Second Seminar on the Boundaries of European PIL

Boundaries of European Private International Law

Seminar n° 2 – Louvain la Neuve:

What are the Boundaries between Internal Market and European PIL and among PIL Instruments?

5/6 June 2014

Coordination : Jean-Sylvestre Bergé (Université Jean Moulin Lyon 3), Stéphanie Francq (Université catholique de Louvain) et Miguel Gardenes Santiago (Universitat Autònoma de Barcelona)

A demonstration of the existence of European private international law is no longer necessary. However, the question of the place of European private international law in a more globalised legal order, i.e. the difficult but crucial theme of reconciling European private international law to the legal frameworks that preceded it at national, international and European level, has been largely neglected to date.

The aim of this research program is to remedy this situation by holding discussions in different locations in Europe (Lyon – Barcelona – Louvain), bringing together European specialists in private international law or European law and doctoral or post-doctoral students.

For this second seminar, taking place in Louvain-la-Neuve (following the very successful Barcelona seminar, held in March), two main themes will be tackled:

1. Reconciling European private international law with other fields of European law, namely the internal market (free circulation and harmonisation of private national legislations) and other aspects of the area of freedom security and justice (immigration and cooperation in criminal matters);

2. Reconciling the various European instruments of private international law.

Thursday, 5 June

Inaugural Session

14:30 to 15.00: inauguration of the seminar and welcome addresses

15.00 to 16:15: opening session, chaired by Dean **Marc Fallon**, Louvain University.

Veerle Van Den Eeckhoudt, Professor, Antwerp & Leiden University, *"The Instrumentalisation of Private International Law by the European Institutions : quo vadis? Rethinking the 'Neutrality' of Private International law in an Era of Europeanisation of Private International law and Globalisation"*

Marion Ho-Dac, Lecturer, University of Valenciennes, *"Adapting European Private International Law to the Demands of the Internal Market."*

15.50- 16.15 Discussion

First workshop: Reconciling European private international law with other European law aspects of EU substantive law: internal market and other aspects of the areas of freedom security and justice

16:45 to 18:15: first session of the first workshop

Ulgjesa Grusic, Lecturer in Law, University of Nottingham, *The principle of effectiveness in EU law and Private International law: the case of transnational Employment in the English courts*

Fieke Van Overbeeke, Doctoral candidate, University of Antwerp, *The lost social dimension of the EU: A private international law perspective of labor in international road transport*

Alexandre Defossez, teaching and research assistant at the University of Liège, *The Posting of Workers Directive: Erase or Rewind?*

Friday, 6 June

9:00 to 10:30: second session of the first workshop

Blandine de Clavière Bonnamour (Lecturer, University Lyon 3) et **Bianca Pascale** (Doctoral Candidate, University Lyon 3), *The Scope of European Consumer Law (Substantive and Private International Law Aspects)*

Lydia Beil, Doctoral Candidate, University of Freiburg , *Reconciling Private International Law with European Consumer Law: Where to start consumer protection in the context of E-Commerce?*

Laura Liubertaite, Lecturer Vilnius University, *The Impact of Primary Law of the European Union on the Bilateral Conflict of Laws Rules of the Member States*

Second workshop: Reconciling the various European instruments of private international law.

11:00 to 12:30: first session of the second workshop.

Farouk Bellil, Doctoral candidate, University of Rouen, *Articulating the various PIL instruments applying in the field of insolvency*

Eleonore De Duve (Doctoral candidate) and **Anna Katharina Raffelsieper** (Research Fellow), Max Planck Institute for International, European and Regulatory Procedure (Luxembourg), *The Debtor's Protection in European Civil Procedures: Reviewing the Review*

Libor Havelka, Doctoral Candidate, Masaryk University, *Moving Back and Forth, On the Relationship between the Brussels I Regulation and International and National law*

14:30 to 16:00: second session of the second workshop.

Cécile Pellegrini, Post-Doctoral Researcher, University of Luxembourg, *Current State of the European and American Exorbitant Grounds of Jurisdiction.*

Maria Aranzazu Gandia Sellens, Doctoral Candidate, University of Valencia, *The Relationship between the Brussels I Regulation Recast and the Agreement on a Unified Patent Court, Specially Focusing on Patent Infringement: when reality exceeds fiction*

Jacqueline Gray (Doctoral candidate, Utrecht University), **Pablo Quinzá Redondo** (Doctoral candidate, University of Valencia), *The Coordination of Jurisdiction and Applicable Law in Related Proceedings: the Interaction between the Proposal on Matrimonial Property Regimes and the Regulations on Divorce and Succession*

16:30 to 17:30: third session of the second workshop

Ioannis Somarakis, Doctoral Candidate, University of Athens, *The scope of application of the method of recognition for foreign situations in European private international law*

Amélie Panet, Research and Teaching Assistant University Lyon 3, *The recognition of situations of personal status created in third countries*

Polish Decisions on Submission to Jurisdiction

by Michal Kocur and Jan Kieszczynski of Wozniak Kocur, a Polish litigation boutique law firm.

The Appellate Court in Lublin, Poland passed two separate decisions that stand by the principle that a challenge to international jurisdiction must be clear, substantiated and made right away in the defendant's first appearance before the court.

In decisions taken on 26 March 2013 (file no. I ACz 151/13) and on 8 October 2013 (file no. I ACz746/13), the court found that raising a defense of lack of jurisdiction based on an arbitration clause cannot be treated as contesting the court's international jurisdiction within the meaning of Article 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I).

The decision is particularly noteworthy as it deals with a controversial issue, as yet undecided by the Court of Justice of the European Union (ECJ).

Disputed jurisdiction

Both of the cases concerned the same dispute that emerged between two parties, a Polish and a French company, concerning the performance of a contract for the international sale of goods (Contract). The Polish company twice sued the French company for payment in the Polish courts. Both cases followed a similar pattern of procedural history, which will be outlined below.

In its statement of defense, the French company filed a motion to dismiss the case, taking the position that the dispute fell within the scope of the arbitration clause contained in the Contract. Apart from raising that jurisdictional defense, the defendant also went into the details of the merits of the case, rejecting the Polish company's claim for payment. The Polish court rejected the French company's jurisdictional defense. The court found that the arbitration agreement contained an exception that allowed the claimant to file a claim in a national court.

The French company appealed that decision. In its appeal, for the first time in the proceedings, the defendant raised a defense specifically invoking the lack of jurisdiction of Polish courts, and filed a motion to dismiss the case on those grounds. The defendant argued that the place of delivery of goods had changed, in light of which French courts had jurisdiction to hear the case, not Polish courts.

In response to the above, the claimant argued that the defendant's challenge to the jurisdiction of Polish courts had not been presented in the statement of defense, and was therefore overdue.According to the claimant, as the Polish courts' international jurisdiction was not contested in due time, the dispute was submitted to Polish courts in accordance with Article 24 Brussels I. Submission under Article 24 Brussels I exists when a defendant enters an appearance before the court, unless the appearance was entered in order to contest international jurisdiction:

> *Apart from jurisdiction derived from other provisions of this Regulation, a court*

> *of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.*

The defendant disagreed. It argued that the statement of defense contained a jurisdictional defense based on the arbitration agreement, and that this defense alone was sufficient to properly contest international jurisdiction in the meaning of Article 24 Brussels I.

Inequality of objections

The issue whether raising an objection against jurisdiction based solely on an arbitration agreement is tantamount to contesting the jurisdiction of a Member State's court has not yet been decided by the ECJ. The issue is controversial. In Poland, some scholars refer to a position presented in German language publications that a defense of the lack of jurisdiction based on an arbitration agreement by the same token contests jurisdiction in the meaning of Article 24 Brussels I.

In both of the cases at hand, the Appellate Court in Lublin rejected the defendant's view and found that it had international jurisdiction as the cases fell under the rule of submission to jurisdiction.

The court held that a jurisdictional defense based on an arbitration clause did not contest the Polish courts' international jurisdiction in the meaning of Article 24 Brussels I. According to the court, the defendant's properly contested international jurisdiction too late and by that time the cases must have been treated as having been submitted. In the written reasons of the decisions, the court stated that a challenge against jurisdiction based on an arbitration agreement and a challenge against international jurisdiction are two separate challenges. It is not possible to assume that raising a defense of lack of jurisdiction due to an arbitration agreement is effective with regard to international jurisdiction.

The Appellate Court's decision was correct. An objection to jurisdiction based on an arbitration agreement and an objection to international jurisdiction are based on different legal and factual grounds. This is exemplified by the case at hand.

The lack of jurisdiction due to the arbitration agreement was claimed under the provisions of the Polish Code of Civil Procedure, and the dispute centered around the interpretation of the arbitration clause. The defense of lack of international jurisdiction was made under the provisions of Brussels I and on the basis of a disputed place of delivery of the goods. If different facts and different legal provisions have to be presented to substantiate either of the two defenses, one cannot treat them as synonymous in their effect.

Importance of submission

The analyzed decision of the Appellate Court in Lublin is also in line with the rules of examining jurisdiction enshrined in Brussels I.

Brussels I provides for an examination of the jurisdiction by the court's own motion only in exceptional situations. That is the case, for example, in Article 22 point 1, which provides for the exclusive jurisdiction of the court in which a property is situated in cases concerning rights in rem in immovable property. Apart from such exceptions, the court only examines its jurisdiction if the jurisdiction is challenged by the defendant. Such challenges must be properly substantiated and raised in the first appearance before the court, i.e. usually, in the statement of defense.

This principle is interconnected with another rule, namely, the rule of submission of jurisdiction if no challenge is made by the defendant at the beginning of proceedings.

Both of the rules make perfect sense, both from the perspective of case management and legal certainty. If the courts were to examine jurisdiction by their own motion at every stage of the case, jurisdiction could be questioned very late in the proceedings, even before the court of last instance. That would lead to the obstruction of justice and deprive the parties of the right to have their case decided in due time.

Finding identity between a jurisdictional defense based on an arbitration agreement and a defense of lack of international jurisdiction would be contrary to the above rules. It would demand from the court to examine a challenge based on an arbitration agreement way beyond the legal reasoning and facts presented in that challenge. In such a case, if the court decided that the challenge based on an arbitration agreement should be dismissed, then the court would have to examine

whether it has international jurisdiction, essentially, by its own motion. It would be the court that would be obliged to establish whether there were any other circumstances, apart from the arbitration agreement, that could potentially affect its jurisdiction to hear the case. This would not be a reasonable solution. Instead, the Brussels I rules discipline the parties to promptly decide whether they question the international jurisdiction of the court where they have been summoned. Those rules also prohibit them from second-guessing their jurisdictional defenses.

First Issue of 2014's Journal of Private International Law

The first issue of the *Journal of Private International Law* for 2014 is out.

First Cornerstones of the EU Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive by *Anatol Dutta and Andrea Schulz*

> *Since the Brussels IIa Regulation became applicable for national courts in 2005, the Court of Justice of the European Union (CJEU) can be welcomed within the circle of the European family courts. The Court has so far dealt, in particular, with the part of Brussels IIa dedicated to child matters, in case C in 2007, in Rinau in 2008, in A and Deticek in 2009 and in Povse, Purrucker I, McB,Purrucker II, Aguirre Zarraga and Mercredi in 2010. In 2012, a judgment concerning the cross-border placement of children followed in the case of Health Service Executive (HSE). Some aspects of these decisions are reviewed in this paper but not so as to present a comprehensive analysis of the Regulation. Rather the article shall provide – as a kind of series of interconnected case notes – the interested reader with a first overview on a rather dynamic area of EU family law as reflected in the case-law of the Court.*

Reforming the European Insolvency Regulation: A Legal and Policy Perspective

by G *McCormack*

This paper will critically evaluate the proposals for reform of the European Insolvency Regulation – regulation 1346/2000 – advanced by the European Commission. While criticised by some commentators as unsatisfactory, the Regulation – is widely understood to work in practice. The Commission proposals have been described as 'modest' and it is fair to say that they amount to a 'service' rather than a complete overhaul of the Regulation. The proposals will be considered under the following heads (1) General Philosophy; (2) Extension of the Regulation to cover pre-insolvency procedures; (3) Jurisdiction to open insolvency proceedings; (4) Co-ordination of main and secondary proceedings; (5) Groups of Companies; (6) Applicable law; (7) Publicity and improving the position of creditors. A final section concludes. The general message is that while there is much that is laudable in the Commission proposals, there is also much that has been missed out, particularly in the context of applicable law. The proposals reflect an approach that, in this particular area, progress is best achieved by a series of small steps rather than by a great leap forward. This is not necessarily an approach that is mirrored in other areas of European policy making.

Actio Pauliana – "*Actio Europensis*"? Some Cross-Border Insolvency Issues by *Tuula Linna*

Actio pauliana grants protection to the creditors against detrimental transactions and it is an important tool in the European insolvency system. When an actio pauliana is an ancillary action to collective insolvency proceedings it usually falls outside the scope of the Brussels I Regulation. The problem is that actio pauliana falls also outside the European Insolvency Regulation (EIR) if the insolvency proceedings to which it is related are not mentioned in Annex A of the EIR. These gaps are subjects to amendments in the Commission proposal for the EIR reform. When an actio pauliana falls within the scope of the EIR the lex concursus applies unless it is not possible to challenge the transaction according to the law which normally governs it. If this "veto" has succeeded the lex concursus is not applicable. In cross-border situations actio pauliana raises a number of complicated issues concerning jurisdiction, applicable law, recognition and enforceability.

Should the *Spiliada* Test Be Revised? by *Ardavan Arzandeh*

This article examines recent English authorities concerning the forum (non) conveniens doctrine. It seeks to demonstrate that, largely as a consequence of a disproportionately broad discretionary framework under its second limb, the doctrine's application has led to numerous problems. The article argues that, for both pragmatic and theoretical reasons, the status quo cannot be maintained. In this respect, its key contribution is to identify a doctrinal avenue through which to limit (rather than completely discard) the court's discretion at the second stage. The article's basic thesis is that the court's discretion under the doctrine's second limb should be curtailed in line with the doctrinal framework underpinning the protection of a person's right to a fair trial under Article 6(1) of the European Convention on Human Rights (as defined in expulsion cases).

European Perspectives on International Commercial Arbitration by *Louise Hauberg Wilhelmsen*

During the revision of the Brussels I Regulation several issues pertaining to the interface between arbitration and the Regulation were discussed. Some of the issues were parallel proceedings and conflicting decisions between courts and between courts and arbitral tribunals and the lack of a uniform rule on the law applicable to the existence and validity of an arbitration agreement. This article examines these issues in order to find out whether they are only European or also inherent in the international regulation of international commercial arbitration. The article examines to which extent these issues have already been addressed in the international regulation. Moreover, the article analyses the issues from a European perspective by analysing the interface between the Brussels I Regulation and arbitration and by looking into the objectives of the EU judicial cooperation in civil matters. Finally, the article looks into what the future might hold for these two issues.

Enforcement of Foreign Judgments in Nigeria: Statutory Dualism and Disharmony of Laws by *Adewale Olawoyin*

The enforcement of a foreign judgment is the reward for often protracted and expensive transnational litigation. This post-judgment aspect of Private International Law is as important as the often-discussed pre-judgment considerations of choice of jurisdiction and choice of law. Regrettably, the position in Nigerian law on the enforcement of foreign judgments is far from

coherent and certain. Indeed, it is in a lacunose and largely confused state. It is argued that a coherent and efficient legal regime for the enforcement of foreign judgments is a necessary adjunct to the heightened diverse global commercial relations of contemporary times between and amongst developing nations of Africa and between those African States and the international community at large. The extant state of affairs in Nigeria is the result of an admixture of a historical legacy of antedated laws, inefficient law revision processes and an inherently weak law reform system. The article conducts an audit of Nigerian law (statute and case law) in this area and the central argument is that there is a pressing need for a holistic law reform starting with a paradigm shift from Private International Law orthodoxy regarding the conceptual predicate of reciprocity as the basis of the statutory regime for the enforcement of foreign judgments at common law.

Review Article: Human Rights and Private International Law: Regulating International Surrogacy by *ClaireFenton-Glynn.*

Van Den Eeckhout on Schlecker

Veerle Van Den Eeckhout (Leiden University and University of Antwerp) has posted on SSRN an English version of a paper on international employment law previously published in Dutch in "Tijdschrift Recht en Arbeid" ("TRA", Kluwer, 2014, issue 4).

The paper is entitled "The Escape-Clause of Article 6 Rome Convention (Article 8 Rome I Regulation): How Special is the Case Schlecker?"

In the Schlecker case (12 September 2013, C-64/12), the Court of Justice decides that Article 6(2) of the Rome Convention must be interpreted as meaning that, even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country, the national court may, under the concluding part of that provision, disregard the law of the country where the work is habitually carried out, if it appears from the circumstances as a whole that the contract is more

closely connected with another country.

The author analyses the Schlecker case, commenting the special/ordinary character of Article 6 Rome Convention compared to Articles 3 and 4 Rome Convention, the special/ordinary character of the Schlecker case and the relevance of the decision for cases of international employment in which issues of freedom of movement/freedom of services are addressed.

The author is grateful to Ms. Emanuela Rotella for the English translation of this paper.

The author has also posted on the case at the Leiden Law blog here and here.

Judge Scheindlin, In Re South Africa Apartheid Litigation, and… A Non-Fully Dead ATS?

Although in the middle of the Easter holiday (at least for some), I find it is worth briefly reporting on the opinion of the U.S. District Court for the Southern District of New York *In re South Africa Apartheid Litigation,* that was delivered yesterday.

As stated and criticized by Julian Ku, most of the opinion deals with whether a corporation may be sued under the Alien Tort Statute. Julian Ku goes on explaining that as a lower court within that circuit, the district court should have been bound to follow that court's 2010 opinion *Kiobel v. Royal Dutch Shell,* which held that corporations cannot be sued under the ATS. However, the lower court judge, Shira Scheindlin, decided that since the Supreme Court had ended up dismissing the *Kiobel* plaintiffs on other grounds (e.g. extraterritoriality), the Court had *sub silentio* reversed the original *Kiobel* decision's ruling on corporate liability.

So, let's end in the same way he starts, i.e. with an open question: "maybe the use

of the Alien Tort Statute against corporations for overseas activities isn't fully dead." (Add.: yet).

New Czech Act on Private International Law

By Petr Briza, co-founding partner of Briza & Trubac, a Czech law firm focusing on cross-border litigation and arbitration, among others.

Regular readers of this blog might recall this post that referred to my article at Transnational Notes about the new Czech Act on Private International Law. The article provided a short general description of the new law that entered into effect on January 1, 2014. In this post I would like to introduce in more detail some provisions of the act, especially those that are not preceded by the EU legislation and thus will govern cases heard by Czech courts. Also, below you will find the link to the English translation of the full text of this new act on private international law.

Introductory remarks

For general comments on the new law I refer to my post at Transnational Notes. Here I will only shortly sum up couple of the main facts.

The act (published under No. 91/2012 Coll.) is part of the private law recodification whose main pillars are the new Civil Code (No. 89/2012 Coll.) and the new Business Corporations Act (No. 90/2012 Coll.). The act has 125 sections divided into 9 parts: (1) General Provisions (§ 1 – 5), (2) General Provisions of Procedural International Law (§ 6 – 19), (3) General Provisions of Private International Law (§ 20 – 28), (4) Provisions Concerning Individual Types of Private-Law Relations (§ 29 – 101), (5) Judicial Cooperation in Relations with Foreign States (§ 102 – 110), (6) Insolvency Proceedings (§ 111 – 116), (7) Arbitration and Recognition and Enforcement of Foreign Arbitral Awards (§ 117 – 122), (8) Transitional and Final Provisions (§ 123 – 124) and (9) Entry into Force

(§ 125).

Now I will turn to the provisions that might be of interest for foreign readers.

General issues (§ 1-5 and 20-25)

The law regulates general issues of private international law, such as public policy (ordre public) exception, overriding mandatory rules, renvoi, qualification (characterisation), preliminary questions or application of foreign law. Unlike the previous "old" act (No. 97/1963 Coll.), the law does not define "ordre public"; instead it only introduces public policy (public ordre) exception as such (§ 4). It is expected that Czech courts will interpret the notion of ordre public in line with § 36 of the old act that defined ordre public as "such principles of the social and state system of the Czech Republic and its law that are necessary to insist on unconditionally." The old law did not contain provisions on overriding mandatory norms; the new act regulates them in § 3 (lex fori overriding mandatory norms) and in § 25 (foreign overriding mandatory norms). While § 3 in fact merely acknowledges the existence of lex fori provisions that are always applicable, § 25 dealing with third state overriding mandatory norms resembles to some extent controversial Article 7 para 1 of the Rome Convention. The new act also regulates circumvention (abuse) of law (§ 5) that may relate both to the conflict rules and the rules on jurisdiction. Characterisation should be usually made under Czech law (§ 20). Foreign law is to be ascertained and applied ex officio (§ 23).

Jurisdiction, recognition and enforcement of foreign judgments

As already suggested, the importance of the act lies in the areas outside the scope of the EU law and/or international conventions/agreements. In cases where neither the Brussels I regulation nor the Lugano Convention (or another international agreement) is applicable, jurisdiction in general civil and commercial matters will be governed by § 6 of the act. Under this provision Czech courts have international jurisdiction if they have local jurisdiction (venue) under the Czech Civil Procedure Code (see §§ 84-89a of the Civil Procedure Code – No. 99/1963 Coll.) – one of possible jurisdictional grounds under Czech law is, e.g., an asset location in the territory of the Czech Republic.

The recognition and enforcement of third state (non-EU, non-Lugano) judgments in general commercial and civil matters is governed by §§ 14-16. Apart from traditional grounds for the refusal of recognition (ordre public, res judicata, lis

pendens, fair trial) there is mandatory requirement of (material) reciprocity for cases where the decision is against Czech citizen/entity. Also, for a third country judgment to be recognized in the Czech Republic the foreign court has to have jurisdiction under a base of jurisdiction under which Czech courts may assert jurisdiction, unless the defendant voluntarily submitted to the foreign court's jurisdiction (see § 15 (1) a)).

Conflict rules and rules on jurisdiction in specific matters

In this part I will again mention especially those conflict rules and provisions on jurisdiction that fall outside the scope of the EU legislation.

The primary connecting factor for legal capacity of natural persons is place of habitual residence (§ 29 para 1). However, in case of a name the primary connecting factor is the citizenship with habitual place of residence being a subsidiary connecting factor (see § 29 para 3). Capacity and internal matters of legal entities are governed by the law of the place of incorporation (§ 30).

As the Czech Republic is not a party to 1978 Hague Convention on Agency, the act will be applicable to relations between the principal and third person (these matters fall outside the EU law, which is applicable to principal-agent and agent-third person relations). Apart from a general rule on agency with multiple connecting factors (§ 44), there is a special rule on „proxy" ("die Prokura" in German) and similar specific types of agency (§ 45).

In the area of family law (§ 47 – 67) one might want to take a look at the conflict rule on divorces (§ 50), as the Czech Republic is not bound by the Rome III regulation. Property regimes of spouses shall be governed by the law of the state in which both spouses are habitually resident; otherwise by the law of the state of which both spouses are citizens; otherwise by the Czech law (§ 49 para 3). The conflict rules, rules on jurisdiction and recognition of foreign judgments in matters of establishment and contesting of parentage are contained in § 53-55. International adoption is governed by § 60-63, registered partnerships and similar unions by § 67.

In the area of rights in rem § 70 para 2 is especially worth noting; it brings about an important change compared to the previous law by assigning the transfer (creation and extinguishment) of ownership under the law governing the contract on the basis of which the ownership is being transferred. § 73 regulates conflict

rules for trusts, including the recognition of foreign trusts in the territory of the Czech Republic; the applicable law is the law of the closest connection with the trust, unless the settlor selects the applicable law. Succession is governed by § 74-79, although the importance of these provisions will be largely diminished by the EU regulation on succession, (fully) coming into force in August 2015.

The field of obligations (§ 84 – 101) is largely covered, except for promissory notes and bills of exchange (§ 93 – 100), by the EU legislation. One of few provisions of the act from this area that should be fully applicable is § 101 on non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation. These shall be governed by the law of the state in which the violation (the act giving rise to damage) occurred, unless the injured person chooses one of (up to) three other laws the provision offers for choice.

Insolvency, arbitration and assistance from the Ministry of Justice

The act also deals with those aspects of international insolvency not covered by the EU Insolvency Regulation (§ 111). As regards applicable law, the act in principle extends the regime of the regulation also to the cases falling outside the regulation's scope (§ 111 para 3). In cases not covered by the regulation, Czech courts may conduct insolvency proceedings if the debtor has an establishment in the Czech Republic provided it is requested by the creditor with habitual residence or seat in the Czech Republic or the creditor?s claim arose in connection with the establishment?s activities. They can also extend jurisdiction based on the regulation to the debtor's assets in a foreign state other than a Member State of the European Union provided the foreign state attributes effects to the proceedings in its territory. Foreign judgments in the insolvency matters shall be recognized under the condition of reciprocity provided in a foreign state in which it was handed down the debtor has a centre of main interests and provided the debtor?s assets in the Czech Republic are not a subject of pending insolvency proceedings.

The arbitration matters are largely covered by international agreements to which the Czech Republic is a party, namely the New York Convention and the European Convention on International Commercial Arbitration, thus the impact of the act is limited. Still, apart from the recognition and enforcement of foreign arbitral awards (§120 – 122), the act also regulates the conditions under which a foreigner

may be designated as arbitrator (§ 118). An admissibility of an arbitration agreement shall be assessed under the Czech law and its material validity shall be governed by the law of the state in which an arbitral award is to be issued.

Finally, there is one specific feature of the act worth mentioning: given the complexity of international matters the act provides an opportunity for courts to consult the Ministry of Justice in cases covered by the act (§ 110). It goes without saying that such a consultation is optional and the Ministry's opinion is by no means binding upon the court.

Concluding remarks

I will not repeat my conclusion about the act from my post in Transactional Notes, instead I give you an opportunity to make your own conclusions about the act and its potential added value (not only practical but also in comparative perspective): in order to make the new act available to readers from around the world, my law firm has provided for the English translation of the act. You can download it free of charge via this link.

Those who would like to explore the act, its context and related case law may be interested in the commentary I have co-authored together with my colleagues from the Ministry of Justice, Czech Supreme Court and a notary. Unfortunately, it is only in Czech; the same goes for this commentary written by other team of authors.

Any comments or questions regarding the act or its translation are welcome either under the post or at petr.briza@brizatrubac.cz .

Yale-Humboldt Consumer Law

Lecture

On June 6, 2014 the Humboldt University Berlin will host the first Yale-Humboldt Consumer Law Lecture. The Lecture is part of an annual lecture series that aims at encouraging the exchange between U.S. and European lawyers in the field of Consumer Law understood as an interdisciplinary field affecting many branches of law. Special emphasis will be put on aspects and questions which have as yet received little or no attention in the European discourse.

The Lecture begins at 2 pm in the "Senatssaal" at Humboldt-University Berlin and will be given by Roberta Romano, Daniel Markovits and Alan Schwarte from Yale Law School. The programe reads as follows:

- *Roberta Romano:* The Consumer Financial Protection Bureau and the Iron Law of Financial Regulation
- *Daniel Markovits:* Sharing Ex Ante and Sharing Ex Post
- *Alan Schwartz*: The Rationality Assumption in Consumer Law

Participation is free of charge but prior registration by E-Mail (yhcll@rewi.hu-berlin.de) is required.

Further information is available here.

CJEU rules on Storage Contracts and Article 5(1) (b) Brussels I Regulation

It has not yet been mentioned on this blog that the Court of Justice of the European Union (CJEU) rendered another interesting decision on Article 5(1)(b) Brussels I Regulation in November 2013 (C-496/12, Krejci Lager & Umschlagsbetriebs GmbH ./. Olbrich Transport & Logistik GmbH). The Commercial Court Vienna (Austria) had requested a preliminary ruling on

whether a storage contract is a contract for the "provision of service" within the meaning of Article 5(1)(b) Brussels I Regulation (Article 7(1)(b) of the Brussels I recast of 2012). The CJEU answered the question in the affirmative:

> *It must be borne in mind that, according to the Court's case-law, the concept of service found in the second indent of Article 5(1)(b) of Regulation No 44/2001, implies, at the least, that the party who provides the service carries out a particular activity in return for remuneration (Case C-533/07 Falco Privatstiftung and Rabitsch [2009] ECR I-3327, paragraph 29).*
>
> *In that regard, as the Austrian and Greek Governments as well as the European Commission submit in their written observations, the predominant element of a storage contract is the fact that the warehousekeeper undertakes to store the goods concerned on behalf of the other party to the contract. Accordingly, that commitment entails a specific activity, consisting, at the least, of the reception of goods, their storage in a safe place and their return to the other party to the contract in an appropriate state.*
>
> *As regards the argument that the subject-matter of the contract at issue is the mere renting of an area of space, it must be noted that, in the context of proceedings under Article 267 TFEU, which are based on a clear separation of functions between the national courts and tribunals and the Court of Justice, any assessment of the facts is a matter for the national court or tribunal. In particular, the Court is empowered to rule only on the interpretation or the validity of European Union acts on the basis of the facts placed before it by the national court or tribunal (Case C-491/06 Danske Svineproducenter [2008] ECR I-3339, paragraph 23, and the judgment of 10 November 2011 in Joined Cases C-319/10 and C-320/10 X and X BV, paragraph 29).*
>
> *According to the information provided by the order for reference, the contract at issue in the case in the main proceedings does not concern the rental of premises, but the storage of goods. Moreover, besides the fact that it is not for the Court to call into question that finding of fact, it must be noted that jurisdiction relating to the former type of contract is, in any event, governed by Article 22(1) of Regulation No 44/2001, relating to exclusive jurisdiction in the matter of tenancies of immovable property (see, as regards the Brussels Convention, Case 241/83 Rösler [1985] ECR 99, paragraph 24, and Case C-280/90 Hacker [1992] ECR I-1111, paragraph 10), under which only the*

courts and tribunals of the Member State where the property is situated have jurisdiction.

In the light of the foregoing, the answer to the question referred is therefore that the second indent of Article 5(1)(b) of Regulation No 44/2001 must be interpreted as meaning that a contract relating to the storage of goods, such as that at issue in the main proceedings, constitutes a contract for the 'provision of services' within the meaning of that provision.

The full decision is available here.

CJEU rules on Arts. 22 No 1 and 27(1) Brussels I-Regulation

On 3 April 2014 the Court of Justice of the European Union (CJEU) rendered a noteworthy decision on Arts. 22 No 1 and 27(1) Brussels I-Regulation (C-438/12 – Weber ./. Weber). The court clarified a number of issues relating to the scope of Art. 22 No 1, the obligations of the court second seised under Art. 27(1) as well as the relationship between Art. 22 No 1 and 27(1) Brussels I-Regulation.

The facts of the underlying case (as presented in the judgment) were as follows: Ms I. Weber (82) and Ms M. Weber (78) were co-owners of a property in Munich (Germany). On the basis of a notarised act of 20 December 1971, a right in rem of pre-emption over the share belonging to Ms M. Weber was entered in the Land Register in favour of Ms I. Weber. By a notorial contract of 28 October 2009, Ms M. Weber sold her share to Z. GbR, a company incorporated under German law, of which one of the directors is her son, Mr Calmetta, a lawyer established in Milan (Italy). According to that contract, Ms M. Weber, as the seller, reserved a right of withdrawal valid until 28 March 2010 and subject to certain conditions. Being informed by the notary who had drawn up the contract in Munich, Ms I. Weber exercised her right of pre- emption over that share of the property by letter of 18 December 2009. On 25 February 2010, by a contract

concluded before that notary, Ms I. Weber and Ms M. Weber expressly recognised the effective exercise of the right of pre-emption by Ms I. Weber and agreed that the property should be transferred to her for the same price as that agreed in the contract for sale signed between Ms M. Weber and Z. GbR.

By an application of 29 March 2010, Z. GbR brought an action against Ms I. Weber and Ms M. Weber, before the Tribunale ordinario di Milano (District Court, Milan), seeking a declaration that the exercise of the right of pre-emption by Ms I. Weber was ineffective and invalid, and that the contract concluded between Ms M. Weber and that company was valid. On 15 July 2010, Ms I. Weber brought proceedings against Ms M. Weber before the Landgericht München I (Regional Court, Munich I) (Germany), seeking an order that Ms M. Weber register the transfer of ownership of the said share with the Land Register.

The Landgericht München I having regard to the proceedings brought before the Tribunale ordinario di Milan decided to stay the proceedings in accordance with Article 27(1) Brussels I-Regulation. Ms I. Weber appealed against that decision to the Oberlandesgericht München (Higher Regional Court, Munich) (Germany) which, in turn, referred (among others) the following two questions to the CJEU for a preliminary ruling:

Are there proceedings which have as their object a right in rem in immovable property within the meaning of Article 22(1) of Regulation No 44/2001 if a declaration is sought that the defendant did not validly exercise a right in rem of pre-emption over land situated in Germany which indisputably exists in German law?

Is the court second seised, when making its decision under Article 27(1) of Regulation No 44/2001, and hence before the question of jurisdiction is decided by the court first seised, obliged to ascertain whether the court first seised lacks jurisdiction because of Article 22(1) of Regulation No 44/2001, because such lack of jurisdiction of the court first seised would, under Article 35(1) of Regulation No 44/2001, lead to a judgment of the court first seised not being recognised? Is Article 27(1) of Regulation No 44/2001 not applicable for the court second seised if the court second seised comes to the conclusion that the court first seised lacks jurisdiction because of Article 22(1) of Regulation No 44/2001?

The CJEU started its reasoning with the first of these questions relating to the

scope of Art. 22 No 1 Brussels I-Regulation. It held that actions seeking a declaration of invalidity of the exercise of a right of pre-emption attaching to that property and which produces effects with respect to all parties. 'proceedings which have as their object rights in rem in immovable property':

> *… the essential reason for conferring exclusive jurisdiction on the courts of the Contracting State in which the property is situated is that the courts of the locus rei sitae are the best placed, for reasons of proximity, to ascertain the facts satisfactorily and to apply the rules and practices which are generally those of the State in which the property is situated (Reichert and Kockler, paragraph 10).*
>
> *The Court has already had the occasion to rule that Article 16 of the Brussels Convention and, accordingly, Article 22(1) of Regulation No 44/2001, must be interpreted as meaning that the exclusive jurisdiction of the courts of the Contracting State in which the property is situated does not encompass all actions concerning rights in rem in immovable property, but only those which both come within the scope of the Convention or of Regulation No 44/2001 and are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights in rem therein and to provide the holders of those rights with protection for the powers which attach to their interest (Case C-386/12 Schneider [2013] ECR, paragraph 21 and the case-law cited).*
>
> *Similarly, under reference to the Schlosser Report on the association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59/71, p. 166), the Court has held that the difference between a right in rem and a right in personam is that the former, existing in an item of property, has effect erga omnes, whereas the latter can be claimed only against the debtor (see order in Case C-518/99 Gaillard [2001] ECR I-2771, paragraph 17).*
>
> *…*
>
> *As is apparent from the file before the Court, a right of pre-emption, such as that provided for by Paragraph 1094 of the BGB, which attaches to immovable*

property and which is registered with the Land Register, produces its effects not only with respect to the debtor, but guarantees the right of the holder of that right to transfer the property also vis-à-vis third parties, so that, if a contract for sale is concluded between a third party and the owner of the property burdened, the proper exercise of that right of pre-emption has the consequence that the sale is without effect with respect to the holder of that right, and the sale is deemed to be concluded between the holder of that right and the owner of the property on the same conditions as those agreed between the latter and the third party.

It follows that, where the third party purchaser challenges the validity of the exercise of the right of pre- emption in an action such as that before the Tribunale ordinario di Milano, that action will seek essentially to determine whether the exercise of the right of pre-emption has enabled, for the benefit of its holder, the right to the transfer of the ownership of the immovable property subject to the dispute to be respected. In such a case, as is clear from paragraph 166 of the Schlosser Report, referred to in paragraph 43 of the present judgment, the dispute concerns proceedings which have as their object a right in rem in immovable property and fall within the exclusive jurisdiction of the forum rei sitae.

The court then went on to discuss the second question (the fourth in total) relating to the obligations of the court second seised under Article 27(1) Brussels I-Regulation. It held that Article 27(1) must be interpreted as meaning that, before staying its proceedings, the court second seised must examine whether, by reason of a failure to take into consideration the exclusive jurisdiction laid down in Article 22(1), a decision on the substance by the court first seised will be recognised by other Member States in accordance with Article 35(1) of that regulation:

It is clear from the wording of Article 27 of Regulation No 44/2001 that, in a situation of lis pendens, any court other than the court first seised must of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established and, where that jurisdiction is established, it must decline jurisdiction in favour of that court.

Called on to rule on the question whether the provision of the Brussels

Convention corresponding to Article 27 of Regulation No 44/2001, namely Article 21 thereof, authorises or requires the court second seised to examine the jurisdiction of the court first seised, the Court has held, without prejudice to the case where the court other than the court first seised has exclusive jurisdiction under the Brussels Convention and in particular under Article 16 thereof, that Article 21 concerning lis pendens must be interpreted as meaning that, where the jurisdiction of the court first seised is contested, the court other than the court first seised may, if it does not decline jurisdiction, only stay the proceedings and may not itself examine the jurisdiction of the court first seised (see Case C-351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraphs 20 and 26).

It follows that, in the absence of any claim that the court other than the court first seised had exclusive jurisdiction in the main proceedings, the Court has simply declined to prejudge the interpretation of Article 21 of the Brussels Convention in the hypothetical situation which it specifically excluded from its judgment (Case C-116/02 Gasser [2003] ECR I-14693, paragraph 45, and Case C-1/13 Cartier parfums — lunettes and Axa Corporate Solutions Assurances [2014] ECR, paragraph 26).

Having subsequently been asked about the relationship between Article 21 of the Brussels Convention and Article 17 thereof, relating to exclusive jurisdiction pursuant to a jurisdiction clause, which corresponds to Article 23 of Regulation No 44/2001, it is true that the Court held in Gasser that the fact that the jurisdiction of the court other than the court first seised is assessed under Article 17 of that Convention cannot call in question the application of the procedural rule contained in Article 21 of the Convention, which is based clearly and solely on the chronological order in which the courts involved are seised.

However, as stated in paragraph 47 of the present judgment, and unlike the situation in case which gave rise to the judgment in Gasser, in the present case exclusive jurisdiction has been established in favour of the court second seised pursuant to Article 22(1) of Regulation No 44/2001, which is in Section 6 of Chapter II thereof.

According to Article 35(1) of that regulation, a judgment is not to be recognised in another Member State if it conflicts with Section 6 of Chapter II of that

regulation, relating to exclusive jurisdiction.

It follows that, in a situation such as that at issue in the main proceedings, if the court first seised gives a judgment which fails to take account of Article 22(1) of Regulation No 44/2001, that judgment cannot be recognised in the Member State in which the court second seised is situated.

In those circumstances, the court second seised is no longer entitled to stay its proceedings or to decline jurisdiction, and it must give a ruling on the substance of the action before it in order to comply with the rule on exclusive jurisdiction.

Any other interpretation would run counter to the objectives which underlie the general scheme of Regulation No 44/2001, such as the harmonious administration of justice by avoiding negative conflicts of jurisdiction, the free movement of judgments in civil and commercial matters, in particular the recognition of those judgments.

Thus, as the Advocate General also observed in point 41 of his Opinion, the fact that, in accordance with Article 27 of Regulation No 44/2001 the court second seised, which has exclusive jurisdiction under Article 22(1) thereof, must stay its proceedings until the jurisdiction of the court first seised is established and, where that jurisdiction is established, must decline jurisdiction in favour of the latter, does not correspond to the requirement of the sound administration of justice.

Furthermore, the objective referred to in Article 27 of that regulation, namely to avoid the non-recognition of a decision on account of its incompatibility with a judgment given between the same parties in the specific context in which the court second seised has exclusive jurisdiction under Article 22(1) of that regulation, would be undermined.

The full decision can be downloaded here. The press release is available here.

Malbon on Online Cross Border Consumer Transactions

Justin Malbon (Monash University Faculty of Law) has posted Online Cross-Border Consumer Transactions: A Proposal for Developing Fair Standard Form Contract Terms on SSRN.

Online consumer sales are growing at a substantial rate. An estimated 45% of online purchases by consumers in Australia are from overseas sellers, including US sellers. The question whether these transactions are governed by the Australian Consumer Law (ACL) is examined. The conclusion drawn is that cross-border transactions are usually governed by the ACL – at least in theory. In practice a consumer will invariably confront a bewildering array of procedural complexities and face prohibitive costs. US law and standard form terms are generally less favourable to consumers than Australian and European laws. There also appears to be an increasingly pro-seller bias developing in US standard form terms. The article considers why this is so. Why, for instance, are market forces not operating to provide incentives for the development of party balanced terms? The article then considers ways in which the interests of consumers can be better protected and enhanced regarding cross-border online transactions. It is proposed that a series of standard form 'Fair Terms' which could be made freely available on the Internet for parties to voluntarily incorporate into their contracts should be developed. This proposal follows the lead provided by developments for international commercial transactions. The article concludes by suggesting starting points for the development of fair terms provisions.