition of such an arbitral award in the member state where the proceedings are brought is no more contrary to the Brussels I Regulation than the court's power to stay proceedings of its own motion in order to give effect to an arbitration clause, the enforcement of such an award by the courts of another member state would be much more similar to the situation which the ECJ ruled out in *West Tankers*.

Second, the ECJ has not yet decided on the admissibility of damage awards in view of its restrictive approach to anti-suit injunctions. English courts seem to distinguish the one from the other by treating anti-suit injunctions as a remedy for the *jurisdictional* dimension of arbitration agreements while considering damages as a remedy for their *contractual* dimension. Yet, one may argue that the practical effects of both remedies are still very similar, especially if damages are granted, as in *The Alexandros T*, by way of an indemnity even before litigation has finished. But although it is hard to see why the ECJ would not consider damage awards to be contrary to "the general principle that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it" as formulated in *West Tankers*, it is indeed not very likely that the Court will get a chance to make such a decision after the English courts – the only courts that actually grant such awards – saw no need to submit the question in *The Alexandros T*.

Finally, it has been noted (by Hartley [2014] ICLQ 843, 866) that the new rules on recognition and enforcement of decisions that have been obtained in violation of an arbitration agreement in paras 2 and 3 of recital (12) leave open one particular case, namely the situation where a court is asked to recognize and enforce both an arbitral award made within the jurisdiction (and thus not creating an obligation under the New York Convention) and a conflicting judgment on the merits from another member state. While the wording of recital (12) indicates that the court has to give effect to the judgment, this would give the arbitral award the weakest effect in its "home jurisdiction". The better approach therefore seems to be to consider arbitral awards made within the jurisdiction as a "judgment given between the same parties in the Member state addressed" and

apply Art. 45(1)(c) of Brussels I by analogy.

AG Cruz Villalón on the circumstances allowing the review of a European order for payment

This post has been written by Irene Maccagnani.

On 2 July 2015, Advocate General Pedro Cruz Villalón delivered his Opinion in *Thomas Cook Belgium* (C-245/14), a case before the ECJ concerning the interpretation of Regulation No 1896/2006 creating a European order for payment procedure (the Opinion is not available in English; the French version may be found here, the Italian version here and the German version here).

The request for a preliminary ruling arose from a dispute concerning a contract concluded between a Belgian travel agency and an Austrian company.

The Austrian company applied for a European order for payment, alleging that the travel agency had failed to fulfill its obligations under the contract. The application was filed before the Vienna Commercial Court on the assumption that jurisdiction could be asserted on the basis of Article 5(1) of Regulation No 44/2001 (Brussels I), now Article 7(1) of Regulation No 1215/2012 (Brussels I*a*), Vienna being the place of performance of the relevant obligation.

In the application, the Austrian company omitted to mention that the contract concluded with the travel agency featured a choice-of-court agreement conferring exclusive jurisdiction on Belgian courts.

The Vienna Commercial Court issued the order for payment. The defendant was duly served with the order, but did not lodge a statement of opposition within the 30-day time limit indicated in Article 16(2) of Regulation No 1896/2006. Only later did the travel agency applied for a review, relying on Article 20 of the

Regulation ("Review in exceptional cases").

Seised of the request for review, the Vienna Commercial Court asked the ECJ to clarify the interpretation of Article 20(2). Pursuant to this provision, the defendant is entitled to apply for a review "where the order for payment was clearly wrongly issued, having regard to the requirements laid down in this Regulation, or due to other exceptional circumstances". According to Recital 25 of the Regulation, such other exceptional circumstances "could include a situation where the European order for payment was based on false information provided in the application form".

Specifically, the Vienna Commercial Court asked whether "exceptional circumstances" within the meaning of Article 20(2) could be deemed to exist when an order for payment has been issued on the basis of information provided in the application form, which subsequently turned out to be inaccurate, where the jurisdiction of the seised court depends on such inaccurate information.

In his Opinion, the AG begins by noting that Article 20(2) is to be interpreted restrictively. It allows for review only "where the order for payment was clearly wrongly issued". Thus, only false or inaccurate information which could not be detected by the defendant before the expiry of the time limit for opposition may be considered to amount to "exceptional circumstances" for the purposes of the provision in question. By contrast, if it is established that the defendant could have reacted to those false or inaccurate information by lodging a timely statement of opposition, he should not be allowed to avail himself of Article 20(2).

According to the AG, this conclusion equally applies to cases where the seised court asserted its jurisdiction based on false or inaccurate information provided by the applicant. In this connection, he reminded that, according to Recital 16, the court should examine the application, including the issue of jurisdiction, "on the basis of the information provided in the application form".

Since the court is merely required to determine if jurisdiction is "plausible" pursuant to the Brussels I Regulation, and the defendant is informed that the order "has been issued solely on the basis of the information provided by the claimant and not verified by the court", the defendant – once the order has been served on him – must be deemed to be aware that the applicant did not inform the

court about the existence of a choice-of-court agreement.

The AG goes on to recall that the parties may always waive their choice-of-court agreement and concludes that, in circumstances like those of the case at hand, the fact for the applicant of referring to the place of performance of the relevant contractual obligation as a basis for jurisdiction does not amount to providing “false information” for the purposes of Article 20 of Regulation No 1896/2006.

The mere presence of a choice-of-court clause in the contract, he adds, leaves the issue open of whether the clause is vlid, or not. Assessing the validity of such a clause requires, in fact, a broader examination than that provided under Article 8 of Regulation No 1896/2006, regardless of whether the judge is aware of the existence of the clause itself. If the applicant has a doubt as to the validity of the choice-of-court agreement, he is not required to mention that clause in the application form, since similar issues cannot be discussed in the framework of this kind of proceedings.

In conclusion, according to the AG, the ECJ should state that, under Article 20(2) of Regulation No 1896/2006, read in conjunction with Recital 25, the “exceptional circumstances” that entitle the defendant to apply for a review of the order for payment cannot be said to already exist for the mere fact that the order for payment, effectively served on the defendant, is based on “false or inaccurate information”, even if the jurisdiction of the court depends on such information.

This does not preclude the defendant from relying on Article 20 when he can show that he could discover such falsity or inaccuracy only after the expiry of the time limit for opposition.

Issue 2015.2 Nederlands

Internationaal Privaatrecht

The second issue of 2015 of the Dutch journal on Private International Law, *Nederlands Internationaal Privaatrecht*, includes the following contributions:

- Xandra Kramer, 'Editorial: Empirical legal studies in private international law' , p. 195-196.
- S.H. Barten and B.J. van het Kaar, ''Grensverleggend' derdenbeslag: over de reikwijdte van een Nederlands beslagverlof onder de Herschikking Brussel I', p. 197-204.

This article deals with the new opportunities that the revised Brussels Regulation ('Recast') may offer to claimants who wish to obtain a Dutch pre-judgment garnishee order against garnishees located in other Member States. Under the former Brussels Regulation, the recognition and enforcement of 'ex parte' provisional measures in another Member State than that of the courts ordering the measures fell outside the scope of Chapter III Brussels Regulation in accordance with the case law from the European Court of Justice (Denilauler/Couchet). The Recast, in contrast, allows the enforcement of 'ex parte' garnishee orders in other Member States, provided the court issuing the order has jurisdiction as to the subject-matter of the proceedings. However, the enforcement of a Dutch ex parte garnishee order in other Member States may give rise to practical difficulties. The Recast requires the ex parte judgment to be served upon the debtor before the enforcement (garnishment) takes place. It may therefore prove to be difficult for claimants to ensure that garnishment will take place only shortly after the garnishee order was served on the debtor in order to prevent the dispersal of funds by the debtor. It is argued that these problems may be solved by good coordination between the competent enforcement authorities of the Member States. However, in all likelihood, successful coordination by the creditor is only possible in the event of a limited number of garnishees involved.

In light of this abolition of impediments at the European level, the article considers whether Dutch national procedural law may restrict courts in the Netherlands from issuing extraterritorial garnishee orders against garnishees who do not have their domicile in the Netherlands. Based on the current guidelines and case law it is to be expected that the Dutch courts will exercise

restraint when dealing with a request for an extraterritorial order. It is argued that, although Dutch law does require a certain connection with Dutch territory, the said connection may also be established if the creditor can make a reasonable case that one of the anticipated garnishees has its domicile within the Netherlands and that there are clear indications that the funds will be dispersed. This could, for instance, succeed if the debtor and garnishee are in a close relationship to one another (e.g. a parent company and its subsidiary).
It remains to be seen whether the Dutch courts are willing to issue orders against garnishees outside the Netherlands. If they are, this jurisdiction may soon offer a solution for creditors of Dutch parent companies having claims against their subsidiaries in other Member States. In the Netherlands it is relatively easy to obtain a prejudgment garnishee order. Under the Recast, even EU jurisdictions not familiar with a pre-judgment garnishee order will have to recognize and enforce a Dutch order.

- Miriam Kullmann, 'Tijdelijke grensoverschrijdende detachering en gewoonlijk werkland: over de verhouding tussen de Rome I-Verordening en de Detacheringsrichtlijn en de rol van de Handhavingsrichtlijn', p. 205-216.

The cross-border posting of workers involves the applicability of two EU laws: the Posting of Workers Directive 96/71/EC and the Rome I Regulation. In neither of these legal regulations are the terms 'temporariness' and the 'country in/from which the employee habitually carries out his work' concretised. This contribution aims at clarifying the meaning of these two terms in both legal regulations in the context of the temporary cross-border posting of workers. Moreover, it assesses the role of the Enforcement Directive, adopted in May 2014, supplementing the Posting of Workers Directive. The new Directive introduces a provision containing criteria by which to identify a 'genuine posting'. In practice it seemed that often no country where the work was being habitually carried out could be identified. The question then was whether the Posting of Workers Directive would be applicable and what role Articles 8 and 9 Rome I Regulation would play in identifying the applicable law. In addition, the unclear relationship between the Posting of Workers Directive and the Rome I Regulation is analysed.

- Steven Stuij, ‘De wetsontduiking in het ipr: de opleving van een leerstuk?’, p. 217-225.

Recital 26 of the preamble to the EU Regulation (650/2012) on Succession and Wills allows national authorities to suppress evasions of the law by using the doctrine of fraude à la loi. The referral to this doctrine is an interesting development, since the Regulation is the first in a series of EU Regulations in the field of private international law to expressly mention fraude à la loi as a potential corrective mechanism. Besides, this doctrine is rather underdeveloped in Dutch private international law. It will therefore be interesting to analyse this doctrine and to assess its added value in contemporary (EU) private international law. First, several aspects of fraude à la loi will be scrutinised, as well as its acceptance in both Dutch and European private international law. Furthermore, the aforementioned point 26 of the preamble and its rationale will be focused upon. Finally, the relevance of fraude à la loi for contemporary private international law will be observed, with a special emphasis on the Dutch situation.

- E.C.C. Punselie, ‘Verordening wederzijdse erkenning van Beschermingsmaatregelen in burgerlijke zaken’, p. 226-228 (overview article)

In this article an overview is given of Regulation (EU) No. 606/2013 of the European Parliament and of the Council of 12 June 2013 on the mutual recognition of protection measures in civil matters and the way this regulation is implemented in the Netherlands. The Regulation provides for a mechanism by which a person at risk of violence can also rely on a protection measure issued against the person causing this risk in his or her home country – a member state of the European Union – when he or she travels or moves to another member state. For that purpose the protected person can achieve a certificate in the issuing member state with which the protection measure is recognised in another member state without any special procedure being required.

- Pauline Kruiniger, ‘Book presentation: Pauline Kruiniger, Islamic Divorces in Europe: Bridging the Gap between European and Islamic Legal Orders, Eleven International Publishing, The Hague 2015’, p. 229-230.

A Dutch-Moroccan woman has been repudiated in Morocco. She remarries a Moroccan man. Then she moves from the Netherlands to Belgium. Although the preceding repudiation had been recognized in the Netherlands, the Belgian authorities refuse to recognize that repudiation. Consequently she is still seen as being married to her former husband in Belgium and cannot bring her latest husband from Morocco to Belgium. There is discontinuity concerning her personal status and thus a limping legal relationship emerges.

Parallel Proceedings and Contradictory Decisions in International Arbitration

Bruylant, in its Arbitration collection, has just published the speakers' contributions to the conference on *Parallel Proceedings and Contradictory Decisions in International Arbitration* hosted by ICC on this sensitive topic. The conference was organized by the students and alumni of International Law programs of the University Panthéon-Assas, Paris II. A detailed report was published by the ICC at the time. The book dedicated its first section to Investment Arbitration and a second section to Commercial Arbitration. The book, in French, can be ordered on Bruylant's website.

Summary:

Première partie – Les procédures parallèles et la contrariété de décisions dans l'arbitrage d'investissement

- Développement des procédures parallèles et facteurs de désordres procéduraux dans l'arbitrage d'investissement, par *Walid Ben Hamida*
- La contrariété de décisions dans l'arbitrage d'investissement : risques et conséquences, par *Fernando Mantilla-Serrano*
- Procédures parallèles : aspects procéduraux et solutions institutionnelles,

par *Éloïse Obadia*

Seconde partie – Les procédures parallèles et la contrariété de décisions dans l'arbitrage commercial international

- Propos introductifs relatifs aux Problématiques spécifiques à l'arbitrage commercial international, par *Philippe Leboulanger*
- La prévention des contrariétés de décisions arbitrales et étatiques, par *Claire Debourg*
- L'exclusion de l'arbitrage dans la refonte du règlement Bruxelles I, par *Laurence Usunier*
- Les contrariétés de décisions dans le contrôle des sentences arbitrales, par *Sylvain Bollée*
- Une illustration récente : l'affaire Planor Afrique, par *Alexandre Reynaud et Héloïse Meur*
- La jonction de procédures arbitrales dans le règlement de la Chambre de commerce internationale, par *Thomas Granier*
- Un remède : la concentration du contentieux devant l'arbitre, par *Jean-Pierre Ancel*

Conclusion

Procédures parallèles et contrariété de décisions dans l'arbitrage international : essai de synthèse, par *Daniel Cohen*

International Maritime Labour Law by Laura Carballo

A readworthy and laboursome book on **International Maritime Labour Law**, authored by Laura Carballo Piñeiro (Santiago de Compostela), has just been published within the Hamburg Studies on Maritime Affairs (Springer, 2015).

The blurb reads:

This book focuses on maritime employment from a private international law perspective. The first chapter analyzes the background against which international jurisdiction and conflict of laws rules are drawn up and examines uniform law in this context, in particular the 2006 Maritime Labour Convention and the 2007 ILO Convention No. 188 on Work in Fishing. The second chapter addresses international jurisdiction issues as regards individual employment contracts, while also exploring other issues (e.g. insolvency-related and social security matters) that are subsequently revisited in the third chapter while discussing conflict of laws issues related to said contracts. In turn, chapter four focuses on collective labour relations and private international law, i.e. collective agreements, strikes and other forms of collective action and information, and on the participation rights of employees in business matters.

More information is available here.

On PIL, International Labour law and Corporate Social Responsibility

On the blog section of the Dutch journal Nederlands Juristenblad, a blog of Veerle Van Den Eeckhout on the importance of Private International Law has been published, see here.
The blog is entitled “The impact and potential of a curious and unique discipline. About PIL, Shell Nigeria, European and global competition and social justice.” It is written in Dutch; here is the English version.

The blog refers, inter alia, to the Shell-Nigeria case and to some PIL-aspects of international labour law. It was foreseen that on 14 July 2015 the Hague Court of Appeal would pass judgement in the Shell-Nigeria case, but in the meantime the judgement has been postponed until a later date.

On SSRN, an English verson of Van Den Eeckhout's paper "The Right Way to Go in International Lbour law – and Beyond" has been made available meanwhile. This paper discusses some PIL-aspects of international labour law.

The procedural impact of the Greek debt crisis: The CJEU rules on the applicability of the Service Regulation

by Anastasia Gialeli

Anastasia Gialeli, LL.M. (Freiburg), is a doctoral candidate at the Albert-Ludwigs-University Freiburg (Germany) and a research assistant at the University's Institute for Comparative and Private International Law (Dept. III). She has kindly provided us with her thoughts on a seemingly technical, but actually very sensitive legal and political issue raised by the Greek debt crisis.

The Court of Justice of the European Union (CJEU) on 11 June 2015 delivered its judgment in the joined cases C-226/13, C-245/13, C-247/13 and C-578/13 regarding the concept of "civil and commercial matters", now for the first time within the meaning of the Service Regulation (No 1393/2007).

1. Background

In the main four proceedings before German courts (i.e. Landgericht Wiesbaden and Kiel), the claimants, all holders of Greek State bonds, had initiated legal actions against the Hellenic Republic based on German civil law. They were claiming compensation for disturbance of ownership and property rights, contractual performance of the bonds which have reached maturity or damages caused by the retroactive and unilateral change of the bonds by the Greek State in the framework of the Private Sector Involvement (PSI). The judgment is

particularly important because it concerns numerous civil legal actions of German bondholders against Greece brought before German courts (cf. the identical request for a preliminary ruling made by Landgericht Aachen in case C-196/14 and the cited case law as follows).

In the decision made by the European Council regarding financial assistance for Greece at the summit of 21 July 2011 a "voluntary" PSI was included. It was regarded as an exceptional and unique solution for the sustainability of the Greek debt (Euro Summit Statement of 26 October, 2011, page 4-5, Statement by the Eurogroup of 21 February, 2012). A successful PSI operation was therefore a requirement for Greece in order to achieve a second Economic Adjustment Programme with the EU, the IMF and the ECB (Statement by the Eurogroup of 21 February, 2012). In line with this, the Greek Parliament adopted the Law No 4050/2012 entitled „Rules relating to the adjustment of securities, their issue or guarantee by the Greek State with the agreement of the bond holders" (hereinafter: Greek Bondholder Act) on 23 February 2012.

In accordance with the Greek Bondholder Act, the Greek State in February 2012 submitted an exchange offer to the applicants which provided for the original bonds to be exchanged for new bonds with a considerably reduced nominal value (53,5%) and a longer period of validity, which the applicants, however, rejected. Nevertheless, the Greek State carried out the proposed exchange in March 2012, by means of the restructuring clause contained in the Greek Bondholder Act, also known in financial terms as a so-called "CAC" (Collective Action Clause) (see the detailed presentation by *Sandrock* RIW 2012, 429). Pursuant to this clause, the unilaterally proposed change of the initial conditions of the bonds could be accepted (or refused, but not renegotiated or modified) by a quorum representing 50% of the total outstanding bondholders concerned and with a decision by the qualified majority corresponding to two thirds of the participating capital. This decision then had to be approved by a resolution of the Greek Council of Ministers and executed by the Greek Central Bank. Article 1(9) of the Greek Law furthermore provides for an *erga omnes* effect of the decision adopted by the majority, which is also binding on the minority of the concerned bondholders and overrides any general or specific law and any contracts conflicting with it. Finally, it stipulates that these provisions protect the public interest and, thus, they constitute overriding mandatory rules, excluding any liability of the Greek State.

The exchange of the bonds was disadvantageous for the applicants, who obviously

belong to the disagreeing minority (hold-out creditors, 5% pursuant to the Second Economic Adjustment Programme for Greece of March 2012, page 48). In order to serve the documents initiating the proceedings against the Greek State, the transmitting body (Bundesamt für Justiz, i.e. the German Federal Office for Judicial Administration and Cooperation) raised the question as to whether, for the purpose of Article 1 (1) of Regulation No 1393/2007, those actions concerned "civil or commercial matters" or acts or omissions in the exercise of State authority, which are, pursuant to Article 1 (1, 2nd sentence), explicitly excluded from the scope of the Regulation (*acta iure imperii*). The crucial question is whether the interpretation of the concept of civil or commercial matters should be made by focusing on the civil law basis of the legal actions or on the subject matter of the dispute.

The Landgericht Wiesbaden (one of the referring courts) tended towards characterizing the claims based on the subject matter of the dispute, namely the intervention by law in a case originally of a civil nature – i.e. the purchase of the bonds – and its effects on the property or contract rights of the applicants. Thus, according to this court, the case at issue should be classified as falling under the explicit exclusion in Article 1 (1, 2nd sentence) concerning the liability of a State acting in the exercise of public authority (LG Wiesbaden, 18.4.2013 para. 14-15). This is in line with the case law of other German civil courts, which in similar cases involving German bondholders' actions have argued that the subject matter concerns the Greek State's public authority and that, accordingly, the Hellenic Republic should enjoy immunity in this regard (cf. LG Konstanz 19.11.2013, para. 27; OLG Schleswig-Holstein 04.12.2014, para. 48-72, pending before the BGH ref. number XI ZR 7/15). This line of reasoning also corresponds with the leading judgment of the plenum of the Greek Council of State No 1116/2014 of 21 March, 2014.

2. Judgment

The CJEU, however, holds that article 1 (1) of the Service Regulation *"must be interpreted as meaning that legal actions for compensation for disturbance of ownership and property rights, contractual performance and damages, such as those at issue in the main proceedings, brought by private persons who are holders of government bonds against the issuing State, fall within the scope of that regulation in so far as it does not appear that they are manifestly outside the concept of civil or commercial matters."*

Standard of evidence

First, the CJEU points out that it *"suffices that the court hearing the case concludes that it is* ***not manifest*** *that the action brought before it falls outside the scope definition of civil and commercial matters"* (para. 49). The Court adopts the Commission's opinion and argues that, because of the complexity of the distinction between civil or commercial matters and *acta iure imperii*, the court usually has to decide on this question only after having heard all the parties and thus having all the necessary information. In the case of the Service Regulation however, this question arose in a very early phase, i.e. even before the defendant had been served with the initiating document. Moreover, the answer to this question determines the methods of service of that document. Thus, *"the court must limit itself to a preliminary review of the available evidence, which is inevitably incomplete, in order to decide"* about the application of the Service Regulation.

As far as the question of distinguishing between civil or commercial matters, on the one hand, and *acta iure imperii*, on the other, arises within the framework of the Service Regulation, the answer is restricted to the method of the service without prejudice to the international jurisdiction and the substance of the case at issue (para. 46). Thus, the Court reasonably takes into account that the court seised may not have the jurisdiction that is required to deliver its judgment in substance. As a consequence, the Court facilitates the initiation of the proceedings, one of the key aims of the Regulation.

However, the Court argues that its interpretation is also confirmed by the general scheme of the Service Regulation, as this results from recital 10, which states that *"the possibility of refusing service of documents should be confined to exceptional situations"*, in conjunction with Article 6 (3), which enables the receiving agency to return the documents to the transmitting agency if the concerned request for service is *"manifestly outside the scope of that regulation"*. This argument is not fully convincing as it should be noted that the cited provision is a special rule and is addressed to the receiving agency because of the non-judicial nature of those bodies in contrast to the seised court. The seised court, however, is the competent body to decide on the applicability of the Service Regulation. Thus, the systematic argument of the Court is rather doubtful (see also Advocate General *Bot* 9.12.2014, para 72 and footnote 73).

The CJEU further stipulates that, in conformity with its case law on the Brussels Convention and Brussels I, the concept of civil or commercial matters must be regarded as an independent concept within the framework of the Service Regulation as well, interpreted by referring to the objectives and the scheme of that Regulation. With regard to the main objectives of the Service Regulation, the Court points out that recitals 2, 6 and 7 provide for the improvement and the expediency of the transmission of judicial and extrajudicial documents, in order to ensure the proper functioning of the internal market. In this context, it should be noted that – in contrast to the opinion of AG *Bot* (AG *Bot* 9.12.2014, para. 49) – the Court seems not willing to take into proper consideration the general objectives of legal certainty and coherence of law, but overestimates the objective of the effectivity of the Service Regulation. The service of a document should certainly be improved and facilitated, but only under the condition that the case at issue falls into the scope of the Regulation at all.

Decisive criterion for the distinction

The wording of the Court's ruling that *"legal actions (…) fall within the scope of that regulation* ***in so far as it does not appear*** *that they are manifestly outside the concept of civil or commercial matters"* is rather unfortunate and unusual – compared to, e.g., C-302/13 flyLAL, C-292/05 Lechouritou, C-645/11 Sapir, C-14/08 Roda Golf – and ends in a vicious circle, which does not provide a safe harbour for national courts having to determine whether the case at issue falls in or outside the scope of the Regulation.

In the reasoning of its judgment, the Court tries to define the crucial criterion for determining whether the case at issue falls in or outside the scope of the Service Regulation. In general terms, the disputed act of the state authority should lead directly and immediately to a change in the legal relationship involved and therefore should cause the alleged damage. The Court holds that *"it is not obvious that the adoption of the Law No 4050/2012 led* ***directly and immediately*** *to changes to the financial conditions of the securities in question and therefore* ***caused*** *the damage (…)"* (para. 57). Instead of the Greek Bondholder Act itself, the Court considers the decision of the majority of the bondholders accepting the exchange offer as the event giving rise to the damage. This is hard to square with the fact that it was exactly the Greek Bondholder Act which imposed the retroactive *erga omnes* effect of a majority decision upon the hold-out bondholders' contracts in order to safeguard public interests. The direct binding

effect of the majority's decision on the contracts of the hold-out applicants does not, however, fall under the scope of ordinary legal rules applicable to relationships between private individuals. Further, it should be pointed out that, first, the bond exchange was executed by the Central Bank of Greece after a resolution of the Council of Ministers had approved the majority's decision, also by an administrative process, and secondly, that the content of the decision itself was not negotiable by the majority but in fact unilaterally designated by the Greek Bondholders Act. Finally, this Act was adopted in order to deal with a severe financial crisis and especially to restructure the public debt and secure the stability in the Eurozone, objectives closely linked to state sovereignty. Those objectives are also noticed by the Court, but the judges do not consider them as decisive. Thus, the Court, similar to its earlier *Sapir* judgment (C-645/11 para. 35-37) concerning Brussels I, interprets the concept of civil or commercial matters widely in the framework of the Service Regulation as well.

In contrast, AG *Bot* had pleaded persuasively that the case at issue should be excluded from the scope of the Service Regulation because the present dispute was rooted in the adoption and the implementation of the Greek Bondholders Act, which constitutes an act in the exercise of public power (AG *Bot* para. 63-70). This opinion is in accordance with my reading of the earlier case law of the CJEU with regard to the unilateral and binding manner of acting by a public authority, which appears as inextricably linked to a State's public interest, in the case at issue to financial policy (cf. especially CJEU Lechouritou C-292/05 para. 37; Baten C-271/00, para. 36; Tiard C-266/01, para. 33; Sapir C-645/11, para. 33; flyLAL C-302/13, para. 31; cf. *Kropholler/von Hein* EuZPR, 9th ed., Art. 1 EuGVO para. 6; Stein/Jonas/*Wagner* ZPO, 22nd ed., Art. 1 EuGVO para. 11).

The initial purchase of the bonds is, in line with the Court's judgment, governed by the ordinary financial market and legal rules applying to individuals. However, the decision of the majority of the bondholders, which pursuant to the Court should be regarded as the decisive act, does constitute the implementation of the Greek Bondholders Act itself. It seems that the Court adopts an inconsistently technical view of the subject matter when it refuses to consider the form of the crucial act of the Greek State, i.e. the adoption of the Law in itself, as decisive, but at the same time characterizes the majority bondholders' acceptance as the decisive criterion, although that acceptance was in fact only motivated by a desire to avoid an absolute loss (cf. *Sandrock* RIW 2013, 12, 15: Bondholders had the

choice between Scylla and Charybdis). Furthermore, the argument that the *intention* of the Greek State (para. 57) was to keep the handling of the bonds within a regulatory framework of a civil nature should be irrelevant to an autonomous definition in European civil procedure law.

3. Outlook

After the Court has paved the way for applying the Service Regulation in the cases of German bondholders, it must be awaited how the German courts will evaluate the parallel issue at the level of jurisdiction. As far as the courts accept the civil nature of the case, they must then determine which head of jurisdiction under Brussels Ia could apply. After the *Kolassa* judgment (C-375/13), the only available basis is found in Article 7 No 2, which in turn may be overruled by a choice of court agreement (Article 25). On a conflict of laws level, it is assumed that in the general terms of the exchange of the bonds at issue a choice of law clause in favour of Greek, English or Swiss law has been made (*Sandrock*, RIW 2012, 429 434). In case that the *lex causae* is not Greek law, the question arises as to whether the Greek Bondholder Act must be characterized as an overriding mandatory rule (cf. the request for a preliminary ruling of the BAG, 25.2.2015 in case C-135/15 Nikiforidis, concerning labour contracts with the Greek State, and the previous post by *Dr. Lisa Günther* on this issue).

Latest Issue of RabelsZ: Vol. 79 No 3 (2015)

The latest issue of "Rabels Zeitschrift für ausländisches und internationales Privatrecht – The Rabel Journal of Comparative and International Private Law" (RabelsZ) has recently been released. It contains the following articles:

Dagmar Coester-Waltjen, *Himmel und Hölle: Einige Überlegungen zur internationalen Zuständigkeit (*Heaven and Hell: Some Reflections on International Jurisdiction)

Jurisdictional rules differ all over the world. Plaintiffs might consider jurisdictional practices in one legal system as "heaven", whereas defendants will fear exactly these rules like "hell". Due to increasing global interconnectedness that results from increasing cross-border trade, from the mobility of people, and the global reach of the internet, there is a need for international consensus on matters of jurisdiction on several levels. The first level concerns the question whether a complete set of acceptable grounds of jurisdiction (direct grounds of jurisdictions) can be developed for a binding instrument. On the second level the question arises as to tolerable heads of jurisdiction (only) for the purpose of recognition and enforcement of foreign judgments (indirect grounds of jurisdiction). And finally the jurisdiction of the courts that recognize and enforce the foreign judgment is at issue. The Hague Conference on Private International Law has resumed its work on the so-called judgment project and it is working on all three levels although direct grounds of jurisdiction will be tackled only after a certain agreement will have been reached on jurisdictional issues concerning recognition and enforcement of judgments. However, on all three levels the inclusion and the role of the doctrine of forum non conveniens will be an important and most decisive issue.

The doctrine of forum non conveniens has its origin in the common law world, but has spread around the globe in recent decades. Today it can be found also in jurisdictions which traditionally apply strict jurisdictional rules. The very essence of the doctrine is a margin of discretion the competent court may apply in staying or rejecting litigation. This applies if in the given situation the court addressed seems to be a "not convenient" forum and there is another more appropriate forum. The particulars of the doctrine as well as the standards of the test (inconvenient, clearly inconvenient, more appropriate) and the determinative considerations vary.

By contrast, it has been said that the European rules on jurisdiction are and have to be strict rules in order to guarantee certainty and predictability. However, a close look at these jurisdictional systems in European regulations reveal some weakness of the strict rules on the one hand and also the fact that even in these systems a non-convenience substitute has been developed. There are rules which allow courts to deny jurisdiction by way of interpreting a jurisdictional rule restrictively in the light of specific circumstances of the case at hand. There are other rules which give judges a limited power to decline (or

in case of a forum necessitatis even to attract) jurisdiction outside the normal rules. In this situation forum non conveniens-type considerations are at issue. In so far the acceptability of the doctrine of forum non conveniens in a global instrument concerning jurisdiction even for continental-European legal systems and the EU as such does not seem unthinkable any more.

This applies especially as far as direct jurisdiction is concerned. Globalization of the markets and of societies as well as the delocalisation of the connecting factors ask for wide jurisdictional rules which may have to be restricted with regard to the specific and limited circumstances of the precise facts of a case.

Concerns about "access to justice", "the right to a lawful judge", non-discriminatory decisions, predictability and certainty of the jurisdictional system can be rebutted if the terms and conditions of a rule on forum non conveniens are framed accordingly: A presumption that honours the plaintiff's choice of court may only be rebutted, if the defendant proves that the interests of both parties and the end of justice justify a stay or denial of the proceedings. He will have to prove in addition that there is an alternative appropriate forum which guarantees a lawful procedure and a possibility for the plaintiff to enforce his right when granted by this alternative court. Much will depend on the phrasing of the rule, but there are models for orientation.

When it comes to indirect jurisdiction the doctrine of forum non conveniens for constitutional reasons plays an important role in the United States. It seems unlikely that an agreement on the international level will be reached without coping with this issue. However, forum non conveniens may have a very limited role on this level only. Due to the fact that in so far practical difficulties for the original forum in adjudicating the case are not at issue any more, the essential issue will be whether the interests of the defendant have been treated in accordance with the rule of law. This could be argued under the head of "ordre public", but it seems preferable to define the limits of such exception expressly.

Finally, the jurisdictional rules of the courts recognizing and enforcing foreign judgments are of pivotal importance. Without the possibility of enforcement a right may be theoretical and illusionary only. Therefore, in order to guarantee practical and effective rights, a legal system must not refrain from enforcing a judgment according to the doctrine of forum non conveniens if and so far as this judgment has to be recognized in this system. Thus, on the third stage of

jurisdictional issue the doctrine of forum non conveniens should not play any role at all.

Rolf Wagner, *EU-Kompetenz in der justiziellen Zusammenarbeit in Zivilsachen – Resumée und Ausblick nach mehr als fünfzehn Jahren* (EU Legislative Powers Regarding Judicial Cooperation in Civil Matters)

Since the entry into force of the Amsterdam Treaty in 1999, the European Union has been empowered to cooperate in the area of civil matters. As this power has now existed for more than fifteen years, it seems appropriate to take stock of developments. In addition to asking whether initial legal uncertainties regarding the interpretation of the power of judicial cooperation in civil matters have been resolved over the course of time, the present article also considers what new problems may have emerged.

Chloé Lignier and **Anton Geier,** *Die Verstärkte Zusammenarbeit in der Europäischen Union – Politischer Hintergrund, Bestandsaufnahme und Zukunftsperspektiven* (Enhanced Cooperation in the European Union – Political Background, Current Status and Future Perspectives)

The legislative instrument of enhanced cooperation allows member states to create a common legal regime in a given field, which applies only to those member states that voluntarily subject themselves to it. While the concept of having different levels of integration ("differentiated integration") as such is not new to EU law, the instrument of enhanced cooperation stands out through its broad scope of application and its elaborate institutional entrenchment.

The history of differentiated integration in the EU illustrates the basic conflict between effective integration on the one hand and preserving the sovereignty of the member states on the other hand. In this context, the two principal competing political ideals aspiring to resolve this conflict are often labelled as "Europe à la carte" on the one hand and "multi-speed Europe" on the other hand. Both ideals – to a varying degree – manifest themselves in the rules on enhanced cooperation introduced with the treaties of Amsterdam and Nice.

After having been neglected by the European legislator for a long time, we can now witness the first practical implementations of enhanced cooperation in the

fields of divorce law, patents and the financial transaction tax. The ideas of differentiated integration and the instrument of enhanced cooperation remain highly controversial. Some see it as the only means for overcoming the integrational standstill in an ever more complex and heterogenic Union. Others fear that enhanced cooperation will sow division among the member states and foster political and legal alienation between them.

Ultimately, an analysis of the rules on enhanced cooperation in the treaties and the latest examples of its implementation gives rise to optimism. It reveals a promising potential of the instrument of enhanced cooperation for achieving effective integration in the EU, while duly observing the legitimate interests of all member states, be they participating or not. At the same time, the European legislator should wield its new sword with caution if it wishes to preserve the solidarity among the member states and the coherence of EU law. It cannot be denied that specific projects of enhanced cooperation can come into conflict with other EU interests such as the coherence and effectiveness of the internal market. As regards the political coherence of the EU, the provisions on sincere cooperation do allow for political inclusion and wisely oblige the participating member states to confer with the non-participants at every stage. The extent to which the member states act in this spirit of constructiveness and cooperation will decide over the fate of enhanced cooperation as either a king's road or a dead end of European legal integration.

Marieke Oderkerk, *The Need for a Methodological Framework for Comparative Legal Research – Sense and Nonsense of "Methodological Pluralism" in Comparative Law*

The paper has presented a framework for comparative legal research indicating the various methodological issues that have to be considered in the various stages of a research project. Its significance is twofold. In the first place it brings order into the existing methodological knowledge in the field such that the various methods and techniques can be understood and assessed within the correct context, automatically unveiling existing lacunae. Secondly, and probably most importantly, the framework shows that there is indeed one framework which contains – at the moment at least, for certain parts of it – clear guidelines and principles that can guide comparatists conducting any type of comparative legal research in any field of the law.

Dieter Martiny, *Die Haager Principles on Choice of Law in International Commercial Contracts – Eine weitere Verankerung der Parteiautonomie (*The Hague Principles on Choice of Law in International Commercial Contracts: Buttressing Party Autonomy)

The Hague Conference on Private International Law has recently drawn up "Principles on Choice of Law in International Commercial Contracts". An innovative feature of these Principles, which are accompanied by an explanatory Commentary, is that unlike an international convention they are non-binding. The Principles were drafted by a Working Group, which commenced in 2010, and by a Special Commission of November 2012. The instrument was approved by the Council on General Affairs and Policy in March 2015.

The Principles' relatively few black-letter rules (12 articles and a preamble) seek to encourage choice of law in international commercial transactions. They contain clarifications and innovations on choice of law, particularly for jurisdictions where party autonomy is not accepted or is accepted only in a restrictive manner. The Principles try to achieve universal application and also to influence existing regional instruments such as the Rome I Regulation of the European Union and the OAS Mexico Convention.

Developing the Principles was a demanding task since they apply not only to courts but also to arbitral tribunals. Since party autonomy is the centrepiece of the Hague Principles, freedom of choice is granted basically without restriction. The Principles clarify important issues for agreements on choice of law. A reference to "law" also includes generally accepted "rules of law". The latter refers to principles developed by international organisations or international conventions. This approach is also applicable to courts. Under he Hague Principles the parties' choice of law is severable from the main contract. Express and tacit choices are accepted. There is no requirement as to the formal validity of a choice of law. An innovative solution also tries to find an agreement on choice of law in the case of a battle of the forms. Not only are international mandatory rules of the forum respected but under certain circumstances mandatory provisions from other sources are also taken into account. The extent to which overriding mandatory rules and public policy are applied or taken into account, however, is ultimately a matter not for the non-binding Principles themselves but for other rules.

The Hague Principles declare themselves to be an international code of current best practice with respect to the recognition of party autonomy in choice of law in international commercial contracts. Their acceptance in international practice will show how far the expectations of The Hague will be met.