Update: International Conference at the Academy of European Law: “How to handle international commercial cases – Hands-on experience and current trends”

It has already been announced on this blog that the Academy of European Law (ERA) will host an international, English-language conference on recent experience and current trends in international commercial litigation, with a special focus on European private international law (see our earlier post here). The event will take place in Trier (Germany), on 8-9 October 2015. A slightly revised programme has now been put online and is available here. Registration is still possible here – so don’t miss the early bird rebate (before 8 September 2015)!

Workshop on General Principles of European Private International Law in Munich

Professor Dr. *Stefan Arnold* (University of Graz, Austria) is organising a workshop on general principles of European private international law in Munich on 18 September 2015. Renowned speakers will deal with pervasive problems such as the notion of a family in PIL, the applicability of religious law, general principles of attachment, party autonomy, renvoi and public policy. The programme may be downloaded here. The conference will be held in German at the Bavarian Academy of Sciences. Participation is free of charge, but prior registration is required here.

One Name throughout Europe: A Conference in Marburg (Germany) on a Draft for a European Regulation on the Law Applicable to Names

Professors *Anatol Dutta* (University of Regensburg), *Tobias Helms* (University of Marburg) and *Walter Pintens* (University of Leuven) are organising a conference on a draft for a European regulation on the law applicable to names in Marburg (Germany) on Friday, 27 November 2015; for the programme, further information and registration, see here. The background of this event lies in the fact that, in spite of the far-reaching Europeanization of private international law, common conflicts rules on this matter are currently lacking. As a consequence, natural persons moving from one Member State to another may suffer from a non-recognition of a name that they have acquired abroad. In order to cure those "limping" legal relationships, a Working Group was convened by the Federal Association of German Civil Status Registrars in order to elaborate a proposal for a European Regulation. The resulting proposal has been published in English in the Yearbook of Private International Law XV (2013/14), pp. 31-37 and in French in the Revue critique de droit international privé 2014, pp. 733 et seq. The aim of the upcoming conference is to present and analyse the Working Group's proposal and to trigger further academic discussion on the subject. The conference language will be German. Participation is free of charge, but registration is required before or on 31 October 2015 at the latest.

Beaumont and Trimmings on Human Rights and Cross-Border Surrogacy

Paul Beaumont and *Katarina Trimmings* (Director and Deputy Director of the Centre for Private International Law, University of Aberdeen, respectively) have just published a highly interesting paper on "Recent jurisprudence of the European Court of Human Rights in the area of cross-border surrogacy: is there still a need for global regulation of surrogacy?". The article is the second paper in the Working Paper Series of the Centre for Private International Law (University of Aberdeen) and is now available on the Centre's website here.

The first part of their paper examines the recent decisions of Chambers of the European Court of Human Rights in cases of *Mennesson v. France* (on this case, see the earlier post by *Marta Requejo*), *Labassee v. France* (cf. the earlier post by *F. Mailhé*), and *Paradiso and Campanelli v. Italy*. It then makes some suggestions as to how the Grand Chamber should deal with the *Paradiso and Campanelli* case before analysing the likely consequences of the *Mennesson* and *Labassee* judgments for national authorities in the context of surrogacy. The article then explores whether, following these decisions, there is still a need for an international Convention regulating cross-border surrogacy.

For those interested in recent developments in German case law on cross-border surrogacy, I also recommend an earlier post by *Dina Reis*.

Surveys on European Order for Payment and Small Claims

Procedures

PhD Researcher Elena Alina Ontanu (supervised by Prof. Xandra Kramer) from Erasmus University Rotterdam is conducting an empirical and comparative research on the functioning of the European Order for Payment and the European Small Claims Procedure in **England and Wales**, **France**, **Italy** and **Romania**. Practitioners from these jurisdictions having experience with (one of) these procedures are warmly invited to fill in the surveys by clicking the links below. The collected data aim to gain a better insight into the use and functioning of these procedures in the selected Member States.

England and Wales
– European Order for Payment
– European Small Claims Procedure

France
– Injonction de payer européenne
– Règlement européen des petits litiges

Italy
– Ingiunzione europea di pagamento
– Procedimento europeo per le controversie di modesta entità

Romania
– Somatia europeana de plata
– Procedura europeana privind cererile cu valoare redusa

The surveys are divided in several sections regarding various aspects of the procedures. Please note that some questions might not be relevant for all legal professions. The time necessary for filling in a survey ranges between fifteen to thirty minutes, and participation will remain anonymous. Multi-session access to the surveys is possible from the same computer. The survey will remain open until **30 September 2015**.

We thank you for sharing your invaluable experience and views.

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

Tobias Lutzi, the author of this post, works at the Institute of Foreign Private and Private International Law of the University of Cologne and studies at the University of Oxford.

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.