Public hearing on the Reform of the Brussels IIa Regulation

On 12 October 2015, the Committee on Legal Affairs of the European Parliament held a public hearing on the reform of the Brussels IIa Regulation. A video of the hearing is available here.

Further information on the public hearing, including the programme and the written contributions can be downloaded here.

Thanks to Edina Márton for the tip-off.

Out now: RabelsZ, Vol. 79 No 4 (2015)

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

Giesela Rühl and **Jan von Hein**, *Towards a European Code on Private International Law?*

> *One of the most important dates in the history of European Private International Law is 2 October 1997. On that day the Member States of the European Union signed the Treaty of Amsterdam – and endowed the European legislature with near to full competences in the field of Private International Law. What followed was a firework of legislative actions leading to the adoption of no less than 15 Regulations on various aspects of choice of law and international civil procedure. The fact that the pertinent legal rules are scattered across various legal instruments that do not add up to a*

comprehensive, concise and coherent body of rules, however, gives rise to a number of concerns. Therefore, the European Commission as well as the European Parliament have called for a discussion on the future of European Private International Law in general and the merits and demerits of a European Code on Private International Law in particular.

Based on a study commissioned by the Committee on Legal Affairs of the European Parliament, the following article seeks to contribute to this debate. It is organized in four parts: The first part analyses the current state of European Private International Law (PIL), in particular its perceived deficiencies. The second part describes possible courses of action to overcome these deficiencies, including a European Code on PIL. The third analyses the merits and demerits of possible courses of action, including the adoption of a European Code on PIL. The fourth part suggests a course of action that will gradually lead to a more coherent legislative framework for European PIL.

Dieter Henrich, *Privatautonomie, Parteiautonomie: (Familienrechtliche) Zukunftsperspektiven* (Private Autonomy, Party Autonomy: (Family Law) Future Perspectives)

Much as it previously dominated the law of contracts, private autonomy increasingly dominates the area of family law. Party autonomy, the right of the parties to select the applicable law, has found acceptance in international family law. The consequences in many areas are nothing less than revolutionary, including divorce by mutual consent, cohabitation instead of marriage, children having two legal fathers or two legal mothers or even three parents (sperm donor and a lesbian couple), surrogate motherhood, and impacts on divorce and maintenance in choice-of-law cases. Not all of these developments may be welcomed by all individuals. But in better serving self-determination, they are attractive to others and represent future perspectives.

Reinhard Zimmermann, *Das Verwandtenerbrecht in historisch-vergleichender Perspektive* (The Intestate Succession Rights of the Deceased's Relatives in Historical and Comparative Perspective)

The intestate succession systems are based, everywhere, on the idea of family succession. The deceased's family consists of his (blood-)relatives as well as,

possibly, his or her surviving spouse. The law, therefore, is faced with two central tasks: (i) to determine in which sequence the deceased's relatives are called to inherit and (ii) to coordinate the position of the survivingspouse with that of the relatives. The present paper analyses how the intestate systems of the Western world deal with the first of these tasks. In spite of differences in detail, they can be subdivided into three types: the "French system", the three-line system, and the parentelic system. Analyzing them in historical and comparative perspective reveals basic commonalities (e.g. the preference given to descendants, and succession per stirpes), but also curious relics of past ages (e.g. the concept of "representation", paterna paternis materna maternis, and la fente successorale). Other criteria relevant for a comparative assessment of the different solutions advocated by the three systems are consistency in the implementation of fundamental structural ideas, the avoidance of inconsistencies in evaluation, of arbitrariness, and of discrimination, the ability to forestall manipulations, and the preference for simplicity over complexity. The presumed intention of a typical deceased can be an important argument for deciding what might be the most appropriate solution, for the rules on intestate succession should, in case of doubt, reflect what those subject to these rules would typically regard as appropriate, as far as the distribution of their estate is concerned. But there are also issues where reliance on the presumed intention is misplaced. All in all, a reasonably limited parentelic system appears to be the superior intestate succession system. A strongly cultural impregnation of the rules on intestate succession is apparent only if Western and non-Western systems are compared. Within the Western legal world, the differences existing between the legal systems cannot be traced to differences in legal culture. All modern legal systems of the Western world attempt to take account of the deceased's relatives in a rational fashion. In that respect they build on the scheme established in Justinian's novels, the earliest one that can be labelled modern. The "French" system and the three-line system represent different manifestationsof the Justinianic scheme, while the parentelic system implements its underlying ideas in an even more consistent manner, and inspired by Natural law ideas. Why the one system has taken root in one country, and the other in another, is a matter of historical contingency.

Alistair Price and **Andrew Hutchison**, *Judicial Review of Exercises of Contractual Power: South Africa's Divergence from the Common Law Tradition*

No English abstract available

François Du Toit, *The South African Trust in the Begriffshimmel? – Language, Translation and Taxonomy*

No English abstract available

Praxis des Internationalen Privat- und Verfahrensrechts (IPRax) 6/2015: Abstracts

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

F. Garcimartin, **The situs of shares, financial instruments and claims in the Insolvency Regulation Recast: seeds of a future EU instrument on rights in rem?**
The location of intangible assets is a key issue for the application of certain Private International Law rules. At the EU level, Regulation 1346/2000 on Insolvency proceedings contains three uniform rules on location of assets, one of which deals with claims (Art. 2 (g) III 2000 EIR). The recast of this instrument (Regulation 2015/84) has extended this provision, which now includes eight different rules (Art. 2 (9) EIR Recast). The purpose of this paper is to analyze one set of these rules, specifically those laid down for intangible assets: shares and other financial instruments, claims and cash accounts. The relevance of this analysis is twofold. From a positive-law perspective, it may be useful to resolve some of the problems that the interpretation and application of Article 2 (9) EIR Recast may give rise to in practice. From a normative perspective, Article 2 (9) EIR Recast may be the seed of a future EU instrument on the law applicable to rights in rem. This provision establishes a detailed list of common rules on

location of assets. Should the future instrument take as a starting point the traditional conflict of laws rule in this area, i.e. the *lex rei sitae*, this list would be the primary reference to determine the situs of most assets.

M. Lehmann, **A Gap in EU Private International Law? OGH and BGH on the Law Applicable to Liability for Asset Acquisition and Takeover of a Commercial Enterprise**

The contribution discusses a recent tendency in some Member States to avoid applying European conflict laws to certain aspects of the law of obligations. In question are national rules under which persons who take over the entire property or the commercial business of another are liable for the latter's debt. The highest courts in civil matters in Germany and Austria have decided that these issues are not covered by the Rome Convention of 1980, and have instead submitted them to autonomous national conflict rules. An important strand of the literature wants to transfer this solution to the Rome I and II Regulations. It must be borne in mind, however, that both regulations establish a comprehensive regime for the law of obligations. They do not leave any room for national conflict rules, save for those areas that are expressly exempt from their scope of application. A solution must therefore be found within the regulations themselves. It is suggested here that the type of liability in question could be characterized as an overriding mandatory rule. Looking to the future, it would be preferable if the EU legislator introduced specific conflict rules to address this problem.

C. Kohler, **Special Rules for State-owned Companies in European Civil Procedure? (ECJ, 23.10.2014 – Case C-302/13 – flyLAL-Lithuanian Airlines AS, in liquidation, v Starptautiska lidosta Riga VAS, Air Baltic Corporation AS)**

In Case C-302/13, *flyLAL-Lithuanian Airlines*, the ECJ held that an action for damages resulting from the alleged infringement of EU competition rules by two Latvian companies, *Starptautiska Lidosta Ri-ga* and Air Baltic, was civil and commercial in nature. It was irrelevant in that respect that the in fringement was said to result from the determination by the defendant *Starptautiska Lidosta Ri-ga* of airport charges pursuant to statutory provisions of the Republic of Latvia. Equally irrelevant was the fact that the defendant companies were wholly or partly owned by that Member State. Furthermore, the ECJ specified the grounds which would bar the recognition and enforcement of a judgment ordering protective measures as being contrary to the public policy of the Member State

addressed. The Court ruled that the mere invocation of serious economic consequences for state-owned companies do not constitute such grounds. The author welcomes the judgment as it clarifies that there is no special regime for state-owned companies in European civil procedure. He adds that the ECJ's opinion 2/13 on the accession of the EU to the European Convention of Human Rights, given shortly after the judgment in Case C-302/13, does, in principle, not affect the relevance of the public policy exception in Regulation Brussels I.

F. Wedemann, **The Applicability of the Brussels Ia Regulation or the European Regulation on Insolvency Proceedings in Company Law Liability Cases**

The ECJ's *G.T. GmbH* decision is important for European civil procedure law as it has significant implications for the demarcation between the scopes of the Brussels Ia-Regulation and the European Regulation on Insolvency Proceedings in company law liability cases. The author analyses these implications. First of all, she identifies and critically discusses the general guidelines established or confirmed by the decision: (1) The fact that a liability provision allows an action to be brought even where no insolvency proceedings have been opened, does not per se preclude such an action from being characterized as falling within the scope of Art. 3 (1) European Regulation on Insolvency Proceedings. Rather, it is necessary to determine whether the provision finds its source in the common rules of civil and commercial law or in the derogating rules specific to insolvency proceedings. (2) In cases where no insolvency proceedings have been opened, actions fall within the scope of the Brussels Ia Regulation. (3) Cases where insolvency proceedings have been opened, but the action in question is brought by someone other than the liquidator, require a differentiating treatment. (4) The defendant's domicile is irrelevant for the applicability of Art. 3 (1) European Regulation on Insolvency Proceedings. (5) The jurisdiction based on Art. 3 (1) European Regulation on Insolvency Proceedings is exclusive. Subsequently, the author focusses on German company law and its broad range of liability provisions and examines the consequences of *G.T. GmbH* for jurisdiction in proceedings based on these provisions.

F. Temming, **International jurisdiction over individual contracts of employment – How wide is the personal scope of Art. 18 et sqq. of the Brussels I Regulation?**

This case note is about the question whether or not independent sales

representatives can be considered as employees for the purposes of Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC). This could be the case if an individual sales representative renders his services only to one principal and does not employ personnel on his own account. The resulting economic dependence vis-à-vis his principal could call for the jurisdictional protection that is granted by Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC) to individual employees. Whereas the Regional Higher Labour Court of Düsseldorf (*LAG Düsseldorf*) denied the analogous application of Art. 18 et sqq. of the Brussels I Regulation (44/2001/EC) in favour of the claimant, there is a good case that – in light of recent judgements – the Court of the European Union could consider individuals, who are economically dependant on their partner of a service contract, to fall under its flexible autonomous concept of "employee", if the degree of subordination due to a right of direction was comparable to the one of an employee. If this case is referred to the Court of the European Union, it will have the potential of becoming a landmark case.

M. Fornasier, **The law applicable to employment contracts and the country of closest connection under Art. 8(4) Rome I**

In its *Schlecker* judgment (Case C-64/12), the European Court of Justice shed some light on the escape clause in the choice-of-law rule regarding employment contracts (Art. 8 (4) Rome I Regulation). The Court held that the employment relationship may be more closely connected with a country other than that in which the habitual workplace is located even where the employee carries out the work habitually, for a lengthy period and without interruption in the same country and where, thus, the territorial connection of the employment contract with the habitual workplace is particularly strong. The following case note analyses to what extent the ruling is reconcilable with the principle of favor laboratories and whether it is consistent with the case law of the ECJ relating to the posting of workers. Moreover, the paper examines the impact of the judgment on mechanisms of collective labor law such as collective bargaining and employee participation.

J. Schilling, **The International Private Law of Freight Forwarding Contracts**

After having taken position to charter parties in its ICF-decision already, the ECJ now comments the international private law of freight forwarding contracts. In its *Haeger & Schmidt* ruling the court clarifies that those contracts, which exclusively state an obligation to arrange for transport cannot be considered

contracts of carriage in the meaning of Art. 4 para. 4 Rome Convention or Art. 5 para. 1 Rome I Regulation. However a freight forwarding contract falls within the material scope of the special rule for transport contracts, if its principal purpose is the transport as such of the goods. This can be considered, if the forwarding agent is performing the transport partially or entirely by himself, or in case of freight forwarding at a fixed price. The question of qualification will particularly be relevant in cases to which the Rome I Regulation applies, because the differences between the conflict of laws regime for general contracts and that for contracts of carriage have increased. As the uniform transport law does generally not apply to freight forwarding contracts, the recent ECJ decision on the international private law of those contracts appears even more important.

J. Hoffmann, **Duties of disclosure towards contracting parties without knowledge of the contract language**

The judgement of the German Federal Labour Court discussed in this article had to determine the legal consequences of the conclusion of a standard contract with an employee who had no knowledge of the language of the contract. Although neither the validity of the contract nor the inclusion and validity of the standard terms are in question, the information imbalance should be addressed by accepting a precontractual duty to explain the contract contents in appropriate cases. Such a duty should specifically be acknowledged if the precontractual negotiations were conducted in a different language. It can also be endorsed as a contractual obligation based on the fiduciary duty of the employer towards his employee as long as the language deficit remains.

M. Zwickel, **Prima facie evidence between lex causae and lex fori in the area of the French Road Traffic Liability Act (Loi Badinter)**

The decision of the Regional Court Saarbrücken, which had already given rise to a preliminary ruling by the ECJ regarding the "effective service of notice of proceedings on the claims representative of a foreign insurer", relates to the problem of the usability of German prima facie evidence in a case to be decided in accordance with French law. The jurisprudence of the French *Cour de cassation* does not permit any reduction in the standard of proof within the framework of road traffic liability. Adducing the prima facie evidence – contrary to French civil law – therefore potentially leads to a divergence of procedural and substantive law. The decision makes it especially clear that prima facie evidence within and outside of the scope of Art. 22 (1) Rome II-Regulation can sensibly only be treated

in accordance with the *lex causae*.

M. Stürner, **Enforceability of English third party costs order**
The German *Bundesgerichtshof* (*BGH*) had to deal with an application to declare enforceable a third party costs order issued by the English High Court in the context of an insolvency proceeding. The *BGH* left open the question whether that decision falls within the scope of the Brussels I Regulation or the Insolvency Regulation as both regimes should not leave any gap between them and also provide identical grounds for refusing recognition. On that basis, the *BGH* held that the third party costs order did not violate German public policy. The author generally agrees with the decision.

H. Roth, **Actions to oppose enforcement and set-off**
Due to the close connection with the enforcement procedure, the exclusive jurisdiction of Article 22 (5) Lugano Convention of 2007 includes actions to oppose enforcement pursuant to § 767 of the German Code of Civil Procedure (*ZPO*).
Contrary to the view of the Federal High Court of Justice (BGH), § 767 ZPO can be applied even if the court seized would not be internationally competent in case of an independent legal assertion of the counterclaim.
The court is able to assess preliminary questions, which were submitted in defense, regardless of the restrictions by the law relating to jurisdiction. This principle also applies to the set-off.

H. Odendahl, **The 1961 Hague Protection of Minors Convention – How vital is the fossil?**
The Austrian Supreme Court of Justice had to decide upon the recognition of a Turkish court decision on the custody of a child of Turkish nationality living in a foster family in Austria, which was based on Art. 4 of the 1961 Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants. Recognition was rejected for reasons of public policy (Art. 16). The following article discusses the remaining scope of this outdated convention and the impact of its application in relation to its successor, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, as well as the 1980 Luxembourg European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children.

A new article-by-article commentary of the Brussels Ia Regulation

An extensive article-by-article commentary, in German, of Regulation (EU) No 1215/2012 (Brussels Ia) has recently been published by Verlag Dr. Otto Schmidt.

This is actually the fourth edition of the volume dealing with jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of the 4-volume commentary of EU law on international litigation and conflicts of laws drawn up under the direction of Thomas Rauscher.

The authors of the volume are Prof. Dr. Stefan Leible (Univ. Bayreuth), Prof. Dr. Peter Mankowski (Univ. Hamburg), Dr. Steffen Pabst (LVV Leipziger Versorgungs- und Verkehrsgesellschaft mbH) and Prof. Dr. Ansgar Staudinger (Univ. Bielefeld).

For more information, see here.

Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band I (Brüssel Ia-VO), 4th edition, Verlag Dr. Otto Schmidt, 2015, 1456 pages, ISBN 978-3-504-47202-3, 249 Euros.

Now hiring: Assistant in Private

International Law in Freiburg (Germany)

At the Institute for Foreign and Private International Law of the **Albert-Ludwigs-University Freiburg im Breisgau** (Germany), **a vacancy** has to be filled at the chair for **private law, private international law and comparative law (chairholder: Prof. Dr. Jan von Hein)**, from 1 January, 2016 with

a legal research assistant (salary scale E 13 TV-L, personnel quota 50%) limited for 2 years.

The assistant is supposed to support the organizational and educational work of the chairholder, to participate in research projects of the chair as well as to teach his or her own courses (students' exercise). Applicants are offered the opportunity to obtain a doctorate.

Applicants are expected to be interested in the chair's main areas of research. They should possess an above-average German First State Examination (at least "vollbefriedigend") or a foreign equivalent degree and be fluent in German. In addition, a thorough knowledge of German civil law as well as conflict of laws, comparative law and/or international procedural law is a necessity. Severely handicapped persons will be preferred provided that their qualification is equal.

Please send your application (curriculum vitae, certificates and, if available, further proofs of talent) to Prof. Dr. Jan von Hein, Institut für ausländisches und internationales Privatrecht, Abt. III, Peterhof, Niemensstr. 10, D-79098 Freiburg (Germany) no later than 30 November, 2015.

As the application documents will not be returned, applicants are kindly requested to submit only unauthenticated copies. Alternatively, the documents may be sent as a pdf-file via e-mail to ipr3@jura.uni-freiburg.de.

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

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

The piece can be downloaded here.

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

the European Union

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

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

THE EUROPEAN GROUP FOR PRIVATE INTERNATIONAL LAW

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

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

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

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

Recalling, in particular:

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

1967, all of which apply across the European Union,

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

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

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

1. TO ENSURE

Recording and recognition of facts and documents relating to civil status

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

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

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

Refugee status, subsidiary protection status and provisional residence permits

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

2. TO TAKE INITIATIVES WITH A VIEW

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

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

Common ratification of existing instruments and enhancing their effectiveness

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

Footnotes

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

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

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

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

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

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

---

The liability of a company director from the standpoint of the Brussels I Regulation

This post has been written by Eva De Götzen.

On 10 September 2015, the ECJ delivered its judgment in *Holterman Ferho Exploitatie* (C-47/14), a case concerning the interpretation of Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).

More specifically, the case involved the interpretation of Article 5(1) and Article 5(3) of the Regulation, which provide, respectively, for special heads of jurisdiction over contractual matters and matters relating to a tort or delict, as well as the interpretation of the rules laid down in Section 5 of Chapter II (Articles 18 to 21), on employment matters. The said provisions correspond, today, to Articles 7(1) and (2) and Articles 20 to 23 of Regulation No 1215/2012 of 12 December 2012 (Brussels Ia Regulation).

The request for a preliminary ruling arose from a dispute involving a German national resident in Germany, Mr Spies von Büllesheim, who had entered a Dutch company's service as a managing director, in addition to being a shareholder of that company. He had also been involved in the managing of three German subsidiaries of the company, for which he served as a director and an authorised agent.

The company brought a declaratory action and an action for damages in the Netherlands against Mr Spies von Büllesheim, claiming that he had performed his duties as director improperly, that he had acted unlawfully and that, aside from his capacity as a director, he had acted deceitfully or recklessly in the performance of the contract of employment under which the company had hired him as a managing director.

The Dutch lower courts seised of the matter took the view that they lacked jurisdiction either under Article 18(1) and Article 20(1) of the Brussels I Regulation, since the domicile of the defendant was outside the Netherlands, or under Article 5(1)(a), to be read in conjunction with Article 5(3).

When the case was brought before the Dutch Supreme Court, the latter referred three questions to the ECJ.

The first question was whether the special rules of jurisdiction for employment matters laid down in Regulation No 44/2001 preclude the application of Article 5(1)(a) and Article 5(3) of the same Regulation in a case where the claimant company alleges that the defendant is liable not only in his capacity as the managing director and employee of the company under a contract of employment, but also in his capacity as a director of that company and/or in tort.

The ECJ observed in this respect that one must ascertain, at the outset, whether the defendant could be considered to be bound to the company by an "individual

contract of employment". This would in fact make him a "worker" for the purposes of Article 18 of Regulation No 44/2001 and trigger the application of the rules on employment matters set forth in Section 5 of Chapter II, irrespective of whether the parties could also be tied by a relationship based on company law.

Relying on its case law, the ECJ found that the defendant performed services for and under the direction of the claimant company, in return for which he received remuneration, and that he was bound to that company by a lasting bond which brought him to some extent within the organisational framework of the business of the latter. In these circumstances, the provisions of Section 5 would in principle apply to the case, thereby precluding the application of Article 5(1) and Article 5(3).

The ECJ conceded, however, that if the defendant, in his capacity as a shareholder in the claimant company, was in a position to influence the decisions of the company's administrative body, then no relationship of subordination would exist, and the characterisation of the matter for the purposes of jurisdiction would accordingly be different.

The second question raised by the Hoge Raad was whether Article 5(1) of the Brussels I Regulation applies to a case where a company director, not bound by an employment relationship with the company in question, allegedly failed to perform his duties under company law.

The ECJ noted that, generally speaking, the legal relationship between a director and his company is contractual in nature for the purposes of Article 5(1), since it involves obligations that the parties have freely undertaken. More precisely, a relationship of this kind should be classified as a "provision of services" within the meaning of the second indent of Article 5(1)(b). Jurisdiction will accordingly lie, pursuant to the latter provision, with the court for the place where the director carried out his activity.

To identify this place, one might need to determine, as indicated in *Wood Floor Solutions*, where the services have been provided for the most part, based on the provisions of the contract. In the absence of any derogating stipulation in any other document (namely, in the articles of association of the company), the relevant place, for these purposes, is the place where the director in fact, for the most part, carried out his activities in the performance of the contract, provided

that the provision of services in that place is not contrary to the parties' agreed intentions.

Finally, inasmuch as national law makes it possible to base a claim by the company against its former manager simultaneously on the basis of allegedly wrongful conduct, the ECJ, answering the third question raised by the Hoge Raad, stated that such a claim may come under "tort, delict or quasi-delict" for the purposes of Article 5(3) of the Brussels I Regulation whenever the alleged conduct does not concern the legal relationship of a contractual nature between the company and the manager.

The ECJ recalled in this connection that the Regulation, by referring to "the place where the harmful event occurred or may occur", intends to cover both the place where the damage occurred and the place of the event giving rise to it. Insofar as the place of the event giving rise to the damage is concerned, reference should be made to the place where the director carried out his duties as a manager of the relevant company. For its part, the place where the damage occurred is the place where the damage alleged by the company actually manifests itself, regardless of the place where the adverse consequences may be felt of an event which has already caused a damage elsewhere.

Issue 2015.3 of the Dutch journal on Private International Law (NIPR)

The third issue of 2015 of the Dutch Journal on Private international Law, Nederlands Internationaal Privaatrecht, contains contributions on the Hague Convention on Choice of Court Agreements, financial losses under the Brussels I Regulation, Recognition of Dutch insolvency orders in Switzerland, and Indonesian Private International Law.

Marta Pertegás, 'Guest Editorial: Feeling the heat of disputes and finding

the shade of forum selection', p. 375-376.

***Tomas Arons, 'Case Note: On financial losses, prospectuses, liability, jurisdiction (clauses) and applicable law. European Court of Justice 28 January 2015, Case C-375/13 (Kolassa/Barclays Bank)'**, p. 377-382.*

The difficult question of where financial losses are directly sustained has been (partly) solved by the European Court of Justice on 28 January 2015. In Kolassa the ECJ ruled that an investor suffers direct financial losses as a result of corporate misinformation (i.e. misleading information published by a company issuing (traded) shares or bonds) in the place where he holds his securities account. The impact of this ruling is not limited to the question of international jurisdiction. The Rome II Regulation prescribes that the law applicable to tort claims is the law of the country in which the direct losses are sustained. The second part deals with the question whether an investor can be bound by an exclusive jurisdiction clause in the prospectus or other investor information document. In the near future the ECJ will rule on this matter in the Profit Investment SIM case. [free sample]

Raphael Brunner, 'Latest Legal Practice: Switzerland discovers the Netherlands on the international insolvency map', p. 383-389.

By a decision of March 27, 2015 the Swiss Federal Court ruled for the first time in a leading case that the Swiss Courts have to recognize Dutch insolvency orders. It is astonishing that up until now Dutch insolvency orders have not been recognised by the Swiss Courts and hence Dutch insolvency estates and liquidators or trustees (hereafter referred to as liquidators) neither had access to the assets of a Dutch insolvency estate in Switzerland nor to the jurisdiction of the Swiss Courts. The reason for this is that the private international laws of Switzerland and the Netherlands pursue completely different approaches in international insolvency matters. The new decision by the Swiss Federal Court is interesting both from a (theoretical) perspective of private international law as well as from the (practical) perspective of a Dutch liquidator of a Dutch insolvency estate having assets in Switzerland or claims against debtors in Switzerland.

Tiurma Allagan, 'Foreign PIL – Developments in Indonesia: The Bill on Indonesian Private International Law', p. 390-403.

This article discusses the background and contents of the proposal for an Indonesian Private International Law Act that was issued in November 2014.

If you are interested in contributing to this journal please contact the editorial manager Ms Wilma Wildeman at w.wildeman@asser.nl.

The Departure of the European Law of Civil Procedure

Two weeks ago I had the pleasure of announcing the publication of the new edition of the EU-Zivilprozessrecht: EuZPR, authored by Prof. Schlosser and Hess. The Department of European and Comparative Procedural Law of the Max Planck Institute Luxembourg has decided to combine the launching of the book with a seminar entitled "The Departure of the European Law of Civil Procedure", to take place next November 11, at the MPI premises in Luxembourg. The seminar will count with the presence of Prof. Schlosser himself; other prominent speakers will be Judge Marko Ileši? (CJEU) and Prof. Jörg Pirrung. To download the full programme of the event click here.

The seminar starts at 4 pm and will be followed by a reception. It is open to all those willing to attend upon registration (contact person: secretariat-prof.hess@mpi.lu).