

Moses on the Arbitration/Litigation Interface in Europe

Margaret Moses (Loyola University Chicago Law School) has posted *Arbitration/Litigation Interface: The European Debate* on SSRN.

Concerns over the interface between arbitration and litigation have been at the core of a debate in the European Union that has culminated in the issuance of the Recast Brussels Regulation (the “Recast”), effective January 2015. The Recast does not provide a fully transparent and predictable interface between international arbitration and cross-border litigation. Primarily, it does not prevent parallel proceedings, which occur when one party that had agreed to arbitrate nonetheless goes to court, while the other party proceeds with arbitration. These parallel proceedings undermine the effectiveness of arbitration because of the increased cost, inefficiency and delay, as well as the high risk of inconsistent judgments.

Because of the global impact of international commercial arbitration, the significance of the European decision echoes beyond its borders. There is a need for a harmonized consensus on preventing parallel proceedings in order to promote predictability and confidence in the arbitration process. This article considers the reasons for the current European approach, the potential interpretations of the Recast’s explanatory text, the problems it presents as to its expected application, and the interface between the Recast and the New York Convention.

Although anti-suit injunctions could prevent parallel proceedings, the Court of Justice of the European Union has found that anti-suit injunctions are incompatible with the EU Brussels I Regulation (predecessor to the Recast). The Recast’s regulatory regime, which governs jurisdiction of courts and recognition and enforcement of judgments in EU Member States, excludes arbitration. However, the exclusion must be viewed through the lens of an extensive explanation set forth in Recital 12 of the Recast. It is unclear how changes in the Recast, as interpreted in accordance with its explanatory Recital

12, may impact the Court's decision.

The article concludes by proposing various means for encouraging flexible solutions to the problem of parallel proceedings and for achieving gradual harmonization.

Luxembourg Code of Private International Law

I am delighted to announce the publication of the second edition of the  Luxembourg code of private international law.

The book gathers all applicable legislation in the field of private international law in Luxembourg: international conventions ratified by the Grand Duchy of Luxembourg, European legislation and Luxembourg domestic provisions.

The full table of contents is available [here](#).

Readers wondering how Luxembourg PIL legislation differs from other EU states legislation should know that the Grand Duchy is one of the few European states which ratified the Cape Town Convention (and indeed the only state in the world which adopted the Luxembourg Protocol) or the 1978 Hague Convention on Celebration and Recognition of the Validity of Marriages.

And as if it weren't enough, buyers will enjoy a free post on this very blog tomorrow!

Conference on the Cultural Dimension of Private International Law

On 13 June 2014, the Swiss Institute of Comparative Law in cooperation with the Universities of Lausanne, Geneva and Urbino will host a conference on the Cultural Dimension of Private International Law in Lausanne. Speakers will address the audience in French, Italian or English.

The conference aims at honouring Tito Ballarino, who dedicated his life to develop the themes of the conference and to facilitate the meeting of Private International Law culture and traditions, in his writing as well as in his academic experiences and exchanges.

The abstract of the conference reads as follows:

À l'heure où le législateur européen déconstruit les systèmes nationaux de droit international privé en y superposant un appareil normatif de grande ampleur et complexité technique, l'idée de réfléchir autour des éléments culturels qui soutendent le droit international privé peut paraître saugrenue. Et pourtant qui aime la matière ne saurait renoncer à s'interroger sur le sens de la profonde transformation en cours qui engage sûrement l'essence même du droit international privé. Il n'est dès lors pas inutile de recentrer l'attention sur les aspects généraux de la discipline et en repenser la valeur sur fond des grandes questions qui, depuis toujours, agitent la pensée sur le phénomène juridique. Et de fait, la fonction d'intégration sociale que s'assigne le droit - dont le droit international privé est un instrument d'autant plus essentiel à mesure qu'avance la dynamique de la mondialisation - déborde le cadre de la culture juridique au sens étroit et s'impose comme fait spirituel et problème moral. De là la convergence, dans le discours traditionnel du droit international privé, d'une multitude de perspectives combinant la théorie générale du droit, la sociologie, l'histoire, la philosophie, la science politique, l'éthique, en un mot, ce qui constitue la "culture". Pourquoi le droit international privé ? Quelle place le moment présent prend-il au sein d'une évolution historique qui s'est toujours efforcée de respecter l'autonomie et l'identité des différentes réalités sociales

et cultures juridiques ? Comment la fonction régulatrice de cette branche du droit se concilie-t-elle avec la promotion des droits fondamentaux au rang de critère suprême de justice ? Quel rôle peuvent encore jouer les doctrines qui ont marqué l'histoire de la discipline ?

Il est heureux que l'on puisse se pencher sur ces thèmes à l'occasion des quatre-vingt ans du Professeur Tito Ballarino auquel la rencontre est dédiée en hommage à son exceptionnelle œuvre scientifique constamment vouée à saisir, au-delà des contingences du présent, les lignes les plus significatives de l'évolution culturelle de la société.

The program of the conference is available [here](#).

Faculty Position at the University of Windsor (Canada)

The Faculty of Law at the University of Windsor is seeking an outstanding individual or individuals for appointment to the Paul Martin Professorship in International Affairs and Law.

The appointment is intended for established scholars, eminent jurists and distinguished public servants and statespersons who are pursuing research in any area of international or transnational law (which we define widely to encompass public and private international law, comparative law, and law and globalization). Appropriate academic or professional qualifications and experience will be required.

The commencement date, duration, and other terms of the appointment will be negotiated according to the availability of the successful candidate(s). The appointment may extend over one or more academic terms.

JOB DESCRIPTION: The Paul Martin Professor will have the opportunity to engage in scholarly work and will be expected to teach a course (possibly on an

intensive basis). The successful candidate will contribute to the intellectual life of the Faculty, will regularly engage with students and faculty at Windsor Law and the wider University, and will participate in the activities of the Faculty's Transnational Law and Justice Network (TLJN). We would welcome, as well, outreach projects which engage stakeholders and the public in the candidate's chosen field. Remuneration is negotiable and will be commensurate with the experience and expertise of the candidate. Research support will be available.

APPLICATION PROCEDURE: Those interested in applying for the Paul Martin Professorship should send a curriculum vitae and a cover letter indicating scholarly/teaching interests and a proposed project to be undertaken during the course of the appointment to Dean Camille Cameron, Chair, Appointments Committee, Windsor Law School, c/o adawson@uwindsor.ca, by June 9th, 2014.

"The University of Windsor is committed to equity in its academic policies, practices, and programs; supports diversity in its teaching, learning, and work environments; and ensures that applications from members of traditionally marginalized groups are seriously considered under its employment equity policy. Those who would contribute to the further diversification of the University's professional staff include, but are not limited to, women, Aboriginal peoples, persons with disabilities, members of visible minorities, and members of sexual minority groups. The University of Windsor invites you to apply to its welcoming community and to self-identify as a member of one of these groups. International candidates are encouraged to apply; however, Canadians and permanent residents will be given priority."

Bismuth on International Public Policy for Sovereign Debt Contracts

Regis Bismuth (university of Poitiers) has posted The Path Towards an

International Public Policy for Sovereign Debt Contracts on SSRN.

Recent times have been rich in events highlighting the shortcomings of mechanisms for dealing with sovereign debt crises, especially when they involve private creditors. Both the Greek financial debacle and the spate of litigation arising from Argentina's 2001 default have exposed the obstacles to both the successful implementation of restructuring plans and the attempts to block the legal actions brought by private creditors not willing to participate in the restructuring of sovereign debt. Given this seeming disarray and the impediments to the establishment of sovereign insolvency proceedings, the loan contract emerged as one of the most suitable instrument to ensure an orderly resolution of sovereign insolvency issues. In this context, it seems reasonable to examine the possible emergence of an "international public policy" for sovereign debt, the cornerstone of which would be the loan contract concluded between the State and its creditors.

Call for Papers for the Third Annual ASIL-ESIL-MPIL Workshop on Transnational Legal Theory

See here for a call for papers for the Third Annual ASIL-ESIL-MPIL Workshop on International Legal Theory being held September 8, 2014 at the Vienna University of Economics and Business. Abstract submissions should be sent to asil.esil.mpil@gmail.com by June 22, 2014. Short papers (5000 words max.) must be delivered by August 25, 2014.

Questions regarding the workshop may be directed to:

Evan Criddle ejcriddle@wm.edu

Jörg Kammerhofer joerg.kammerhofer@jura.uni-freiburg.de

Alexandra Kemmerer kemmerer@mpil.de

UK Supreme Court Rules on Law Governing Damages

On 2 April 2014, the Supreme Court of the United Kingdom delivered its judgment in *Cox v Ergo Versicherung AG*.

In this pre-Rome II case, the issue before the court was whether issues of damages were substantive or procedural in character for choice of law purposes.

The court issued the following press summary.

BACKGROUND TO THE APPEALS

These proceedings arise out of a fatal accident in Germany. On 21 May 2004 Major Cox, an officer serving with H.M. Forces in Germany, was riding his bicycle on the verge of a road near his base when a car left the road and hit him, causing injuries from which he died. The driver was Mr Kretschmer, a German national resident and domiciled in Germany. He was insured by the respondent, a German insurance company, under a contract governed by German law. The appellant, Major Cox's widow, was living with him in Germany at the time of the accident. After the accident, she returned to England where she has at all relevant times been domiciled. She has since entered into a new relationship and has had two children with her new partner.

Liability is not in dispute, but there are a number of issues relating to damages. Their resolution depends on whether they are governed by German or English law, and, if by English law, whether by the provisions of the Fatal Accidents Act 1976 ("the 1976 Act") or on some other basis. The question which law applies was ordered to be tried as a preliminary issue.

There are two relevant respects in which an award under English Law, specifically the 1976 Act, may differ from an award under the relevant German Law, "the BGB". First, damages awarded to a widow under the BGB will take account of any legal right to maintenance by virtue of a subsequent remarriage or

a subsequent non-marital relationship following the birth of a child. Section 3(3) of the 1976 Act expressly excludes remarriage or the prospect of remarriage as a relevant consideration in English law. Secondly, Section 844 of the BGB confers no right to a solatium for bereavement. Under section 823 of the BGB the widow may in principle be entitled to compensation for her own pain and suffering, but this would require proof of suffering going beyond normal grief and amounting to a psychological disturbance comparable to physical injury.

English rules of private international law distinguish between questions of procedure, governed by the law of the forum i.e. in this case England, and questions of substance, governed by the local laws, in this case Germany. The issue in the present case is whether Mrs Cox is entitled to rely on the provisions of sections 3 and 4 of the 1976 Act. They provide for a measure of damages substantially more favourable to her than the corresponding provisions of German law, mainly because of the more favourable rule concerning the exclusion of her current partner's payments of maintenance. This issue depends on whether the damages rules in sections 1A and 3 of the 1976 Act fall to be applied (i) on ordinary principles of private international law as procedural rules of the forum, or (ii) as rules applicable irrespective of the ordinary principles of private international law.

The Court of Appeal held that English law should adopt the German damages rules as its own and apply them not directly but by analogy.

JUDGMENT

The Supreme Court unanimously dismisses the appeal and finds that the German damages rules apply. Lord Sumption writes the leading judgment and Lord Mance writes a concurring judgment [37].

REASONS FOR THE JUDGMENT

- The Court finds that the relevant sections of the 1976 Act do not apply as they do not lay down general rules of English law, but only rules applicable to actions under the Act itself. An action to enforce a liability whose applicable substantive law is German law is not an action under section 1 of the 1976 Act to which the damages provisions of the Act can apply [20].

- As the particular rules of assessment in the 1976 Act do not apply, then the answer must be sought in the rules of assessment which apply generally in English law in the absence of any statute displacing them. The relevant English law principle of assessment, which applies in the absence of any statute to the contrary, is that Mrs Cox must be put in the same financial position, neither better nor worse, as she would have been in if her husband had not been fatally injured. It follows that, in principle, credit must be given for maintenance from her subsequent partner during the period since the birth of their child [21].
- A further issue concerns Mrs Cox's receipt of maintenance from her current partner during the period before they had a child, when he was under no legal obligation to maintain her either in German or in English law [22]. The findings at first instance about the relevant German law indicate that it is not just the maintenance that the appellant would have received from Major Cox that must have been received by virtue of a legal obligation, but also the maintenance from her current partner for which she can be required to give credit. Lord Sumption notes that the classification of a damages rule regulating the receipts for which credit must be given in an award of damages is a difficult question which admits of no universal answer but that, in the present case, the rule in question is one of substance, rather than procedure [22] (Lord Mance [39]).
- Lord Sumption rejects the argument that the 1976 Act should be applied notwithstanding the ordinary rules of private international law. As a matter of construction the Act does not have extraterritorial effect [32 - 34]. Nor do the principles enacted in the 1976 Act represent 'mandatory rules' of English law, applicable irrespective of ordinary rules of private international law [35].
- Lord Mance explains that it makes no difference to the outcome of the appeal whether or not the dependency claims under the 1976 Act and German law are categorised as broadly similar or whether the relevant provisions of the 1976 Act are treated as substantive or procedural [47]. Assuming that the dependency claims are categorised as broadly similar, the provisions of ss. 3 and 4 of the 1976 Act are, if substantive, irrelevant to a tort subject to German substantive law. If on the other hand, the provisions of ss. 3 and 4 were to be treated as procedural, their

application could have no effect on the outcome. There is no basis on which an English procedural provision can expand a defendant's liability under the substantive principles of the relevant governing law [48].

Castermans and de Graaf on Competition in European Insolvency Law

Alex Castermans and Ruben de Graaf (Leiden Law School) have posted *The General Concept of Concurrence Applied to European Insolvency Law* on SSRN.

In the current multilevel legal order, private relationships are governed by rules rooted in different international, European and national regimes. Where these rules lead to conflicts, important questions arise. May they be applied simultaneously, or should one of the regimes be excluded in favor of the other? And if the latter is the case, who should make that choice: the claimant or the court?

To solve these questions, a method of interpretation is needed, crafted with private relationships in mind. This contribution seeks to uncover such a method within the area of European insolvency law, where issues of concurrence arise as the result of the division of companies and as a result of private international law.

Note: The contribution has been published in the Liber Amicorum for Prof. Bob Wessels (international insolvency law, Leiden Law School).

Munagorri on Hierarchy of Norms and PIL

Rafael Munagorri (university of Nantes) has posted *Droit international privé et hiérarchie des normes: Observations sur une rencontre* (Private Law and Hierarchy of Norms: Some Remarks on Their Relations) on SSRN.

Traditional methods to solve conflicts of laws and conflict of jurisdictions have been shaped without the idea of the hierarchy of norms. Moreover, some specialists of international private law consider that the very idea of hierarchy of norms is inappropriate within their field. This opinion reflects an ideological point of view. Hierarchy of norms is interesting in order to understand historical, theoretical and epistemological dimensions of international private law.

The paper was published in the *Journal for Constitutional Theory and Philosophy of Law* in 2013.

ECJ Rules on Territorial Reach of EU Data Protection Law

Many readers will have heard of the landmark decision of the Court of Justice of the European Union of May 13 in *Gonzales v. Google* (case C 131/12). 

In 2010 Mario Costeja González, a Spanish national, lodged with the Agencia Española de Protección de Datos (Spanish Data Protection Agency, the AEPD) a complaint against La Vanguardia Ediciones SL (the publisher of a daily newspaper with a large circulation in Spain, in particular in Catalonia) and against Google Spain and Google Inc. Mr Costeja González contended that, when an internet user entered his name in the search engine of the Google group ('Google Search'), the list of results would display links to two pages of La

Vanguardia's newspaper, of January and March 1998. Those pages in particular contained an announcement for a real-estate auction organised following attachment proceedings for the recovery of social security debts owed by Mr Costeja González.

Scholars are debating whether there is now a right to be forgotten. The case also has a choice of law dimension, as it accepts that the Data Protection Directive applies to Google.

The press release of the Court summarized the ruling on this point as follows.

As regards the directive's territorial scope, the Court observes that Google Spain is a subsidiary of Google Inc. on Spanish territory and, therefore, an 'establishment' within the meaning of the directive. The Court rejects the argument that the processing of personal data by Google Search is not carried out in the context of the activities of that establishment in Spain. The Court holds, in this regard, that where such data are processed for the purposes of a search engine operated by an undertaking which, although it has its seat in a non-member State, has an establishment in a Member State, the processing is carried out 'in the context of the activities' of that establishment, within the meaning of the directive, if the establishment is intended to promote and sell, in the Member State in question, advertising space offered by the search engine in order to make the service offered by the engine profitable.

Here are the reasons of the Court:

44 *Specifically, the main issues raised by the referring court concern the notion of 'establishment', within the meaning of Article 4(1)(a) of Directive 95/46, and of 'use of equipment situated on the territory of the said Member State', within the meaning of Article 4(1)(c).*

Question 1(a)

45 *By Question 1(a), the referring court asks, in essence, whether Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when one or more of the following three conditions*

are met:

- *the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State, or*
- *the parent company designates a subsidiary located in that Member State as its representative and controller for two specific filing systems which relate to the data of customers who have contracted for advertising with that undertaking, or*
- *the branch or subsidiary established in a Member State forwards to the parent company, located outside the European Union, requests and requirements addressed to it both by data subjects and by the authorities with responsibility for ensuring observation of the right to protection of personal data, even where such collaboration is engaged in voluntarily.*

46 *So far as concerns the first of those three conditions, the referring court states that Google Search is operated and managed by Google Inc. and that it has not been established that Google Spain carries out in Spain an activity directly linked to the indexing or storage of information or data contained on third parties' websites. Nevertheless, according to the referring court, the promotion and sale of advertising space, which Google Spain attends to in respect of Spain, constitutes the bulk of the Google group's commercial activity and may be regarded as closely linked to Google Search.*

47 *Mr Costeja González, the Spanish, Italian, Austrian and Polish Governments and the Commission submit that, in the light of the inextricable link between the activity of the search engine operated by Google Inc. and the activity of Google Spain, the latter must be regarded as an establishment of the former and the processing of personal data is carried out in context of the activities of that establishment. On the other hand, according to Google Spain, Google Inc. and the Greek Government, Article 4(1)(a) of Directive 95/46 is not applicable in the case of the first of the three conditions listed by the referring court.*

48 *In this regard, it is to be noted first of all that recital 19 in the preamble to Directive 95/46 states that 'establishment on the territory of a Member State*

implies the effective and real exercise of activity through stable arrangements' and that 'the legal form of such an establishment, whether simply [a] branch or a subsidiary with a legal personality, is not the determining factor'.

49 *It is not disputed that Google Spain engages in the effective and real exercise of activity through stable arrangements in Spain. As it moreover has separate legal personality, it constitutes a subsidiary of Google Inc. on Spanish territory and, therefore, an 'establishment' within the meaning of Article 4(1)(a) of Directive 95/46.*

50 *In order to satisfy the criterion laid down in that provision, it is also necessary that the processing of personal data by the controller be 'carried out in the context of the activities' of an establishment of the controller on the territory of a Member State.*

51 *Google Spain and Google Inc. dispute that this is the case since the processing of personal data at issue in the main proceedings is carried out exclusively by Google Inc., which operates Google Search without any intervention on the part of Google Spain; the latter's activity is limited to providing support to the Google group's advertising activity which is separate from its search engine service.*

52 *Nevertheless, as the Spanish Government and the Commission in particular have pointed out, Article 4(1)(a) of Directive 95/46 does not require the processing of personal data in question to be carried out 'by' the establishment concerned itself, but only that it be carried out 'in the context of the activities' of the establishment.*

53 *Furthermore, in the light of the objective of Directive 95/46 of ensuring effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data, those words cannot be interpreted restrictively (see, by analogy, Case C-324/09 L'Oréal and Others EU:C:2011:474, paragraphs 62 and 63).*

54 *It is to be noted in this context that it is clear in particular from recitals 18 to 20 in the preamble to Directive 95/46 and Article 4 thereof that the European Union legislature sought to prevent individuals from being deprived of the protection guaranteed by the directive and that protection from being*

circumvented, by prescribing a particularly broad territorial scope.

55 *In the light of that objective of Directive 95/46 and of the wording of Article 4(1)(a), it must be held that the processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out ‘in the context of the activities’ of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable.*

56 *In such circumstances, the activities of the operator of the search engine and those of its establishment situated in the Member State concerned are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed.*

57 *As has been stated in paragraphs 26 to 28 of the present judgment, the very display of personal data on a search results page constitutes processing of such data. Since that display of results is accompanied, on the same page, by the display of advertising linked to the search terms, it is clear that the processing of personal data in question is carried out in the context of the commercial and advertising activity of the controller’s establishment on the territory of a Member State, in this instance Spanish territory.*

58 *That being so, it cannot be accepted that the processing of personal data carried out for the purposes of the operation of the search engine should escape the obligations and guarantees laid down by Directive 95/46, which would compromise the directive’s effectiveness and the effective and complete protection of the fundamental rights and freedoms of natural persons which the directive seeks to ensure (see, by analogy, L’Oréal and Others EU:C:2011:474, paragraphs 62 and 63), in particular their right to privacy, with respect to the processing of personal data, a right to which the directive accords special importance as is confirmed in particular by Article 1(1) thereof and recitals 2 and 10 in its preamble (see, to this effect, Joined Cases C?465/00, C?138/01 and C?139/01 Österreichischer Rundfunk and Others EU:C:2003:294, paragraph 70; Case C?553/07 Rijkeboer EU:C:2009:293, paragraph 47; and Case*

C-473/12 IPI EU:C:2013:715, paragraph 28 and the case-law cited).

59 *Since the first of the three conditions listed by the referring court suffices by itself for it to be concluded that an establishment such as Google Spain satisfies the criterion laid down in Article 4(1)(a) of Directive 95/46, it is unnecessary to examine the other two conditions.*

60 *It follows from the foregoing that the answer to Question 1(a) is that Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State.*